



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kinyanjui v Njoki (Civil Appeal E298 of 2023)  
[2024] KEHC 344 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 344 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E298 OF 2023  
FN MUCHEMI, J  
JANUARY 25, 2024**

**BETWEEN**

**DANIEL MWANGI KINYANJUI ..... APPELLANT**

**AND**

**MARIAM NJOKI ..... RESPONDENT**

**RULING**

**Brief Facts**

1. The application for determination dated 18<sup>th</sup> October 2023 and seeks for orders of stay for execution of the judgment in Ruiru ELC Case No. E032 of 2022 delivered on 20<sup>th</sup> June 2023 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed Grounds of Opposition dated 31<sup>st</sup> October 2023 and a Replying Affidavit dated 1<sup>st</sup> November 2023.

**Applicant's Case**

3. The applicant states vide a plaint dated 24<sup>th</sup> February 2022, filed a suit against the respondent in Ruiru ELC Case No. E032 of 2022 claiming removal of caution of title for LR Ruiru/Ruiru West Block 3/461. The suit was dismissed for lack of merit on 20<sup>th</sup> June 2023. Being dissatisfied with the judgment, the applicant lodged an appeal against the whole judgment of the trial court. The applicant states that before the judgment in ELC Case No. E032 of 2022 was rendered, he filed Ruiru Misc Application No. E005 of 2022 whereas part of the prayers sought were granted by the honourable court on 25<sup>th</sup> March 2022 by Hon. Khakasa. The judgment delivered on 20<sup>th</sup> June 2023 delivered by Hon Agonda varied the orders made by Hon Khakasa which orders the applicant argues are valid on record as they have not been appealed against by the respondent.



4. The applicant states that he is highly prejudiced and stands to suffer substantial loss if the respondent proceeds with the execution of the decree and orders made by the trial court in Ruiru ELC Case No. E032 of 2022. Furthermore, the applicant argues that amongst the orders made by the trial court is to have the interested party, who was never a party to the lower court proceedings, move out of the suit property within a period of sixty (60) days from the date of judgment, failure of which the court gave broad leeway and liberty to the respondent to evict the said interested party and demolish the structures built on the suit parcel of land. The applicant further states that the trial court ordered that the land registrar immediately reconstructs and restores the original register for LR No. Ruiru/Ruiru West Block 3/641 and have the same registered in the names of both the applicant and respondent, failure of which execution is to issue, notwithstanding the fact that title has since passed hands into the names of another party who was never accorded an equal opportunity to be heard by the honourable court.
5. The applicant is apprehensive that the respondent will execute the decree against him as he sold the land to the interested party which shall render the whole appeal nugatory. The applicant further argues that he will be greatly prejudiced if stay of execution is not granted as the interested party will be forced to leave the suit land or will be evicted and his structures demolished from the suit land upon the expiry of 60 days and in the event the appeal succeeds, the applicant will not be able to recover from the loss or damage that would have been occasioned through the demolitions which he may be forced to pay for causing him substantial loss.
6. The applicant contends that he lodged an appeal being ELC Appeal Case No. E060 of 2023 against the judgment dated 30<sup>th</sup> June 2023 as well as the application for stay of execution pending appeal dated 13<sup>th</sup> July 2023 but the court in the course of hearing the application on 27<sup>th</sup> September 2023 and upon looking at the pleadings filed therein, with the consensus of the advocates representing the parties on record, directed and ordered that the said appeal be transferred to this court thus necessitating the filing of the present application and appeal. Thus the applicant contends that the application has been brought without undue delay.

### **The Respondent's Case**

7. The respondent states that the applicant filed the trial suit on 2<sup>nd</sup> March 2022 and subsequently after filed a motion dated 24<sup>th</sup> February 2022 seeking orders for the unconditional removal of the caution. In blatant abuse of the court process and without full disclosure to the court of the existence of ELC Case No. E032 of 2022 Ruiru, the applicant on 4<sup>th</sup> March 2022, one day after lodging the suit, moved the court by way of separate suit Misc Application No. E005 of 2022 Ruiru seeking the very same orders for the removal of the said caution which orders the court granted without the knowledge of the existence of the said main suit. The respondent further contends that the applicant deceived the court that he had served the respondent with the application, which he had not. In an attempt to defeat justice, the respondent states that the applicant upon obtaining the said order, proceeded to have the said caution removed and immediately transferred the said property to a third party.
8. The respondent contends that the court in Ruiru ELC Case No. E032 of 2022 having become aware of the applicant's blatant abuse of the court process in delivering its judgment ordered for reinstatement, restoration and reconstruction of the original title register Ruiru/Ruiru West Block 3/461 and further ordered that the same be jointly registered in favour of the applicant and the respondent herein. The court further held that the said third party, in whose favour the applicant had transferred the said suit property, yield up vacant possession within sixty (60) days. Pursuant to the said decree, the applicant moved the court by way of an appeal being ELC Case No. E060 of 2023 Thika. The applicant further lodged an application dated 13<sup>th</sup> July 2023 seeking for orders of stay of execution. While the motion was



still pending before the appellate court moved the instant court seeking similar orders. The respondent contends that the applicant's actions demonstrate that he is ready and willing to do all that is in his power both legal and illegal to ensure final judgment of the trial court is not enforced.

9. The respondent argues that the third party is a result of convoluted efforts by the applicant to deny her the rights to a property jointly acquired which she had placed a caution so as to avert any dealings adverse to her interests.

### **The Applicant's Submissions**

10. The applicant relies on the case of *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 Others* [2018] eKLR and submits that a replying affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or list of authorities that may be subsequently filed. The applicant argues that the replying affidavit sworn by the respondent is wanting in form and substance as it does not set out the basis upon which she has opposed the instant application. As such, the applicant contends that the written submissions by the respondent dated 21<sup>st</sup> November 2023 are of no effect.
11. The applicant submits that the grounds of objection dated 31<sup>st</sup> October 2023 are not grounds of opposition properly so called as they too set out explanations of facts and not specific points of law. As such, the applicant contends that the grounds of objection are equally wanting in form and substance. The applicant thus submits that the application stands unopposed.
12. The applicant relies on order 42 rule 6 of the *Civil Procedure Rules* and the cases of *Visbram Ravji Halai v Thornton & Turpin* [1990] KLR 365 and *Antoine Ndiaye v African Virtual University* (2015) eKLR and submits that he has satisfied the conditions set out for the grant of the orders of stay pending appeal.
13. On the condition of substantial loss the applicant cites the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR and submits that the impugned judgment has the effect of exposing him to a flood gate of litigation by the third party on account of the sale of the suit property. Furthermore, the third party was not a party to the trial court proceedings and thus he stands to be evicted within sixty days despite being unheard. The applicant further argues that the suit property has a multimillion investment erected on it and the suit property forms the substratum of the appeal. Thus, the applicant is apprehensive that the developments on the suit property will be demolished and obliterated besides the registrar effecting the orders of the title reverting back to the appellant and the respondent herein from the third party.
14. The applicant submits that he has brought the instant application timeously as the impugned judgment was delivered on 20<sup>th</sup> June 2023 and he lodged an appeal in the Environment and Land Court in Thika being ELC Case No. E060 of 2023 alongside an application for stay of execution dated 13<sup>th</sup> July 2023. On 27<sup>th</sup> September 2023, the ELC Court transferred the file to the instant court.
15. On the issue of security, the applicant submits that he filed an undertaking in court on 31<sup>st</sup> October 2023 on security of costs following the directions of Mshila J. on 23<sup>rd</sup> October 2023. The applicant further submits that he is amenable to any further conditions that this honourable court will set to enable him pursue the appeal.

### **The Respondent's Submissions**

16. The respondent relies on the case of *Gurbachan Singh Kalsi v Yoweri Ekori* Civil Appeal No. 62 of 1958 cited with authority in *Republic v Registrar of Societies Kenya & Others ex parte Moses Kirima &*



- Others* [2017] eKLR and submits that the applicant vide a plaint dated 24<sup>th</sup> February 2022 and filed on 2<sup>nd</sup> March 2022 sought for orders removal of the caution placed on LR. No. Ruiru/Ruiru West Block 3/641 and two days later, on 4<sup>th</sup> March 2022 the applicant moved the court vide a separate suit being Misc. Application No. E005 of 2022 Ruiru seeking similar orders. The respondent submits that on perusal of the said motion, the court was never notified that there already existed a separate suit being MCELC Case No. E032 of 2022 where the very same orders had been sought.
17. The respondent submits that the trial court granted the said orders having been misled and deceived by the applicant that he had effected service of the said motion upon her and therefore the application was unopposed. Furthermore, the respondent submits that the applicant did not serve her the said order for compliance and thus he caused the removal of the said caution on 14<sup>th</sup> April 2022 and in less than a month and while the main suit in MCELC Case No. E032 of 2022 was pending, caused transfer on 10<sup>th</sup> May 2022 to a third party. The respondent contends that she was not aware of the events and came to learn of them when the applicant filed his submissions.
18. The respondent relies on the case of *Halal & Another v Thorton & Turpin Ltd* (no citation given) and *Hassan Guyo Wakalo v Straman EA Ltd* (2023) eKLR and submits that the applicant has not satisfied the conditions for stay of execution. The respondent further submits that the applicant does not stand to suffer any substantial loss as by having the suit property jointly registered between them, the same would amount to a protection of the property since none of the parties is likely to deal with the property in a manner adverse to the other party's interests. Furthermore, the respondent argues that the transfer of the suit property to the third party was unlawful and unprocedural as it was done during the pendency of the lower court matter with the sole intention to defeat justice and therefore the justification by the applicant for stay to protect the third party is unjustified. Moreover, the applicant did not enjoin the said third party to the proceedings nor call him as a witness in the lower court. The respondent further submits that the lower court found the alleged transfer was shrouded by illegalities as no agreement of sale was availed to the court to confirm compliance with Section 3 of the Law of Contract, no spousal consent and/or land control board consent was produced. Therefore granting stay, this honourable court would be stamping on the said illegalities.
19. The respondent further relies on Order 51 Rule 14 of the *Civil Procedure Rules* and submits that she was at liberty to file the grounds of objection without the replying affidavit but decided to file both. The respondent further submits that the case of *Gideon Konchellah v Julius Lekakeny Ole Sunkuli & 2 Others* [2018] eKLR is distinguishable from the present case as in the former case a replying affidavit was lacking. Furthermore, there were no grounds of objection or preliminary objection in the former case and thus in the absence of the three documents pursuant to Order 51 Rule 14 of the Civil Procedure Rules, there was no basis upon which the respondent could have filed written submissions and that's why the court held that the submissions filed were of no effect.

## The Law

### Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

20. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) *Civil Procedure Rules*. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:-
1. "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and



whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.

2. 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 1<sup>st</sup> 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.
21. Thus under Order 42 Rule 6(2) of the [Civil Procedure Rules](#), an applicant should satisfy the court that:
  1. Substantial loss may result to him/her unless the order is made;
  2. That the application has been made without unreasonable delay; and
  3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
22. Substantial loss was clearly explained in the case of [James Wangalwa & Another v Agnes Naliaka Cheseto](#) [2012] eKLR:-

" No doubt in law, 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 [CPR](#). 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.
23. The applicant contends that he stands to suffer irreparably if the respondent levies execution against him as there is a third party involved and he was not a party in the trial proceedings. Thus by declining to grant the stay orders, it would amount to condemning the third party without him being heard. Further, the applicant contends that he stand to suffer substantial loss as he will be exposed to a flood gate of litigation by selling the suit property to the third party.
24. The respondent argues that the applicant has not demonstrated the substantial loss he stands to suffer. The respondent argues that the trial court by ordering that the suit be jointly registered in both their names protects both parties' interests. I have perused the trial record and noted that the applicant filed a suit against the respondent on 2<sup>nd</sup> March 2022 and the trial court heard and determined the matter
25. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. Moreover, the applicant has contributed to his own misfortune as he claims that there is a third party who will be condemned unheard but from the record, he never called the said third party in the trial court as a witness or enjoined him to the suit. In any event, the trial court's orders of having the property jointly registered protects both parties' interests. It is thus my considered view that the applicant has not demonstrated any substantial loss he stands to suffer.



### **Has the application has been made without unreasonable delay.**

26. Judgment was delivered on 20<sup>th</sup> June 2023 and the applicant filed an application for stay of execution on 13<sup>th</sup> July 2023 in the Environment and Land Court in Thika being ELC Appeal Case No. E060 of 2023. On 27<sup>th</sup> September 2023, the application came up for hearing and Eboso J with the consent of the parties transferred the suit to the High Court for determination. The applicant thus filed the instant application on 23<sup>rd</sup> October 2023. It has taken the applicant twenty six (26) days between the ruling of the ELC court and the time when he filed the instant application. It is therefore my considered view that a delay of twenty six (26) days is not inordinate. As such, the application was filed timeously.

### **Security of costs.**

27. The purpose of security was explained in the case of [\*Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others\*](#) [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the [\*Civil Procedure Rules\*](#) acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

28. Evidently, the issue of security is discretionary and it is upon the court to determine the same. I have perused the court record and noted that the court on 23/10/2023 directed the applicant provides a letter of undertaking as to security for damages within five days from the said date. The applicant filed the letter of undertaking in court on 31<sup>st</sup> October 2023.
29. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of [\*Samvir Trustee Limited v Guardian Bank Limited\*](#) [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

30. The court in granting stay has to carry out a balancing act between the rights of the two parties. The question then begs as to whether there is just cause for depriving the respondent her right of enjoying her judgment. I have perused the grounds of appeal and without going into the merits of the appeal noted that they do not raise any arguable points of law. Therefore it is my considered view that the applicant has not met the threshold of granting stay of execution pending appeal.



### **Whether the application is properly defended.**

31. The instant application was defended by the respondent by way of grounds of opposition dated 31<sup>st</sup> October 2023 and replying affidavit dated 1<sup>st</sup> November 2023. The applicant on his part argues that the grounds of objection do not raise any specific points of law and neither does the replying affidavit set out the basis upon which the respondent opposed his application and therefore both documents are wanting in form and substance.
32. The legal provision on ways of opposing an application is Order 51 Rule 14 of the *Civil Procedure Rules* which provides:-  
Any respondent who wishes to oppose any application may file any one or a combination of the following documents:-
- a. A notice of preliminary objection; or
  - b. Replying affidavit; and/or
  - c. A statement of ground of opposition
33. The respondent has opposed the application by way of grounds of objection and replying affidavit, which is recognized by the law. Nonetheless, there is need to review the grounds of objection and replying affidavit to determine whether they are merited. A perusal of the grounds of objection shows that the said grounds largely respond to the averments in the application and thus they address issues of fact. In the case of *Kennedy Otieno Odiyo & 12 Others v Kenya Electricity Generating Company Limited* [2010] eKLR the court held:-  
The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to issues raised by the applicant in its supporting affidavit. Thus what was deposed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant.
34. I have equally considered the case of *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 Others* [2018] eKLR and noted that the case is distinguishable from the present case as in the former case the respondent filed a replying affidavit but did not have it signed, dated or commissioned and therefore the court found it fatally defective, which is not case in this application.
35. In the instant case, the respondent filed a replying affidavit which rebuts the averments made by the applicant in his affidavit. Furthermore, this court is guided by Article 159 of the *Constitution* which binds the court not to pay undue regard to technicalities but rather the substance and although the grounds of objection strictly speaking contain statements of facts, the substance of the response clearly indicates that the respondent opposes the instant application. As such, in the interests of justice, it is my view that the replying affidavit and grounds of objection are not fatally defective.

### **Conclusion**

36. In an application of this nature, the condition that forms the backbone of the application is proof of substantial loss that is likely to be suffered by the applicant. I have already pronounced the position that substantial loss has not been satisfied by the applicant. In the absence of satisfying this condition, this application has no chances of success and must fail.



37. It is my finding that this application has no merit and it is hereby dismissed with costs to the respondent.

38. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 25<sup>TH</sup> DAY OF JANUARY 2024.**

**F. MUCHEMI**

**JUDGE**

