



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wanjohi & 4 others v Wachira (Environment & Land Case  
226 of 2015) [2023] KEELC 794 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 794 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 226 OF 2015**

**JO OLOLA, J**

**FEBRUARY 16, 2023**

**BETWEEN**

**PETER MURIITHI WANJOHI ..... 1<sup>ST</sup> PLAINTIFF**  
**JOHN WACHIRA WANJOHI ..... 2<sup>ND</sup> PLAINTIFF**  
**CHARLES NJONJO WANJOHI ..... 3<sup>RD</sup> PLAINTIFF**  
**JOSEPH MBUTHIA WANJOHI ..... 4<sup>TH</sup> PLAINTIFF**  
**GRACE WANGECHI WANJOHI ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**JOHN MWANGI WACHIRA ..... DEFENDANT**

**RULING**

1. By the notice of motion dated April 26, 2022, the five (5) plaintiffs herein urge the court to grant an order of stay of execution from the judgment delivered herein on March 17, 2022 and all consequential orders pending the hearing and determination of the appeal.
2. The application which is supported by an affidavit sworn by the 1<sup>st</sup> plaintiff Peter Muriithi Wanjohi is based on the grounds that:
  - (i) Judgment was delivered herein on March 17, 2022;
  - (ii) The applicant being aggrieved with the said judgment have lodged a notice of appeal;
  - (iii) The nature and contents of the judgment are completely strenuous and forcible upon the applicants as the same are grounded on LR No Nyeri/Uasonyiro/82 where the applicants have been residing for more than 28 years and as such they risk destitution and irreparable loss upon them being evicted and permanently barred from accessing the suit property;



- (iv) The applicants risk being evicted from the suit property which action would amount to incurable irreparable loss as there is an ongoing appeal with an overwhelming chance of success and which would be rendered nugatory upon the same succeeding if the orders sought are not granted;
  - (v) The application and the appeal have been filed without undue delay;
  - (vi) The grounds for the intended appeal are weighty and raise serious issues of law and fact and has an overwhelming chance of success;
  - (vii) The applicants are ready to comply with any condition imposed by this court; and
  - (viii) The interest of justice will be served by the grant of the prayers sought.
3. The application is opposed. In her replying affidavit sworn on June 22, 2022 and filed herein on June 27, 2022, Virginia Wairimu Mwangi Wachira (the respondent) avers that she is the widow and administrator of the estate of John Mwangi Wachira (the deceased) who died on December 29, 2021.
  4. The respondent avers that the application is defective to the extent that it seeks from this court a stay of execution of the judgment delivered on March 17, 2022 pending the hearing of the appeal lodged at the Court of Appeal. The respondent avers the matter herein is now in the realm of the Court of Appeal by dint of rule 2 of the *Court of Appeal Rules, 2010* which defines an appeal to

#### **Include An Intended Appeal.**

5. The respondent further avers that the suit property is the subject of proceedings in Nyeri High Court Succession Cause No E010 of 2022 wherein letters of administration *ad colligenda bona* have already been issued to herself to preserve and possess the property.
6. The respondent accuses the 1<sup>st</sup> plaintiff herein of unbridled abuse of the court process and vexatious litigation in that he has filed in the said succession cause an objection to the making of a grant of representation on the purport that he is a beneficiary of the estate.
7. The respondent avers that at the time of pronouncing its judgment on March 17, 2022, this court granted a thirty-day period of stay. A further period of stay is therefore untenable considering that the status of the property has now changed as it is now the subject of the succession cause.
8. I have carefully perused and considered both the plaintiffs' application as well as the response thereto by the defendant. I have similarly perused and considered the written submissions and authorities placed before me by the learned counsels representing

#### **The Parties.**

9. The plaintiffs/applicants pray for an order of stay of execution of the judgment delivered herein on 17<sup>th</sup> March, 2022 pending the hearing and determination of their appeal at the Court of Appeal.
10. As regards an application for stay of execution pending appeal, order 42 rule 6 of the *Civil Procedure Rules* provides thus;
  - (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 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.”
11. Accordingly, under order 42 rule 6(2) of the [Civil Procedure Rules](#), an applicant for an order of stay of execution ought to persuade the court that:
- (a) Substantial loss may result to him unless the order is made;
  - (b) The application has been made without unreasonable delay;
  - (c) The applicant has given such security as the court may order for the due performance of such decree or order as may ultimately be binding on him.
12. As Platt J A stated in [Shell Limited vs Kibiru and Another](#) (1986) KLR 410:
- “It is usually a good rule to see if order XLI rule 4 (now order 42 rule 6(2) of the [Civil Procedure Rules](#) can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”
13. In the matter before me, the applicants state that they stand to suffer substantial loss as the defendant is keen on executing the judgment and decree that they risk being evicted and barred from permanently accessing the suit property. It is their case that such situation would result to destitution and irreparable loss as the suit property contains their home where they live and they have no other place to call home.
14. As Gachuhi Ag J A observed in the [Kenya Shell Limited case](#) (supra):
- “It is not sufficient by merely stating that the sum of Kshs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that *status quo* should remain as it were before judgment. What assurance can there be of the appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment.”
15. In the circumstances herein, I did not think it was sufficient for the applicants to merely state that their eviction from the suit land would cause them substantial loss. A perusal of the proceedings and the judgment delivered on the said March 17, 2022 does not reveal any instance where the applicants had constructed a home or even a house on the suit property. All the evidence before the court which they did not dispute pointed to the fact that the home which they were residing in was built by the respondent before the applicants entered the suit property.



16. As the court stated in *James Wangalwa & Another vs Agnes Naliaka Cheseto* (Bungoma High Court Misc Application No 42 of 2011):

“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. That is what substantial loss would entail.”

17. In the premises, I was not persuaded that the applicants stand to suffer substantial loss. I am therefore not persuaded that there is any merit in the motion dated April 26, 2022. The same is dismissed with costs to the respondent.

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

In the present of:

Ms Wanjiru holding brief for Ngurina for the Applicants

No appearance for the Respondents

Court assistant – Kendi

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**J. O. OLOLA**

**JUDGE**

