



**Abdalla & 2 others v Zakaria & 3 others (Environment and Land Appeal
E003 of 2022) [2023] KEELC 800 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 800 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E003 OF 2022
JO OLOLA, J
FEBRUARY 16, 2023**

BETWEEN

**HUSSEIN ALI ABDALLA ALIAS BILLY 1ST APPELLANT
HALIMA WANJIKU WAWERU 2ND APPELLANT
RUKIA NJOKI HAMISI 3RD APPELLANT**

AND

**SUSAN WANJIRU ZAKARIA 1ST RESPONDENT
NATIONAL LAND COMMISSION 2ND RESPONDENT
COUNTY LAND REGISTRAR 3RD RESPONDENT
COUNTY GOVERNMENT OF NYERI 4TH RESPONDENT**

(Emanating from a judgement rendered in Nyeri MELC No. 92 of 2018 on 7th January, 2022)

RULING

1. By the notice of motion dated May 17, 2022, the three appellants pray for an order of stay of execution of the judgment and decree delivered on January 7, 2022 in Nyeri MELC No 92 of 2018; Susan Wanjiru Zakaria vs Hussein Ali Abdalla alias Billy & 5 others.
2. The application is supported by an affidavit sworn by Rukia Njoki Hamisi (the 3rd appellant) and is premised on the grounds that:
 - (i) The judgment required the appellants to be evicted from LR No Nyeri/Municipality Block II Majengo 495 within 45 days and for the 1st respondent to be paid damages amounting to Kshs 5,000,000/= by the appellants;



- (ii) The appellants lodged and appeal herein *vide* a memorandum of appeal dated January 19, 2022 on January 21, 2022;
 - (iii) The appellants application dated January 26, 2022 for stay of execution before the lower court was disallowed on May 12, 2022;
 - (iv) That the appellants are now exposed to execution and stand to suffer substantial loss if no stay of execution is granted;
 - (v) That there is need to preserve the substratum of the suit property which may change in terms of the judgment appealed against thereby rendering the appeal nugatory;
 - (vi) That the appellants are willing to provide security for the due performance of the decree by depositing the title of the suit property in court; and
 - (vii) That it is mete and just that the orders sought are granted.
3. Susan Wanjiru Zacharia (the 1st respondent) is opposed to the application. In her replying affidavit sworn on June 2, 2022 and filed herein on June 6, 2022, the 1st respondent avers that the 3rd appellant has no authority from the 1st and 2nd appellants to swear the supporting affidavit on their behalf.
 4. The 1st respondent asserts that the title deed of the suit property being the subject matter of the judgment and having been awarded to herself by the lower court, was not available to be deposited as security for the due performance of the decree.
 5. The 1st respondent further avers that the appeal as filed has no merit and has no chance of succeeding. she further avers that the application is incompetent, does not meet the requirements for the grant of the orders sought and is only meant to cause her prejudice by delaying the realization of the fruits of her judgment.
 6. I have carefully perused and considered the application as well as the response thereto. I have similarly perused and considered the written submissions and authorities placed before me by the learned advocates acting for the parties.
 7. The appellants have urged the court to stay execution of the judgment rendered against them in Nyeri MELC No 92 of 2018 on January 7, 2022. It is the appellant's case that the judgment requires them to be evicted from the suit property – Nyeri/Municipality Block II/Majengo 495 within 45 days and that they have also been condemned to pay the sum of Kshs 5,000,000/= to the respondents as general damages.
 8. Sub-rule 1 of order 42 rule 6 provides the circumstances under which an order of stay of execution may be made by the court. Sub-rule 2 of rule 6 however provides as follows:
 - No order for stay of execution shall be made under sub-rule (1) unless –
 - (a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
 9. Accordingly, under order 42 rule 6(2) of the *Civil Procedure Rules* before an order for stay of execution is made the court must be persuaded that the application has been made without unreasonable delay



and that substantial loss may result to the applicant unless such an order is made. The court must also further be satisfied that the applicant has furnished security for the due performance of the decree or order.

10. As was stated in *RWW vs EKW* (2019 eKLR:

“ 1. ... the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

11. Again as was stated in *James Wangalwa & Another vs Agnes Naliaka Cheseto* (2012) eKLR:

“ 1. ... The fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 rule 6 of the *Civil Procedure Rules*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the *status quo* because such loss would render the appeal nugatory.”

12. In the circumstances herein, i note that the motion before me was filed a mere seven (7) days after the lower court disallowed a similar application for stay. I was therefore persuaded that the application was brought without undue delay.

13. In regard to the likelihood of the appellant suffering substantial loss, i note that the appellants claim to have been in the disputed parcel of land from as far back as 1956. There was evidence that they had put up properties on the land as far back as 1998 when they were given notice to vacate the suit property. It was apparent that over the long period of time, the respondents had not occupied the suit property. In the circumstances herein, i am persuaded that the appellants stand to suffer substantial loss as they stand to be evicted from the properties they had built on the land over the period of time.

14. In the premises I find merit in the motion dated May 17, 2022. I allow the motion but on condition that the appellants do deposit security for costs in the sum of Kshs 300,000/- in a joint interest earning account in the names of their advocates and the advocates for the respondents within 45 days from today.

15. The costs of this application shall however be in the appeal.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 16TH DAY OF FEBRUARY, 2023.

In the presence of:

Mr. Muhoho for the Appellant/Applicant



Mr. Waweru Macharia for the Respondents

No appearance for the 2nd to 4th Respondents

Court assistant - Kendi

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J. O. OLOLA

JUDGE

