



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Ochieng & another v Kenya Ports Authority & 3 others (Environment & Land Case 40 of 2019) [2023] KEELC 16569 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16569 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 40 OF 2019**

**E ASATI, J
MARCH 28, 2023**

BETWEEN

AMINA ACHIENG' OCHIENG 1ST PLAINTIFF

TILAPIA BEACH RESORT LIMITED 2ND PLAINTIFF

AND

KENYA PORTS AUTHORITY 1ST DEFENDANT

KENYA RAILWAYS CORPORATION 2ND DEFENDANT

COUNTY GOVERNMENT OF KISUMU 3RD DEFENDANT

THE HONORABLE THE ATTORNEY GENERAL (SUED ON BEHALF OF THE GOVERNMENT OF KENYA) 4TH DEFENDANT

RULING

1. This ruling is in respect of the two applications dated 10th March 2022 and 25th May, 2022 filed by the 2nd Defendant and the 3rd Defendant respectively, which by consent of the parties, were canvassed together by way of written submissions.

Application by the 2nd Defendant

2. The first application is the Notice of Motion dated 10th March, 2022 filed by the 2nd Defendant, the Kenya Railways Corporation, pursuant to the provisions of Sections 1A, 1B, 3, 3A, 63(e) and 79G of the *Civil Procedure Act* and Order 42 Rule 6 of the *Civil Procedure Rules* 2010. It seeks for orders that the court be pleased to grant a stay of execution of the judgement and decree issued on 24th February, 2022 pending hearing and determination of the appeal.
3. It was the case of the 2nd Defendant that by the court's judgement dated 24th February 2022, the 2nd, 3rd and 4th Defendants were ordered to pay to the Plaintiffs Kshs. 27,000,000/= together with interest



thereon as compensation for the value of lost property as a result of the demolitions and 49,873,366/= together with interest thereon as value of lost assets and costs of the suit. That being aggrieved with the judgment, it preferred an appeal to the Court of Appeal which appeal has high chances of success. That before the appeal is heard and disposed of, there is clear substantial loss to be suffered by the 2nd Defendant, as the Plaintiffs are at liberty to execute the judgement. That the application has been made without unreasonable delay and that the 2nd Defendant is ready and willing to provide any security the court may deem fit for the due performance of the order as may ultimately be binding on the 2nd Defendant. The application was supported by the averments in the Supporting Affidavit and the Further Affidavit both sworn by Stanley Gatari on 10th March, 2022 and 23 March 2022 respectively. It was deposed that the appeal has reasonable chances of success, that the court has unfettered discretion to grant orders of stay of execution, that no prejudice will be occasioned to the Plaintiffs if the orders sought are granted and that if the orders sought are not granted, the appeal will be rendered nugatory. And that the subject matter of the appeal being the damages ordered by this court, the same will be lost unless it be preserved in the event appeal succeeds.

Application by the 3rd Defendant

4. The second application is the Notice of Motion dated 25th May, 2022 filed by 3rd Defendant, The County Government Of Kisumu on 31st May, 2022. It was brought pursuant to the same provision of the law as the application by the 2nd Defendant and seeks similar orders namely; stay of execution of the judgement and decree pending the appeal.
5. It is the case of the 3rd Defendant that the honourable court delivered judgement against the 2nd, 3rd and 4th Defendants on 24/2/2022. That in the judgement the 2nd, 3rd and 4th Defendants were ordered to pay Kshs. 27,000 for the value of property lost during demolition and Kshs.49, 893, 366 value of lost goods with interest until payment in full. That the 3rd Defendant was aggrieved by the judgement and filed a Notice of Appeal. That in the meantime, the Plaintiff have extracted decree in readiness for execution. That if the orders sought are not granted, execution will proceed. That the Applicant is willing to abide by orders of the court to guard against the ends of justice. That the application has been brought timeously without delay. To the Supporting Affidavit sworn by Edris Omondi on 25th May, 2022 were attached copy of decree, copy of Notice of Appeal and plaintiffs' application for garnishee Order.

Plaintiffs' response to the applications

6. Both applications were opposed vide the Replying Affidavits sworn by Amina Achieng Ochieng, the 1st Plaintiff on her own behalf and on behalf of the 2nd Plaintiff on 21st March, 2022 and 2nd June, 2022 respectively.
7. The Plaintiffs' objection to the applications as contained in the Replying Affidavits is that the applications are hopelessly lacking in merit, are fatally and incurably defective and amount to sheer abuse of the court process and should be summarily dismissed. That the applicants have failed to demonstrate the nature and extent of the substantial loss that they would suffer in the event that the order of stay is not granted. That the applicants in both applications have failed to demonstrate the Plaintiffs' inability to repay or refund the decretal sum in the event the appeal succeeds. That the applications have no merit and have not met the legal threshold for the order sought. That the Plaintiffs should be accorded unrestricted liberty to enjoy the fruits of the judgement.



Submission by the 2nd Defendant

8. The 2nd Defendant filed written submissions dated 23rd January, 2023. It submitted that the issue for determination is whether or not the applicant has met the criteria for stay of execution of the judgment pending hearing and determination of the appeal. The 2nd Defendant submitted that the basis of its apprehension for substantial loss is founded on the uncertainty of the ability of the 1st Plaintiff to refund the decretal sum in the event the appeal succeeds. That the uncertainty stems from the contradiction of averments contained in the 1st Plaintiff's Replying Affidavit and her testimony during trial. That although the 1st Plaintiff claimed that she has several properties and would be in a position to refund the money these claims were not substantiated.
9. On whether or not the application was filed without unreasonable delay, the 2nd Defendant relied on the case of *Jaber Mobasen Ali & another v Priscillah Boit & another* (2014) eKLR to submit that the application was filed without delay since Judgment was delivered on 24/2/2022, Notice of Appeal lodged on 7/3/2022 and application filed on 10/3/2022.
10. On the requirement for provision of security, the 2nd Defendant relied on the case *Selestica Limited v Gold Rock Development* (2015) eKLR where it was held, *inter alia*, that the court has the power to order such security for due performance of decree or order and that the appellant did not have to furnish such security upfront before arguing the application for stay pending appeal, and submitted that it is willing and ready to furnish security as may be ordered by the Court and offered to deposit Kshs.963,543.33 being the taxed costs of the suit in a joint interest earning account in the names of the Applicant's and Respondent's advocates. The 2nd Defendant prays that application be allowed.

Submissions by the 3rd Defendant

11. The 3rd Defendant filed written submissions dated 30th January, 2023. It submitted that the issue for determination was whether the 3rd Defendant's application meets the legal threshold for grant of an order of stay of execution pending appeal. Relying on the case of Nyahururu ELCA No.5 of 2020 *Kariuki Njuri vs Francis Kimaru Rwara (Suing as Administrator of the Estate of Rwara Kimaru alias Benson Rwara Kimaru (Deceased))* (2020) eKLR the 3rd Defendant submitted that the purpose of an order of stay of execution is to preserve the subject matter of the appeal. On substantial loss, the 3rd Defendant submitted that the decretal sum is substantial and that there is a genuine and reasonable apprehension that the Respondents may not be able to recover the decretal sum if paid out.
12. That for purposes of staying a decision of monetary decree the courts have held that the Respondents ought to swear an affidavit of means to show financial status and material possessions in opposition to the application for stay and in order to dissuade the Applicant's apprehension on the Respondents financial standing and capability to refund the decretal sum. Reliance was placed on the case of *Samwel Kimutai Korir (Suing as personal and legal Representative of Estate) of Chelangat Silevia v Nyanchwa Adventist Secondary School & Nyanchwa Adventist College* (2017)eKLR among others, for the submission.
13. That the application has been filed without unreasonable delay.
14. On security, it was submitted that the decretal sum outstanding is Kshs.76,873,366 to be paid by the Applicants to the Plaintiffs. That in compliance with the prerequisite requirements for grant of an order for stay of execution and as security for performance of the decree, the Applicant being part of Government of Kenya relied on Order 42 Rule 8 of the *Civil Procedure Rules*, 2010.



Plaintiffs' written submissions

15. The Plaintiff vide the written submissions dated 16th February, 2023 submitted that under the provisions of Order 42 Rule 6 *Civil Procedure Rules*, the filing of an appeal does not automatically entitle one to stay of execution. That the facts contained in the Plaintiffs' affidavits have not been factually challenged by the applicants hence should be taken to be the truth. That the nature of the application seeks balancing of the interests of the successful party who has the judgement in his favour and the party who feels aggrieved by the judgement.
16. That the Applicants completely failed to demonstrate the nature and extent of the substantial loss they are likely to suffer. That it is a requirement that a party must fully demonstrate substantial loss as a prerequisite for grant of stay orders against a successful litigant. The Plaintiffs submitted that whereas the applicant has expressed in the submissions the fact that the Respondents may not be able to repay the decretal sum if paid to them in the event that the appeal succeeds, it is clear from the Replying Affidavit that the Respondents have sufficiently demonstrated their ability and capacity to comfortably repay the sum however enormous as stated by the applicant from the property they own within Kisumu and beyond. The Plaintiffs submitted that the application is clearly tailored to frustrate the efforts of the Respondents to enjoy fruits of their judgment and unnecessarily delay determination of this matter.
17. The plaintiffs relied on several authorities to support their submissions inclusive of Machakos HCCA Number E052 of 2021, *Michael Ntouthi Mitheu vs Abraham Kivondo Musau*, where it was held that the jurisdiction of the High Court to grant stay of execution pending appeal is fettered by three conditions namely sufficient cause, satisfaction of substantial loss and furnishing of security. And *Samir Trustee Limited s Gurdian Bank* Nai.Milimani HCCCNumber 795 of 1997 where it was held that the yardstick is for the court to balance or weigh the scales of justice by ensuring that a successful party is prima facie entitled to the fruits of the judgement.

That the Plaintiff should be allowed to enjoy the fruits of their judgment unrestricted particularly considering the agony and hardships they have undergone since their entire investment and source of livelihood was unlawfully reduced to ashes.
18. The Plaintiffs submitted further that the application lacks merit and has not met the threshold spelt out by dint of the express provisions of Order 42 Rule 6 and should be dismissed with costs to the Respondents.
19. The plaintiffs submitted in the alternative that if the court is inclined to grant the applications, then an order should issue that half of the decretal sum inclusive of costs and interest so far accrued be paid to the plaintiffs and the remaining half be deposited in a joint interest earning account in the names of the advocates for the applicants and the Plaintiffs within 30 days from the date of the ruling.

Determination

20. Order 42 Rule 6(1) *Civil Procedure Rules* empowers the court to stay the execution the decision being appealed from pending the determination of the appeal. This power should be exercised in a way not to prevent the appeal and if there is no overwhelming hindrance a stay must be granted so that an appeal may not be rendered nugatory. The grounds for grant of orders of stay of execution of decree/ judgement as provided for in Order 42 Rule 6(2) are that:
 - 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.
21. The court must be satisfied that the Applicant will suffer substantial loss if the order of stay of execution is not granted. In *Dr. Daniel Chebutuk Rotich v Morgan Kimaset Chebutuk* Nakuru H.C.C.C No.368 of 2001 the court held that:
- “Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an Applicant is likely to suffer if stay of execution is not granted and the Applicant is therefore forced to pay the decretal sum.”
22. The burden of proof lies with the Applicant to prove that substantial loss will result to him/her if the order sought is not granted. In the case of *Charles Wahome Gethi v Angela Wairimu Gethi* [2008]eKLR the Court of Appeal held-
- “...it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the applicants stand to suffer if the Respondent execute the decree in this suit against them”
23. In the case of *Rhoda Mukuma v John Abuoga* [1988]eKLR the court held that the issue of substantial loss is the cornerstone of both the jurisdiction under order 42 rule 6 *Civil Procedure Rules* and Rule 5 of the *Court of Appeal Rules*. That substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
24. In the present case the substantial loss is that the decretal sum is enormous and there is no certainty that the same will be recoverable from the Respondents if the appeal succeeds. The 1st plaintiff stated in the Replying Affidavits that the assets that she owns within Kisumu and beyond have a value that far much outweigh the decretal sum and would have no difficulty in repaying the entire decretal sum if required to do so. However, the nature of the assets and their value were not disclosed. The 3rd Defendant submitted that this was not sufficient and that the Respondents ought to have sworn affidavit of means so as to dispel the fear and apprehension that the applicants have.
25. The purpose of the requirement for provision of security as stated in the case of *Aron C. Sharma vs Ashana Raikundalia t/a Raikundaria & Co Advocates* under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicants. Both applicants undertook to abide by conditions on provision of security as may be given by the court. The 2nd defendant offered to deposit the taxed costs in an interest earning account as security for the due performance of any order or decree that may ultimately be binding upon it.
26. In the present case, it is not in dispute that the appeal is filed. The applicants demonstrated this vide the copies of the Notices of Appeal annexed to the applications. The applicants are entitled to preserve the appeal. The Respondents are entitled on the other hand to enjoy the judgement. The role of court is to balance these competing interests; to prevent an appeal that has been filed from being rendered nugatory while at the same time guarding the right of the successful party not to lose the fruits of the judgement. Guided by the cited authorities and more particularly *Butt vs Rent Restriction*



Tribunal [1982]KLR 417 where the Court of Appeal held inter alia that the court's discretion should be exercised in such a way as not to prevent an appeal and further that

"The general principle in granting or refusing a stay is: if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory..."

27. And taking all the relevant factors into account and in order to secure the rights/interests of both parties, I allow both the applications. I grant an order of stay of execution of the judgement and decree herein pending hearing and determination of the appeal to the Court of Appeal on condition that the applicants deposit, within 45 days hereof half of the decretal sum and taxed costs in a joint interest earning account in a reputable financial institution in the joint names of Counsel for the applicants and Counsel for the Plaintiffs/Respondents. Failure to deposit the said amount as directed herein, the order of stay of execution will lapse. Costs of the applications to the Respondents.

Orders accordingly

RULING DATED AND SIGNED AT KISUMU AND DELIVERED VIRTUALLY THIS 28TH DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

M.C. Ouma Advocate for the Plaintiff/Respondent

Moraa Advocate for the 2nd Defendant/Applicant

