



REPUBLIC OF KENYA



**Mwaura & another v Naserian (Sued as the legal representatives of the Estate of the Late Josephine Asiagi Kasembe) (Environment and Land Appeal E35 of 2023) [2024] KEELC 636 (KLR) (13 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 636 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND APPEAL E35 OF 2023  
MAO ODENY, J  
FEBRUARY 13, 2024**

**BETWEEN**

**PETER MWAURA ..... 1<sup>ST</sup> APPELLANT**

**BENSON NG'ETHE MUIRURI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**CAROL IPITE NASERIAN (SUED AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE JOSEPHINE ASIAGI KASEMBE) .... RESPONDENT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated 20<sup>th</sup> November 2023 by the Appellant/Applicants seeking the following orders:
  - a. Spent
  - b. Spent
  - c. Spent
  - d. That pending determination this appeal, the Honorable court be pleased to grant to the applicants stay of execution of the judgment and orders of Honorable K.I Oreng'e (PM) in Nakuru CM ELC 1003 of 2013 dated the 27<sup>th</sup> October, 2003.
  - e. That the costs of this application be borne by the Respondent.
2. The application was supported by the annexed affidavit of Peter Mwaura sworn on 20<sup>th</sup> November 2023 where he deponed that he had the authority of the 2<sup>nd</sup> Appellant to swear the affidavit on his behalf. He stated that Josephine Asiagi Kasembe(deceased) had sued them in Nakuru CM ELC 1003



of 2013 alleging that they had trespassed onto her parcel of land known as Plot No. 105 ADC Ndabibi Central Farm.

3. The Applicant also deponed that it was their contention before the trial court that they had purchased the suit property from Josephine Asiagi Kasembe (deceased) but upon the trial court hearing the case; it gave judgement in favour of the estate of the deceased. The court ordered that they vacate the suit property and pay Kshs.600,000/= as general damages for trespass.
4. It was the Applicant's case that unless stay orders are granted, the respondent will proceed with the execution and render the present application and appeal nugatory. The appellants filed a further affidavit and stated that the respondent only has a limited grant ad litem issued on 24<sup>th</sup> January 2022 which was limited to prosecuting this suit and cannot therefore be called to reimburse the appellants on behalf of the estate if need be.
5. He further stated that the issue of depositing of security was discretionary and since they were peasant workers, they urged the court to allow them to provide reasonable surety.
6. The respondent filed a replying affidavit sworn on 27<sup>th</sup> November 2023 and deponed that the trial court in its judgment delivered on 27<sup>th</sup> October 2023 directed the Appellants to vacate the suit property and pay the respondent Kshs. 600,000/= for trespass plus costs of the suit.
7. The Respondent further stated that the costs of the suit were assessed at Kshs. 177,060/= and a certificate of costs issued on 23<sup>rd</sup> November 2023. That her case before the lower court was that the Appellants were tenants on the suit property from the year 2006 but ceased paying rent in the year 2008 hence their continued occupation was trespass.
8. The Respondent stated that the Appellants have not demonstrated that they will suffer any substantial loss and that if the court is inclined in granting an order of stay of execution then the Appellants should deposit Kshs. 777,060/. in a joint account pending the hearing and determination of the appeal.

### **Appellants Submissions**

9. Counsel relied on Order 42 Rule 6 of the *Civil Procedure Rules* and submitted that the Appellants are likely to suffer substantial loss because they face imminent eviction from the suit property. Counsel cited the case of *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR and submitted that the respondent had not demonstrated that she was a person of means to reimburse the applicants of any loss should the appeal succeed.
10. Counsel also submitted that the trial court delivered its judgment on 27<sup>th</sup> October 2023 and the Appellants filed the present application on 21<sup>st</sup> November 2023 and therefore the application was filed without unreasonable delay.
11. On the issue of security for costs, counsel relied on the case of *Festus Nyambeka v Texco Spinning Mills* [2014] eKLR and Order 26 Rule 3 of the *Civil Procedure Rules*. Counsel further reiterated that the respondent only has a limited grant of letters of administration ad litem, which is limited to prosecuting and/or defending a suit and does not extend to receiving money on behalf of the estate of the deceased.

### **Respondent's Submissions**

12. Counsel relied on the case of *Transbel Limited v Ann Mwelu Mutungi & another* [2007] eKLR and submitted that the Appellants have not demonstrated the substantial loss they are likely to suffer if stay orders are not granted. It was counsel's further submission that the Appellants have neither



demonstrated the nature of business that they operate on the suit property nor attached valuation reports to show the value of the kiosks that they have put up.

13. On the issue for security for the due performance of the decree, counsel relied on the case of *Arun C. Sharma v Ashana Raikundalia & 2 others* [2014] eKLR and submitted that the requirement to deposit security for due performance of the decree is absolutely necessary before the Appellants are allowed to move forward with their appeal.
14. On whether the Appellants have an arguable appeal, counsel argued that the trial court made various rulings that the Appellants failed to appeal from which now form part of their Memorandum of Appeal. Counsel relied on the case of *Frederick Gathithi Kabue v Cannon Assurance Kenya Limited* [2008] eKLR and sought that the appellants' application be dismissed with costs.

### **Analysis and Determination**

15. The issue for determination is whether the Appellants have met the threshold for grant of stay of execution as provided for under Order 42 Rule 6 of the *Civil Procedure Rules* which provides as follows:
  - “(2) 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.”
16. For an order of stay of execution to issue, an Applicant must comply with the set requirements that the application must be filed without delay; must establish substantial loss that he or she will suffer if the orders are not granted; that will deposit security as the court may order for the due performance of the decree which will ultimately be binding on the applicant.
17. On the issue whether the application was filed without unreasonable delay, it is on record that the impugned judgment was delivered on 27<sup>th</sup> October 2023 while the current application was filed on 21<sup>st</sup> November 2023. I find that the application was filed timeously.
18. On the issue of substantial loss, the Appellants submitted that they are likely to suffer loss if the Kiosks that they depend on for their livelihoods are demolished. The respondent however argued that the Appellants ought to have produced valuation reports of the kiosks in order to demonstrate substantial loss.
19. In the case of *Noor Said v Mary Mwawasi Manga* [2022] eKLR the court held as follows:
  - “16. The critical issues arising in this application are whether the applicant stands to suffer substantial loss if the order of stay is not granted and the question of security. The applicant has of course argued that if she is evicted and the respondent deals with the property, and she subsequently succeeds on appeal, she may find no house to return to. I am persuaded that if this happens then the applicant may suffer substantial loss. However, I think this is one case where the circumstances demand for security to be presented.”



20. The trial court awarded respondent Kshs.600,000/= as general damages for trespass together with costs which have been taxed at Kshs.177,060/. Each case must be looked at on its own merits and the prevailing circumstances. An applicant cannot claim that he or she will suffer substantial loss merely because he or she will be evicted. The essence why the Respondent filed the case was for an order of eviction. Eviction of a person who has been declared by a court as a trespasser would ordinarily not pass as proof of substantial loss.
21. The court must balance the rights of the successful litigant and one who wants to try a second bite of the cherry. That is why there is a hierarchy of courts that can provide reprieve in a case where a party is dissatisfied with the outcome of his/her case.
22. In the case of *Gianfranco Manentbi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR the Court held that:
- “...the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails. Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal.”
23. The court has the discretion to order for security for the due performance of the decree which will ultimately be binding on the Applicant. This is not meant to be punitive to stop a person who is desirous of filing an Appeal from exercising that right. Further, it should also cushion the successful litigant from vexatious applications, which are meant to delay the case.
24. In the interest of justice I hereby grant an order of stay of execution on condition that the Appellant/Applicant deposits Kshs.200,000/ in a joint interest earning account of the advocates on record within 30 days from the date of this ruling failure to which the order lapses. The Appeal to be prosecuted within 90 days from the date hereof.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 13<sup>TH</sup> DAY OF FEBRUARY 2024.**

**M. A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28<sup>th</sup> March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure.

