



**Ngari & 2 others v Mugo (Suing as the administrator of the
Late Gaita alias Mugo s/o Gaita) (Environment and Land Appeal
E009 of 2024) [2024] KEELC 7058 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7058 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL E009 OF 2024
YM ANGIMA, J
OCTOBER 17, 2024**

BETWEEN

**JOHN MBUTHIA NGARI 1ST APPELLANT
PAUL MACHARIA TAITI 2ND APPELLANT
OTHAYA MAHIGA CHINGA EXFACO LTD 3RD APPELLANT**

AND

**JANE WANGECHI MUGO (SUING AS THE ADMINISTRATOR OF THE LATE
GAITA ALIAS MUGO S/O GAITA) RESPONDENT**

RULING

1. Vide a notice of motion dated 17.04.2024 expressed to be brought under Articles 48, 50 & 159 of *the Constitution* of Kenya, 2010, Order 42 Rule 6 of the Civil Procedure Rules, Order 51 rule 1, Sections 1A and 3A of the *Civil Procedure Act*, (Cap 21) and all other enabling provisions of the law the Appellants sought a stay of execution of the judgment and decree of the trial court dated 27.03.2024 in Nyahururu CM ELC No. 73 of 2019 pending the hearing and determination of the appeal.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 1st appellant, John Mbuthia Ngari, on 17.04.2024. The appellants stated that they were aggrieved by the said decree in consequence whereof they had filed the instant appeal. They further contended that they had filed the instant application timeously and that they stood to be rendered homeless and destitute if they were to be evicted from the suit property pending the hearing and determination of the appeal. They also indicated that they were willing to furnish security for due performance of the decree.



Respondent's Response

3. The respondent filed a replying affidavit sworn on 17.05.2024 in opposition to the application. It was asserted that the appellants had not satisfied the requirements for the grant of a stay pending appeal. It was denied that the appellants stood the risk of being rendered homeless or destitute in the absence of a stay. It was pleaded that the appellants were not occupying or residing on the suit property hence there was no evidence of substantial loss as contemplated under Order 42 rule 6 of the Civil Procedure Rules. It was also contended that the application was merely a delaying tactic intended to delay her from enjoying the fruits of her judgment hence the court was urged to dismiss it with costs.

Appellants' Rejoinder

4. The appellants filed a supplementary affidavit sworn by the 1st appellant on 30.05.2024 in response to the respondent's replying affidavit. It was stated that the appellants stood to suffer substantial loss if they were to be evicted and the suit property sold during the pendency of the appeal. They further stated that the pending appeal was not frivolous since it raised serious triable issues hence they should be granted a stay of execution pending appeal.

Directions on Submissions

5. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Appellants' submissions were filed on 21.06.2024 whereas the Respondent's submissions were filed on 10.07.2024.

Issues for Determination

6. The court has perused the appellants' notice of motion dated 17.04.2024, the respondent's replying affidavit sworn on 17.05.2024, the appellants' supplementary affidavit as well as the material on record. The court is of the opinion that the following are the key issues for determination herein:
 - a. Whether the appellants have satisfied the principles for the grant of a stay pending appeal.
 - b. Who shall bear costs of the application.

Analysis and Determination

Whether the appellants have satisfied the principles for the grant of a stay pending appeal

7. The court has considered the material and submissions on record on this issue. The appellants submitted that they had satisfied all the requirements for the grant of an order of stay of execution as stipulated under Order 42 rule 6 of the Civil Procedure Rules. They contended that they stood to suffer substantial loss if they were to be evicted from the suit property as they shall be rendered homeless. They further contended that they shall suffer substantial loss if their title to the suit property was to be canceled and the property transferred to third parties and beyond their reach. They cited among other cases *Mwananchi Credit Limited -vs- Onyango & Another (Civil Appeal E037 of 2023)* [2023] KEHC 21253 (KLR) (26 July 2023 (Ruling) and *Muema Kitulu & 8 Others -vs- Elizabeth Kamene Ndolo* [2021] eKLR in support of their application.
8. The respondent, on her part, submitted that the appellants had failed to demonstrate that they were in occupation of the suit property and that they stood to suffer substantial loss in the absence of a stay. She further submitted that the appellants had not offered acceptable security for due performance of the



decree should their appeal ultimately fail because they had offered the title for the suit property which the trial court had ordered to be cancelled. As a consequence, the respondent prayed for dismissal of the application for stay of execution for lack of merit.

9. The court has noted that whereas the appellants claimed to be in occupation of the suit property, the respondent contended that it was actually vacant and that although the appellants were title holders they had never taken possession of the suit property. It is noteworthy that the appellants had at least two opportunities of demonstrating their occupation, if any, but they did not exhibit any photographic evidence in either their supporting affidavit or supplementary affidavit. The court is thus not satisfied that the appellants are in actual occupation of the suit property and that they shall be rendered homeless in the event of an eviction.
10. It is evident from the judgment of the trial court that apart from the order of declaration granted in favour of the respondent the other two were an order for cancellation of the 1st and 2nd appellants' title deed and an injunction to restrain them from selling or disposing of the suit property. The court takes the view that those orders are fully reversible should the appellants' appeal become successful. There is no demonstration that the suit property shall not be available to the appellants should their pending appeal be allowed. There is no evidence to suggest that the respondent intends to sell, charge or alienate the suit property during the pendency of the appeal. As a consequence, the court is not satisfied that the appellants have demonstrated the element of substantial loss or that the pending appeal may be rendered nugatory in the absence of a stay.

Who shall bear costs of the application

11. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. However, since the substantive appeal is yet to be heard the court is of the view that costs of the application should be costs in the appeal.

Conclusion and Disposal Order

12. The upshot of the foregoing is that the court finds no merit in the appellant's application for stay of execution pending appeal. As a consequence, the court makes the following orders for disposal of the application:
 - a. The appellants' notice of motion dated 17.04.2024 is hereby dismissed.
 - b. Costs of the application shall be costs in the appeal.
 - c. The appeal shall be mentioned on 27.01.2025 to confirm the filing of the record of appeal.

It is so ordered.

RULING DATED AND SIGNED AT NYANDARUA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS PLATFORM THIS 17TH DAY OF OCTOBER, 2024.

Y. M. ANGIMA

JUDGE

In the presence of:

Mr. Mugo holding brief for Mr. Ndegwa Wahome for the Appellants



Ms. Wahome holding brief for Mr. Mathea for the Respondent

C/A - Carol

