



**Mwangi & another (Suing as the Administrators and Legal Representatives of the Estate of Simon Ryboy Mwangi Deceased) v Gitoho & another (Environment & Land Case 58 of 2017) [2023] KEELC 16711 (KLR) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16711 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE 58 OF 2017  
LN GACHERU, J  
MARCH 29, 2023**

**BETWEEN**

**PAUL MWAURA MWANGI ..... 1<sup>ST</sup> PLAINTIFF**

**HANNAH WARUGURU MWANGI ..... 2<sup>ND</sup> PLAINTIFF**

**SUING AS THE ADMINISTRATORS AND LEGAL REPRESENTATIVES OF  
THE ESTATE OF SIMON RYBOY MWANGI DECEASED**

**AND**

**SALOME WANJIRU GITOHO ..... 1<sup>ST</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR MURANG'A ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> Defendant/Applicant has filed the instant Notice of Motion Application dated 6<sup>th</sup> December 2022, and sought for the following orders:
  1. Spent
  2. Spent
  3. That the Honourable Court be pleased to stay the execution of its judgment and orders issued on 30<sup>th</sup> June 2022, and order the maintenance of status ante pending the hearing and determination of the Appeal No. E122 of 2022 already filed by the Applicant in the Court of Appeal at Nyeri, on land parcel number Nginda/ Samar/ Block 2/728.
  4. That the costs of this Application do abide the outcome of the said appeal.
2. The application is anchored on seven grounds stated thereon and the depositions contained in the Supporting Affidavit of the applicant sworn on the 6<sup>th</sup> December, 2022. The Applicant averred that



through a Judgment of 30<sup>th</sup> June, 2022 this Court entered judgment in favour of the Respondent against the Applicant. Being dissatisfied with the said Judgment, the Applicant lodged an appeal against the judgment of this Court. She contended that she has an arguable appeal and should stay not be issued, the appeal will be rendered nugatory.

3. Further, she deponed that she has been in possession and occupation of the suit land for over 20 years now, and her occupation has been threatened by the Respondent who has deposited building materials on the suit property. It is her allegations that the Respondent will suffer no prejudice should the orders be granted.
4. The Respondent filed a response to the application vide a Replying Affidavit sworn by Esther Maina, the Attorney duly appointed by the Plaintiff/Respondent on the 24<sup>th</sup> January, 2023. She averred that the application ought to have been brought at the earliest opportunity, after delivery of judgment. That the application has already been overtaken by events since the Applicant's title has already been cancelled and that she is already in occupation of the land.
5. The application was dispensed with by way of written submissions.
6. The Applicant filed her submissions through the Law Firm of Irung'u Mwangi Ng'ang'a & Co. Advocates on the 17<sup>th</sup> February, 2023. She submitted that this Court should be guided beyond the principles to consider for grant of stay as enunciated in Order 42 Rules (6) 2 of the Civil Procedure Rules. It is her submissions that she will suffer irreparable harm should the Respondent proceed and evict her from the suit property. She invited this Court to be guided by the cases of Nicholas Stephen Okaka & Another vs Alfred Waga Wesonga Civil Appeal No. E003 of 2022 and Michael Ntouti Mutheu vs. Abraham Kivondo Musau(2021)eKLR.
7. The Respondent through the Law Firm of Mbiyu Kamau & Co. Advocates filed her submissions on the 22<sup>nd</sup> February, 2023. She submitted that the purpose of stay is to preserve the subject matter of appeal and in this case, the subject matter has already been overtaken by events. She relied on the case of RWW vs EKW {2019} eKLR where the Court the Court held:

"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."
8. The Respondent further submitted that the Applicant has never been in occupation of the suit land, but has only been a trespasser as a result the order of stay will be of no consequential value. Further, she submits that it would be unfair to deny her the use of the land which she submits will occasion her great loss. She urged this Court not to issue orders in vain.
9. This Court has perused the instant Notice of Motion Application and the annexures thereto, and has noted that the Applicant has preferred an Appeal against the Judgment of this Court of 30<sup>th</sup> June 2022, which was found in favour of the Respondent herein. Interestingly, the Applicant has attached a copy of Memorandum of Appeal filed in Nyeri referenced as in the Environment and Land Court at Nyeri. It is not clear to this Court whether the Appeal referenced has been filed in the Environment and Land Court at Nyeri or the Court of Appeal in Nyeri. Even so, there is an impression from the Respondent that there is a competent appeal that has been filed by the Applicant.



10. It is trite law that an appeal cannot operate as stay. Also it is common knowledge that once judgment has been issued, execution is likely to happen anytime as such the judgment debtor if dissatisfied has the responsibility to, at the soonest, seek stay of execution of the judgment. Presently, the judgment was delivered on the 30<sup>th</sup> June 2022, and the application was filed on 7<sup>th</sup> December 2022, that's about six months from the date of judgment.
11. Considering the forgoing, and having read through the Instant Notice of Motion Application, and the annexures thereto, the Replying Affidavit and the Annexures thereto and the rival submission and authorities cited the issues for determination are
  - i. Whether stay of execution should be granted
  - ii. Who should bear costs for the application

**i. Whether stay of execution should be granted**

12. The principles for grant of stay pending appeal are well set out under Order 42 Rule 6 which provides:
  6. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.
    - (1) 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.
    - (2) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
    - (3) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
    - (4) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
    - (5) Notwithstanding anything contained in sub-rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure



for instituting an appeal from a subordinate court or tribunal has been complied with.

13. The Applicant has the option of filing the instant application before this Court or the Appellate Court where the Appeal has been preferred. It is safe to conclude that there is no such application before the Appellate Court, since none of the parties have mentioned it. That being the case the, an Applicant must demonstrate (a) that substantial loss may result unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that the Applicant must be willing to give such security as the court orders for the due performance of such decree or order. This Court will also be guided by the overriding interest principle espoused under Section 1A and 1B of the Civil Procedure Act, which call for *inter alia* just and expedient disposal of cases.

14. The foregoing three principles have been elaborated by many Courts. In the wake of the 2010 Constitution, Supreme Court in Application No 5 of 2014 Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others [2014] eKLR when determining an issue of stay held:

Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

- (i) the appeal or intended appeal is arguable and not frivolous; and that
- (ii) Unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

(88) These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:

- (iii) That it is in the public interest that the order of stay be granted

15. Basing our minds on the foregoing the Applicant must demonstrate that:

- i. The application has been made without unreasonable delay
- ii. She will suffer substantial loss
- iii. The appeal is not frivolous
- iv. The appeal will be rendered nugatory
- v. Security of costs for due performance

16. As stated above, the judgment of this Court was delivered on 30<sup>th</sup> June 2022, whereas this instant application was filed in this Court on the 7<sup>th</sup> December, 2022. This is over six months. There is no measure of what amounts to delay, but depending on the circumstances of the case, delay even for a day is delay. This Court takes cue from the holding of the Court in Mwangi S. Kimenyi v Attorney General & another [2014] eKLR when considering an application for setting aside an order for dismissal it held:

- (14) There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. Caution is, however, advised for courts



not to take the word “inordinate” in its dictionary meaning, but to apply it in the sense of excessive as compared to normality.

17. This was reiterated by the Court in Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another [2014] eKLR when it held

“There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case”

18. The Applicant did not give any reason why she filed the instant application over a period of five months after delivery of Judgment. Time begun running when judgment was entered and nothing stopped it. Time only stops running within the provisions of Order 50 Rule 4 of the Civil Procedure Rules or as directed by court; this was not the case herein. Once Judgment is delivered, there is anticipation that execution can ensure anytime and even though the Applicant might have filed the Notice of Appeal on time, there is no reason advanced for not filing the application at the soonest. As per the receipt attached, the Applicant filed her record of appeal on the 14<sup>th</sup> October, 2022. The instant application was either an afterthought or the Applicant was jolted to action by the Respondent’s move of executing the judgment.

19. The Court in the case of Thomas K’bahati t/a K/Bahati & Co Advocates v Janendra Raichand Shah [2021] eKLR found that a delay for seven months before filing an application for stay pending appeal amounted to inordinate delay. This was also the position in the case of Awale Transporters Co. Ltd v Kennedy Kaunda Odingo [2021] eKLR where the Court found a delay for five months amounted to delay. Similarly, the Court of Appeal in Nakuru Civ’ App’ No. 1/07 William K. Too v Simion K. Langat [2007] eKLR declined to interfere with the ruling of the High Court where the learned judge found that an unexplained delay of forty-two days was inordinate. Having been sufficiently guided and there being no reason advanced for the delay, this Court finds and holds that the delay of about five months was inordinate.

20. The Applicant contends that she will suffer loss should stay not be granted. She has attached some photographs which she alleges the Respondent has deposited building materials thereon. The Respondent on the other hand contended that the Applicant has never been in occupation of the suit property. The burden rested with the Applicant to demonstrate the loss she will suffer loss. Her submissions is that should the Respondent be allowed to evict her and she erects a building or sells the property, the Applicant will suffer damages if the appeal is successful.

21. There is no evidence that has been adduced before this Court that the Respondent intends to sell the suit property and that is a mere apprehension. Evidence in the form of a sale agreement would have been prudent. The Court in the case of Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997 rightly held:

“It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss.”



22. Further, Plat GA J as he then was in the case of Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR held:

"Substantial loss in its various forms is the corner stone of both jurisdictions for granting a 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"

23. While the Applicant has attached some photographs which intimate that she is using the land, this Court notes and appreciates that the Respondent claims to be in possession of the land. Even so, the Applicant has not demonstrated the loss she will suffer should the Respondent erect any building on the suit land. If any, it came out during the trial that the Respondent was in possession of the suit land. It was the Applicant's case that the building materials were brought onto the suit property in November, 2022. However, it is not clear whether up to date the same has interfered with the substratum of the suit property. There having been contention on her occupation of the suit property, the Applicant ought to have adduced further evidence on the loss she will suffer. This Court finds and holds that the Applicant has failed to demonstrate the loss she will suffer.

24. In considering whether the appeal is frivolous or not, this Court will determine whether the appeal is arguable or not. What constitutes an arguable appeal was determined in Kiu & another v Khaemba & 3 others (Civil Appeal (Application) E270 of 2021) [2021] KECA 318 (KLR) where the Court held

"In law, an arguable appeal/intended appeal is one that need not succeed but one that warrants the court's interrogation on the one hand and the courts invitation to the opposite party to respond thereto"

25. This was reiterated by the Court in University of Nairobi v Ricatti Business of East Africa [2020] eKLR when it held:

"An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous"

26. There is a copy of Memorandum of Appeal dated 5<sup>th</sup> October 2022, which this Court is not certain whether it has been filed in the proper Court or not. The said Memorandum of Appeal within the meaning of an arguable appeal above raises bona fide issues that ought to be interrogated by the Appellate Court. However, the Applicant ought to demonstrate that the Appeal if successful will be rendered nugatory. Preserving the subject matter of the intended appeal is important as not to render an appeal nugatory. The onus is on the Applicant to demonstrate that the appeal will be rendered nugatory. The Court of Appeal in Nairobi in Civ' App. No. 211 of 2016; Shah Munge & Partners Ltd v National Social Security Fund Board of Trustees & 3 others [2018] eKLR, when considering whether to allow an application for injunction and stay pending appeal looked at the definition of "nugatory" as was defined in Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232. The court opined that nugatory has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling, essentially one which is of little or no legal consequence.

27. As to whether the appeal will be rendered nugatory varies from case to case as it depends on what is to be stayed. In the instant case, it is land. There is no evidence that demonstrate the Applicant is occupying the suit land. From the pleadings, the Applicant was regarded as a trespasser who planted crops on the suit land. There is no evidence that the Applicant was occupying the suit land which right of occupation will be curtailed if the orders sought are not granted. This Court cannot determine whether the Appeal will be a success or not, as by doing that, it will be sitting on its own appeal.



That being the case, the Applicant has failed to demonstrate how the appeal will be rendered nugatory should it succeed.

28. Having failed to satisfy this Court the principles enumerated hereinabove, an order for security for costs cannot issue.
29. Having analyzed the applications and the annexures thereto, the response and the rival written submissions by parties, this Court finds and holds that the Applicant has not established the principles requisite for grant of the orders sought in the Notice of Motion Application dated 6<sup>th</sup> December, 2023 and proceeds to dismiss the same.

#### **Who should bear costs for the application**

30. This Court has the discretion under Section 27 of the *Civil Procedure Act* to award costs. Also costs follow the events. This Court exercises the discretion in favour of the Respondent.
31. Having carefully considered the instant Notice of Motion Application dated 6<sup>th</sup> December 2022, the Court finds it not merited and the said Application is dismissed entirely with costs to the 1<sup>st</sup> Defendant/ Respondent herein.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 29<sup>TH</sup> MARCH, 2023**

**L. GACHERU**

**JUDGE**

Delivered virtually in the presence of;

M/s Njoroge H/B Mbiyu Kamau for the Plaintiff/Respondent

Kiragu Kimani & Mr Irungu Mwangi for the 1<sup>st</sup> Defendant/Applicant

2<sup>nd</sup> Defendant – Absent

