



REPUBLIC OF KENYA



**KENYA LAW**  
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**Catholic Archdiocese of Nyeri v Mwangi & another (Environment and Land Appeal E055 of 2021) [2023] KEELC 801 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 801 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NYERI**  
**ENVIRONMENT AND LAND APPEAL E055 OF 2021**  
**JO OLOLA, J**  
**FEBRUARY 16, 2023**

**BETWEEN**

**CATHOLIC ARCHDIOCESE OF NYERI ..... APPELLANT**

**AND**

**PEER KAMAU MWANGI ..... 1<sup>ST</sup> RESPONDENT**

**ANGELUS MAINA MWANGI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By the notice of motion dated June 16, 2022 the Catholic Archdiocese of Nyeri (the appellant) prays for orders:
  3. That pending the hearing and determination of this Appeal, this Honourable Court be pleased to stay the execution of the Judgment delivered on 23<sup>rd</sup> November, 2021 and the Decree of the Court issued on 20<sup>th</sup> December, 2021 in Nyeri MCELC Suit No. 29 of 2018 (Peter Kamau Mwangi -vs- Catholic Archdiocese of Nyeri);
  4. That leave be granted to the Defendant to deposit in Court the sum of Kshs.540,000/- within 30 days as security pending the hearing and determination of the Appeal; and
  5. That the costs of this Application abide the costs of the Appeal.
2. The application is supported by an affidavit sworn by Fr. Boniface Mwangi, the Financial Administrator of the Appellant and is premised on the grounds:
  - (i) That Judgment was delivered on 23<sup>rd</sup> November, 2021 in favour of the Respondents;
  - (ii) That the Appellant being aggrieved with the decision in the lower Court lodged the instant Appeal vide the Memorandum of Appeal dated 23<sup>rd</sup> December, 2021;



- (iii) That together with the Appeal, the Appellant filed an application dated 23<sup>rd</sup> December 2021 for stay of execution of the Judgment in the lower Court;
  - (iv) That the application was canvassed before the lower Court and on April 12, 2022 a Ruling was delivered granting a stay of execution on condition that the Appellant deposits the sum of Kshs.540,000/= in an interest gaining joint account in the names of the Parties Advocates within 30 days;
  - (v) That despite spirited efforts, the Appellant was unable to raise the required amount within the 30 days but has now managed to do so;
  - (vi) That the Appellant has since tried to engage the Respondents' Advocates to have the account opened but they have declined the request;
  - (vii) That the delay in getting the funds was not occasioned by any indolence on the part of the Appellant but was due to the processes that preceded the release of the funds from its accounts, which have to be sanctioned through a bureaucratic process;
  - (viii) That the Appellant stands to suffer prejudice, loss and damage unless an order of reasons that:
    - (a) The Appeal will be rendered nugatory as the subject matter of the Appeal being property, will have been transferred to the 1<sup>st</sup> Respondent and possibly to third Parties and secondly, the sum of Kshs.540,000/- will have been paid to the 2<sup>nd</sup> Respondent rendering the Appeal an academic exercise;
    - (b) The property will be transferred without the Appellant's involvement and be out of its reach completely as the 1<sup>st</sup> Respondent will be at liberty to undertake subsequent transfers; and
    - (c) The Appellant if successful in the Appeal will be unable to recover the sums paid out to the 2<sup>nd</sup> Respondent as the said Respondent has no assets known to the Appellant;
  - (ix) That the application has been brought timeously without any inordinate delay; and
  - (x) That it is in the interest of justice and fairness that the application is allowed as prayed.
3. The application is opposed. In a Replying Affidavit sworn on July 5, 2022, Peter Kamau Mwangi (the 1<sup>st</sup> Respondent) avers that the purported Appeal filed herein is frivolous and has no chances of success. The 1<sup>st</sup> Respondent avers that the Appeal as filed seeks to besmirch the religious trust that his deceased father Joseph Mwangi had on the Appellant's first Bishop when they exchanged two parcels of land some 50 years ago.
  4. The 1<sup>st</sup> Respondent further avers that the Judgment dated 23<sup>rd</sup> November, 2021 was self-explanatory that the Defendant owes them a legal duty to transfer 11 acres of L.R No. 9464/1 Kamwenja in honour of the gesture his father did when he transferred L.R No. Nyeri/Mweiga/191 to the Appellant.
  5. The 1<sup>st</sup> Respondent asserts that the Appellant's application is malafides and intended to deny him and the 2<sup>nd</sup> Respondent who is his elder brother the fruits of their Judgment. He avers that the Appellant has not provided any proof that it will suffer any substantial loss in case stay is denied and that the Respondents will be unable to refund the decretal sum should the Appeal succeed.
  6. The 1<sup>st</sup> Respondent accuses the Appellant of being guilty of unreasonable delay in that this application was filed on 16<sup>th</sup> June, 2022 which is about seven (7) months since the Judgment was delivered on 23<sup>rd</sup> November, 2021. It is his case that the Appeal will not be rendered nugatory as the Appellant is already



enjoying quiet possession and use of L.R No. Nyeri/Mweiga/191 which was transferred to them by the 1<sup>st</sup> Respondent's deceased father.

7. The 2<sup>nd</sup> Respondent – Angelus Maina Mwangi is equally opposed to the application. In a Replying Affidavit sworn on his behalf by his Advocate Charles Muchemi Karweru and filed herein on 1<sup>st</sup> August 2022, the 2<sup>nd</sup> Respondent avers that this application is an afterthought and that it was only filed to throw a spanner into the system and prevent parties from enjoying the fruits of Judgment.
8. The 2<sup>nd</sup> Respondent further avers that the Appellant has failed and neglected to obey the Court orders issued on 12<sup>th</sup> April, 2022 which required it to deposit Kshs.540,000/= within 30 days and that the Appellant's application having been dismissed for failure to comply, no enlargement of time can be available as none has been sought.
9. I have carefully perused and considered the application and the responses thereto. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates acting for the Parties.
10. The Appellant herein prays for a stay of execution of the Judgment delivered on 23<sup>rd</sup> November, 2021 in Nyeri MCELC No. 29 of 2018; Peter Kamau Mwangi -vs- Catholic Archdiocese of Nyeri. The Appellant further urges this Court to grant it leave to deposit the sum of Kshs.540,000/- within 30 days as security pending the hearing and determination of the Appeal.
11. The Respondents are opposed to the grant of the said orders. It is their respective positions that the application is malicious and intended to deny them the fruits of their Judgment as delivered in the lower Court on 23<sup>rd</sup> November, 2021. The Respondents accuse the Appellant of failing to obey Court orders issued on April 12, 2022 requiring them to deposit the sum of Kshs.540,000/- in a joint account within 30 days and term the present application as an abuse of the Court process and res judicata the Ruling delivered in the lower Court on April 12, 2022.
12. From the material placed before me, the Appellant was aggrieved by the Judgment of the lower Court delivered as aforesaid on November 23, 2021. They filed herein an appeal against the said Judgment on December 23, 2021. On the same 23<sup>rd</sup> day of December 2021, the Appellant filed an application in the lower Court seeking an order of stay of execution pending the hearing and determination of the Appeal.
13. Upon hearing the application for stay, the lower Court granted the same on condition that the Appellant deposits the sum of Kshs.540,000/- in a joint account within 30 days. It is apparent that they did not comply with those conditions within the time granted and hence the application before this Court seeking orders of stay and leave to be granted to them to deposit the said sum of Kshs.540,000/- within another 30 days.
14. It is the Appellants case that given certain bureaucratic procedures in the Appellant organization, they were unable to procure and process the amount of money required within 30 days but they have now managed to do so and are ready to deposit the sum as earlier required. It is further the Appellant's case that unless the stay is granted, they stand to lose the suit property together with the sum of Kshs.540,000/- which they have been required to pay to the 2<sup>nd</sup> Respondent.
15. According to the Respondents the application before the Court is res judicata and amounts to an abuse of the Court process as the same was already heard before the lower Court and was determined. It is their case that the Appellant's case stood dismissed after the lapse of the 30 days for want of compliance and that it was not open for the Appellant to file a similar application as it has done herein.



16. The application before me is expressed to be brought under order 42 rule 6(1) of the *Civil Procedure Rules*. The said Rule provides as follows:

“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 order set aside.”

17. Arising from the foregoing, it was clear to me that as provided hereinabove, whether an application for stay pending appeal has been allowed or rejected by the lower Court, this Court as the appellate Court is at liberty to consider an application for stay made to it and to make such order thereon as may to it seem just.

18. As it were, the Appellant had vide the Memorandum of Appeal dated December 23, 2021 appealed the Judgment of the lower Court. By that Appeal, the Appellant reserved the right to seek an order of stay of execution pending the Appeal and this court has jurisdiction to handle the same. I was in the circumstances not persuaded that the application before the Court is res judicata and/or that it amounts to an abuse of the Court process.

19. In regard to the application for stay of execution, order 42 rule 6(2) of the *Civil Procedure Rules* provides as follows:

“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 applicants 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.”

20. It was contended by the 2<sup>nd</sup> Respondent that the application was brought after an inordinate delay of seven (7) months after the Judgment was delivered on November 21, 2021. I did not however find much truth in that contention. From the material placed before me, it was apparent that the initial application for stay of execution was filed a month after the date of Judgment and that a Ruling thereon was not delivered until 12<sup>th</sup> April, 2022. The Ruling of April 12, 2022 gave the Appellant a 30 day period to deposit the security of Kshs.540,000/-.

21. The Appellant was thus required to raise and deposit the sum by May 12, 2022. By this present application, the Appellant has explained that due to some bureaucratic processes within the organisation they were unable to comply and that when they did raise the money the Respondents declined to have the joint account opened. This application having been made a month after the lapse of the given time was not in my view filed after an inordinate delay.

22. As was stated in *RWW -vs- EKW* (2019) eKLR:

“... 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.”

23. From a perusal of the material before me, it was apparent that the effect of the Judgment delivered on November 23, 2021 would be to have the suit property transferred to the 1<sup>st</sup> Respondent who intends to have the same sub-divided and distributed to his siblings. The suit property is said to measure some 11 acres and I was persuaded that the Appellant stands to suffer substantial loss. It was also clear that despite its failure to meet the original timelines, the Appellant was ready and willing to abide by such terms as to security for the due performance of the decree as the Court may impose.
24. In the premises, I was persuaded that the Appellant had made a case for the grant of the orders sought. Accordingly, I allow the Motion dated June 16, 2022 in terms of Prayers 3 and 4 thereof.
25. The costs of the application shall 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:**

Ms Moraa holding brief for Mugambi for the Appellant

No appearance for 1<sup>st</sup> Respondent

Mr. Wamahu holding brief for Karweru for 2<sup>nd</sup> Respondent

**Court assistant - Kendi**

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**J. O. Olola**

**JUDGE**

