



**Rufus & another v Kirima (Environment & Land Case 95 of 2013)
[2023] KEELC 779 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 779 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 95 OF 2013
CK NZILI, J
FEBRUARY 15, 2023**

BETWEEN

GLORY NKUENE RUFUS 1ST PLAINTIFF

MARTIN KOOME KIAMBATI 2ND PLAINTIFF

AND

GOERGE KIRIMA ALIAS GEORGE KIRIMA MUGAMBI DEFENDANT

RULING

1. The court is asked to grant leave to the firm of Meenye Kirima Advocates to come on record for the applicant and to grant an order of stay of execution of the judgment delivered on July 13, 2022. The reasons given are contained on the face of the application and in the affidavit of George Kirima Mugambi sworn on July 22, 2022.
2. The applicant averred that he has filed a notice of appeal to the Court of Appeal; unless the decree holder is restrained he may move to dispose of the suit land any time to make the appeal superfluous; he will be prejudiced and suffer substantial loss and damage; the appeal has arguable and high chances of success; the substratum was land which is unique and no one parcel of land can be equated in value to another especially since he had extensively developed it which cannot be compensated by way of damages; that he was ready and willing to provide security and that no prejudice was likely to be occasioned to the respondent.
3. The application was opposed through a replying affidavit by Martin Koome Kiambati sworn on September 23, 2022. The grounds of opposition were that the matter had been determined in an earlier judgement dated November 14, 2018 and the applicant was out to delay his realization of the fruits of his judgment in a contemptuous manner. That the applicant was a vexatious litigant who refused to comply with court orders hence he had the right to use the land as a title holder. That the applicant could not purport to appeal on a suit already abated and not appealed against. That the applicant has



- not developed or used the land but has only leased it out to third parties who continue to benefit at his disadvantage, hence no loss or damage was likely to be suffered.
4. Further, the respondent averred that the appeal had no chances of success unlike the respondents who have incurred a lot of money yet the applicant had not shown proof of his capability to pay costs.
 5. With leave of court, parties filed written submissions dated October 11, 2022 and October 19, 2022 respectively.
 6. The applicant submitted that they had met the three conditions for the grant of stay under Order 42 Rule 6 of the Civil Procedure Rules. On the 1st condition, the applicants submitted since he and his family were in occupation of the suit land they stood to suffer substantial loss. Reliance was placed on Antoine Ndiaye vs African Virtual University (2015) eKLR, John Gachanja Mundia vs Francis Muriira alias Francis Muthika & another (2016) eKLR, RWW vs EKW (2019) eKLR.
 7. On the 2nd condition, the applicants submitted that the application was filed without unreasonable delay. Lastly on the 3rd condition on security, the applicant submitted that the circumstances of the case militated against imposing an order for the deposit of security for the due performance of the decree and if the court were to find otherwise, the same should be reasonable so as to facilitate access to justice. Reliance was placed on Rose Njiru vs Nicholas Muthuri (2019) eKLR.
 8. On the other hand, the respondents submitted that the purpose of stay of execution was to preserve the substratum of the appeal as held in consolidated Marine vs Nampijja and another Civil App No 93 of 1989 (Nairobi). On substantial loss the respondents submitted that a party must demonstrate such loss or damage which the applicant had failed to do. Reliance was placed on Mukuma vs Abuoga (1988) KLR 645 Charles Wabome Gethi vs Angela Wairimu Gethi (2008) eKLR Kenya Shell Ltd vs Kibiru & another (1986) KLR 410. Machira t/a Machira & Co Advocates, Aron C Sharma vs Ashana Raikundalia t/a Rairundalia & Co Advocate.
 9. The court is being asked to stay its own judgment pending an appeal to be preferred at the Court of Appeal. For a party to be entitled to an order of stay, he has to file the application within reasonable period, demonstrate substantial loss or damage, offer security for the due performance of decree should the appeal not succeed and lastly, demonstrate that it is in the interest of justice to grant a stay.
 10. The application herein was filed within 14 days from the date the judgment was delivered. Coming to the issue of substantial loss the court in Charles wabome Gethi vs Angela Wairimu Gethi (supra), the Court of Appeal held that it was not enough for the applicant to say that they lived or resided on the suit land and that they were likely to suffer substantial loss. The court said that an applicant must go further and show substantial loss if execution was to issue.
 11. Further, in Butt vs Rent Restriction's Tribunal (1982) KLR 417, the court held that an applicant must provide for the court's consideration any special circumstances of the case and the unique requirements for the discretion to be exercised in its favor.
 12. In this application, the applicant has merely stated that if the orders sought are not granted, the respondent would dispose of the property. Nowhere has the applicant stated that he was in occupation of the suit land alongside his family. The nature of occupation and the estimated loss or damage has not been demonstrated in the supporting affidavit.
 13. It has been held that written submissions cannot replace evidence or amount to pleadings. The applicant and his family do not feature anywhere in the supporting affidavit by George Kirima Mugambi. In paragraphs 9 & 10 thereof, all what the applicant is saying is that he has extensively developed the suit land and though the value of the property can be ascertained, the subject land cannot



be compensated by way of damages. There are no specific particulars given on the nature of the alleged developments and the estimated value of the property.

14. In *James Wangalwa & another vs Agnes Cheseto* (2013) eKLR, the court held that an applicant must establish other vitiating 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. Similarly, in *RWW vs EKW* (*supra*), the court held that a court must weigh the undoubted right of a successful party against the right of appeal of the losing party to ensure none of them was prejudiced.
15. In this application, the respondent has sworn that he continues to suffer yet the applicant is not in occupation but has leased the subject property to third parties hence he will suffer more prejudice should he be denied his right to enjoy the fruits of his judgment.
16. The applicant has not by way of a rejoinder denied that he is not actually in occupation of the suit property but third parties. There are no certified photographs or valuation reports to support any alleged substantial loss if the application was not allowed. There is no indication also if the decree has been extracted and the process of execution put into motion. See *Machira t/a Machira Co advocates vs East African Standard* (*supra*).
17. As held in Consolidated Marine (*supra*), a party must define the status of the property to be preserved. In *Mukuma vs Abuoga* (*supra*), the court also said substantial loss was that which has to be prevented by preserving the *status quo* because such loss would render the appeal nugatory. The applicant has not brought any tangible or cogent evidence to demonstrate such a loss.
18. As to the issue of security, the court in Aron C Sharma (*supra*), held that the purpose of the same was not to punish the judgment debtor, but since a judgment was like a debt, security was binding on an applicant.
19. In this application, the applicant was ordered to pay costs for the suit. He submitted that security was not necessarily due to the circumstances of the case. He has not defined those unique circumstances. He has not suggested the nature of security he wants to post before court. Assuming without admitting, that he is in occupation of the suit property the applicant has not given any guarantee that he will not interfere with the suit land.
20. In the premises and considering the interests of the wider justice under Sections 1A, 1B & 3A, of the *Civil Procedure Act*, I find the application lacking merits save for the leave to come on record. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 15TH DAY OF FEBRUARY, 2023

In presence of:

C/A: Kananu

Miss Gikundi for respondent

HON. C.K. NZILI

ELC JUDGE

