



REPUBLIC OF KENYA



KENYA LAW
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**Gerad v Njenga (Environment and Land Appeal E002 of 2022)
[2023] KEELC 19218 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19218 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E002 OF 2022
LC KOMINGOI, J
JULY 27, 2023**

BETWEEN

SULDANA HABAT GERAD APPLICANT

AND

MONICA NDUTA NJENGA RESPONDENT

((Being an appeal against the judgement and orders of the Senior Principal Magistrate's Court at Ngong', Hon. P. Achieng (SPM) delivered on 5th September 2022))

RULING

1. This is the Notice of Motion dated December 13, 2022 which seek orders:
 - i. Spent.
 - ii. Spent
 - iii. Spent
 - iv. Spent
 - v. That there be a stay of execution of the judgement herein pending the herein (sic) and determination of the appeal herein;
 - vi. Any orders that this court deems fit to make;
 - vii. The costs of this application are provided for.
2. The grounds are on the face of the application. It is supported by the sworn Affidavit of the Applicant Suldana Habat Gerad dated December 13, 2022 and a further Affidavit dated April 13, 2023 together with the annextures thereto.



3. The Applicant being aggrieved by the judgement delivered against her on September 15, 2022 in Senior Principal Magistrate's Court at Ngong' ELC No. 120 of 2018 wants it set aside as she is the rightful owner of property referenced as 725/ Business Ole Kasasi trading centre (hereinafter referred to as suit property) having been allotted to her by the then County Council of Kajiado in 2006 vide allotment letter Ref No. OCC.LND.16/OLEK/803 and consequently put up developments worth millions of shillings. She confirmed that the Respondent instituted the suit in 2007 which was about two years since she had been allotted the suit property. Adding that the suit property was validated on April 13, 2007 and October 25, 2016.
4. She stated that the impugned judgement which declared the Respondent as the rightful owner and ordered the Applicant to vacate the suit property and pull down the developments and structures thereon was based on the County Surveyor's inconclusive report that failed to account for the actual site location of the suit property versus the Respondent's property 413/Business Ole Kasasi Trading Centre which is distinct from her property. As such pulling down her property would cause her irreparable economic loss.
5. She went on to add that the Appeal which had been filed timeously raised triable issues with high likelihood of success adding that the County Surveyor Kajiado County Government had undertaken another site visit on the suit property on February 24, 2023 and was yet to file a report showing the accurate location of the suit property.
6. The Respondent Monicah Nduta Njenga in her Replying Affidavit dated February 17, 2023 sought for dismissal of the application on grounds that she was the rightful owner of the suit property being Plot No. 413/ Business Ole Kasasi trading centre having purchased it in 2002 from Daniel Tipateti and Stephen Kisemei which was several years from when the Applicant claims to have purchased it.
7. The Respondent went on to state that in 2007 the Applicant trespassed the suit property and pulled down the fence she had put up and started undertaking constructions. This necessitated the Respondent to file a complaint at Olkejuado County Council whereby the property was rightfully declared hers and the Applicant asked to stop any constructions. However, the Applicant did not heed to this order and continued with the construction necessitating the Respondent to seek Court's redress vide Nairobi ELC No. 2328 of 2007 which was transferred to Ngong' ELC No. 120 of 2018. A judgement was then delivered on September 15, 2022 in favour of the Respondent which was the subject of this appeal.
8. The Respondent indicated that it is not clear why the Applicant filed the application at Nairobi ELC while being fully aware that the matter was under Kajiado's jurisdiction, only for them to file the current application a day before the lapse of the grace period given by court in the impugned judgement. She also added that the applicant would not suffer any loss since she had put up the said developments in contempt of court orders being fully aware that the suit property belonged to the Respondent.
9. This application was canvassed by way of written submissions.

The Appellant's/Applicant's Submissions**

10. Counsel for the Applicant in their submissions dated April 18, 2023 submitted that the issue for determination was: whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending appeal. In that whether the instant application had been made without delay and whether the Appellant would suffer substantial loss and irreparable harm.



11. Counsel submitted that the Trial Court’s Judgement should be stayed otherwise the Appellant would suffer irreparable loss and prejudice for the developments put up on the suit property and for the years she had resided there. Counsel stated that the stay would not prejudice the Respondent in any way since she had never been in possession of the suit property.
12. To support their argument counsel cited [RWW v EKW](#) [2019] eKLR and *Marine vs Namijja & Another*, Civil App No. 93 of 1989 (Nairobi) which in essence agreed that: “...the purpose of stay of execution pending appeal was to preserve the subject matter in dispute so that the rights of the appellant ... are safeguarded and the appeal if successful is not rendered nugatory...”
13. On the issue of substantial loss, Counsel submitted that if the judgement was executed and the Applicant’s developments demolished, she would incur substantial loss which ought to be prevented by maintaining the status quo. Reference was made to *HE vs SM* [2020] eKLR, [James Wangalwa & Another vs Agnes Naliaka Cheseto](#) [2012] eKLR, [Charles Kariuki Njuri v Francis Kimaru Rwara \(suing as Administrator of Estate of Rwara Kimaru alias Benson Rwara Kimaru \(Deceased\)\)](#) [2020] eKLR and Court of Appeals *Mukuma vs Abuoga* (1988) KLR 645, [Charles Wahome Getbi vs Angela Wairimu Getbi](#) [2008] eKLR and [Butt vs Rent Restriction Tribunal](#) {1982} KLR 417 (sic).
14. On whether the application was made without unreasonable delay, counsel submitted that the applications were filed expeditiously since the impugned judgement was delivered on September 15, 2022 and the first application made on October 6, 2022 and another one on December 13, 2022.
15. In conclusion, counsel submitted that the Applicant was ready and willing to relinquish her allotment letter to court as security for due performance of any decree that would be binding on her as was held in the case of *Aron C. Sharma vs Ashana Raikundalia T/A Rairundalia & Co. Advocates*.

The Respondent’s Submissions

16. Counsel for the Respondent in their submissions filed on June 13, 2023 rehashed contents of the Replying Affidavit and outlined the issues for determination as: whether the stay pending appeal should not be granted on grounds that the appeal has triable issues; whether the applicant has status quo over the property awaiting judgement; whether the application is an abuse to the court process and is a delaying tactic.
17. On the matter of triable issues, while citing Order 42 Rule 6(2) of the [Civil Procedure Rules, 2010](#) and *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR Counsel submitted that substantial loss would not be incurred by the Applicant because she put up the said structures being well aware that there was a dispute over the suit property and the Court had even issued a temporary injunction over the same in ELC 2328 of 2007. As such, the Applicant had voluntarily assumed risk and should not seek solace from court for actions brought upon by herself as was held in [United Millers Ltd & Another v John Mangoro Njogu](#) [2016] eKLR.
18. Counsel went on to submit that the application was not filed timeously indicating that it was filed on December 13, 2022 which was a day before the 90 days period granted by the lower court lapsed. And that the reason given by the Applicant that they had filed a similar application in Nairobi was unsatisfactory and akin to incompetence and should be dismissed citing [Abdirabman Abdi also known as Abirabman Mubumed Abdi vs Safi Petroleum Products Ltd & 6 others](#).
19. On the issue of maintaining status quo, counsel submitted that the Applicant had maliciously tried to defeat justice by developing the suit property despite a court order stopping her from undertaking any construction on the suit property being in place. As such this prayer should not be granted citing *Republic vs National Environment Tribunal, Ex Parte Palm Homes Limited & Another* [2013] eKLR.



20. While making reference to *Republic vs Paul Kihara Kariuki, Attorney General & 2 others Ex Parte Law Society of Kenya* [2020] eKLR Counsel went on to submit that the instant application was an abuse of the court process, a scheme to delay justice and an act of forum shopping which the court should protect itself from as espoused by Article 50 and Article 159(2)(b) of the *Constitution*. Counsel concluded by submitting that the Applicant lacked good grounds to support the appeal and the same should be dismissed as held in *Butt vs Rent Restriction Tribunal* [1982] KLR (sic).
21. I have considered the Notice of Motion and affidavits in support; the response thereto, submissions and authorities filed. The issue for determination is:
- i. Whether conditions warranting grant of stay of execution of a judgement pending appeal have been satisfied.
22. As already outlined herein above, it is clear that the contention in this instant suit is about the site location of Plot No 725/ Business Ole Kasasi trading and 413 / Business Ole Kasasi trading between the Applicant and Respondent respectively. Hon. P. Achieng in Senior Principal Magistrate’s Court at Ngong’ ELC 120 of 2018 determined that:
- “...According to the Surveyor’s report, the parties are claiming the same plot though using two different letters of allotment... the person entitled to the plot is the Plaintiff, as the allotment of her plot was first in time...I therefore find that the Plaintiff is the rightful owner of the land in dispute herein... Having found as above, I proceed to enter judgement for the Plaintiff against the Defendant as follows:... The Defendant is ordered to vacate the said parcel of land within 3 months from the date of the judgement and to pull down all structures thereon at her own cost...”
23. On stay pending appeal, Order 42, rule 6 (2) of the Civil procedure Rules, 2010 stipulates that: No order for stay of execution shall be made under subrule (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.
24. Further the Supreme Court in *Gitarau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (2014) eKLR held:
- “... The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. 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. (emphasis own)
25. The Applicant claims that she has been on the suit property since 2007 and has undertaken extensive developments worth millions of shillings and would suffer irreparable loss and damage and the appeal would be rendered nugatory should the lower court’s judgement be executed. The Respondent contested the application/ appeal stating that the Applicant had from the word go trespassed on



her property and failed to heed to Court's directives which deterred her from undertaking any construction. As such the Respondent should be allowed to enjoy fruits of the judgement which had taken her over 15 years.

26. This court notes that it is not in contention that there are developments on the suit property undertaken by the Applicant which the trial court ordered to be pulled down. Therefore would execution of the judgment cause substantial loss to the applicant? The Court of Appeal in *In re Estate of Harish Chandra Hindocha (Deceased)* [2021] eKLR had the following to say:

“... the position in law is that, an appeal would be rendered nugatory if the consequential effects for the failure to grant the relief sought would be either irreversible or highly prejudicial so as to render of no consequence the intended appeal or appeal if ultimately successful... on this prerequisite, we find that in the circumstances of the rival position as laid before us, declining the relief sought would pave the way for the respondent to execute the judgment and decree granted in his favour as deemed fit, which may result either in an irreversible consequence or one that would likely be reversed after considerable hardship or expense and would therefore be highly prejudicial to the applicant...”

27. Additionally, the Court of Appeal in *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others* [2013] eKLR stated: “... Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved...”

28. On whether the Appeal had arguable grounds, the Applicant raised 7 grounds of appeal which include but are not limited to:

- i. The learned trial magistrate erred in law and in fact in failing to appreciate that the Defendant was in possession of her own plot which, by description and location, was distinct from the Plaintiff's;
- ii. The learned trial magistrate erred in law and in fact in finding and holding that the Plaintiff had proved her case on a balance of probabilities when, on the facts, she had not;
- iii. The learned trial magistrate erred in law and in fact in applying the first in time principle when, on the facts it did not apply as the properties in issue were distinct;
- iv. The learned trial magistrate erred in law and in fact in holding that the plots, as described in the respective papers were held by the adversaries, were one and the same on ground when there was no expert or other evidence of the fact;...

29. In arriving at whether the above grounds of appeal are arguable, this Court once again associates itself with the Court of Appeal's decision in *In re Estate of Harish Chandra Hindocha (Deceased)* (*supra*) where the learned judges held:

“... In law, an arguable appeal need not be one that will succeed but one that is sufficient for interrogation by the court. One that is not frivolous. We detect no frivolity in the highlighted intended grounds of appeal and which we find well founded on the background to the application set out above. ...”

30. Whether the said application was made without unreasonable delay, I agree that is not clear why Counsel for the Applicant filed the Memorandum of Appeal and Application dated October 6, 2022 in Nairobi ELC being fully aware of Court's jurisdiction here in Kajiado. Moreover, the reasons given



by Counsel for the Applicant that this Court was on transfer or was not sitting are indubitably not satisfactory. However, this Court notes that there have been change of advocates since then. As such and the errors and sins of the previous advocates shall not be heaped upon the client or the current advocate by denying the Applicant an opportunity to be heard.

31. I find merit in this application and I grant the orders sought namely;

- a. That there be stay of execution of the judgment of Hon. P. Achieng SPM delivered on September 15, 2022; Decree and all consequential orders pending the hearing and determination of the Appeal.

On Condition that the Appellant do deposit Kshs 300,000/= being security for costs in a joint interest earning account in the names of counsel for the Appellant and Respondent, within forty five (45) days from the date of this Ruling.

In Default the orders of stay shall automatically lapse.

- b. The Costs do abide the outcome of the Appeal.

Dated Signed and Delivered virtually at Kajiado this 27th day of July 2023.

L.KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Ms. Omwamba for Mr. Bake for the Appellant.

Mr. Oonge for the Respondent.

Mutisya – Court Assistant.

