



**Tomno & 3 others v Ondimu & another (Environment & Land Case 28 of 2020) [2023] KEELC 16597 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16597 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 28 OF 2020**

**JA MOGENI, J  
MARCH 28, 2023**

**BETWEEN**

**MIKAIL KIMUTAI TOMNO ..... 1<sup>ST</sup> PLAINTIFF  
MARIAM JEBET TOMNO ..... 2<sup>ND</sup> PLAINTIFF  
HAJI KIPNGETUNY TOMNO ..... 3<sup>RD</sup> PLAINTIFF  
IDRIS KIPRUTO TOMNO ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**SAIMA JEPKEMBOI ONDIMU ..... 1<sup>ST</sup> DEFENDANT  
MR. MOHAMMED MUNJI ..... 2<sup>ND</sup> DEFENDANT**

*(An application for stay of execution of the Judgment of Lady Justice Jacqueline Mogeni in ELC Case No 28 of 2020 delivered on January 17, 2023.)*

**RULING**

1. The appellant who is also the applicant has filed the Notice of Motion dated January 10, 2023 under Section 1A, 1B, 3 & 3A of [CPA](#) and Order 42 Rule 6 [CPR](#) the applicant is seeking the following orders:
  - i. Spent.
  - ii. That this Honourable Court be pleased to grant the order of stay of execution of the judgment and Order by the Honorable Lady Justice JA delivered on January 17, 2023 in this suit pending the hearing and determination of this Application
  - iii. That this Honourable Court be pleased to grant the order of stay of execution of the judgment and Order by the Honorable Lady Justice JA delivered on January 17, 2023 in this suit pending the hearing and determination of this Appeal



- iv. That the costs of this application be in the appeal.
2. That application is premised on 7 grounds apparent on the face of the said application and the affidavit of the applicant sworn the same date which I see no added value of reproducing here.
3. The Application is opposed by the respondents by way of a joint replying affidavit sworn on February 17, 2023. The respondents aver that the instant application is a delaying tactic made in bad faith that is misconceived, incompetent, lacks merit and an abuse of the court process and ought to be dismissed with costs.

### **Applicant's Case**

4. The applicant in her grounds on the face of the said application stated that her appeal is arguable and raises bona fide and/or plausible issues with high chances of success. She also stated that unless the stay order is granted, her Appeal will be rendered nugatory and that she is ready and willing to abide by any condition imposed by this Honourable Court for the due performance of the decree. She stated that she has satisfied the principles for the grant of stay pending appeal.

### **Respondents' Case**

5. The respondents through their joint affidavit evidence contend that the appellant has not demonstrated what irreparable loss and/or damages she is likely to suffer should the application not be granted. The respondents stated that the appeal and the application are just meant to deny the plaintiffs the fruits of a successful judgment. Further that no substantial loss will result to the applicant which cannot be remedied through monetary compensation.

### **Analysis And Decision**

6. I have considered the application and the rival submissions. I have also considered the documents and the applicable law. An application for stay pending appeal under Order 42 Rule 6 (2) CPR requires that the Court considering such an application must of necessity balance between the rights of a successful litigant and that of an unsuccessful litigant who wishes to exercise his undoubted right of appeal. The Court has to weigh the two competing interest so that rights of the unsuccessful litigant whose appeal if it succeeds ultimately will not reap a barren judgment. In an attempt to balance the two competing interests, the rules Committee formulated the conditions set out in Order 42 Rule 6 (2) which provide as follows:

“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 appellant”

It is clear from the provisions of the law that before an order for stay pending appeal is granted, an applicant must establish the following three tenets:-

- (1) That he will suffer substantial loss unless the order is granted.
- (2) The application has been brought without unreasonable delay; and



- (3) The applicant has given security or an undertaking for the due performance of the decree/order as may ultimately be binding on him.
7. The above tenets from the provisions of the law show that the order of stay pending appeal is a discretionary order that must be exercised judicially and not capriciously. In exercising its discretion, the court should have regard for the lower rather than the highest risk of injustice. This means that the court has to weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that the successful party is not impeded from enjoying the fruits of judgement. Always, there is need for equal level footing or playing ground.
8. The court will then proceed to determine whether the Defendant/Applicant herein has satisfied the required standard for granting of stay orders pending appeal based on the tenets above.

### **Substantial Loss**

9. The Applicant must show that she will suffer substantial loss. Substantial loss in its various forms is the corner stone of stay pending appeal. Meaning that there must be empirical or documentary evidence of the substantial loss to support the contention of loss. This is because this substantial loss is what the Court must prevent so that the intended appeal is not rendered nugatory and the applicant if she finally succeeds will not reap a barren judgment. In a money decree/order, the applicant would ordinarily demonstrate to the Court that the respondents are persons of straw and would not be in a position to refund the money if the appeal succeeds. The subject of the decree in this case is a house on a parcel of land and the applicant must demonstrate that the respondents are likely to sell, transfer and/or dispose of the suit property if execution is allowed to proceed. None of those has been alleged by the applicant. The applicant has not shown in what way her intended appeal will be rendered nugatory.
10. The only way the intended appeal will be rendered nugatory is where the subject matter of the appeal which is the house is either going to be sold or disposed off to third parties. The applicant has not suggested that the respondents are likely to sell or dispose of the suit property if the decree is allowed to proceed. It is to be remembered that we are dealing with two competing interests in this application. The applicant's interest as an unsuccessful litigant who has undoubted right of appeal and the respondents who have a right to enjoy the fruits of a judgment. The Applicant has not placed any evidence in this court to show that the respondents have even extracted the decree and have issued her with a notice of eviction since as she states she is in possession and occupation and has been in occupation for over 20 years. The reasoning that the respondents who have a judgment in their favour and are entitled to enjoy the fruit of the outcome in their favour was expounded in the case of *M/S Portreitz Maternity v James Karanga Kabia*, Civil Appeal No 63 of 1997 where the Court of Appeal held:-
- “That right of Appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right”.
11. I agree with the above decision. There is no evidence of substantial loss to the applicant either in the matter of disposing of the suit property or failing to give vacant possession if the intended appeal succeeds. There are absolutely no reasons advanced by the applicant which would interfere with the status quo and therefore render the intended appeal nugatory if the stay orders are not granted.



12. Again in the case of *Kenya Shell Ltd v Kibiru & another*, Civil Appeal No 97 of 1986, Nairobi, the Court stated as follows: -

“The application for stay made to the High Court failed because the 1<sup>st</sup> of the conditions was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made since the respondents would be unable to pay the money”.

13. I am equally persuaded by the decision hereinabove. Infact the failure by the applicant to prove substantial loss by itself is sufficient to determine this application. The subject matter of this appeal is said to be a house which the 1<sup>st</sup> defendant/applicant claims to have purchased.

14. The plaintiffs on their part claim to have been allocated the said property by the Ministry of Housing upon the demise of their father who worked for the government of Kenya as a civil servant. If indeed the suit property was bought by the 1<sup>st</sup> defendant as alluded by the applicant and if execution is not halted and the suit land is disposed off to a third party, then applicant may not get an equivalent land house. If this is the case which unfortunately it is not, the court would have been persuaded to grant the stay sought. As I have already observed, the application for stay must be brought without unreasonable delay. The judgment before this Honorable Court was delivered on January 17, 2023. The application before me was filed on January 19, 2023 less than one week later. I therefore find that the period of less than 7 days is not inordinate in the circumstances of this case. I also note that on the third ground, the applicant has given an undertaking to comply with any condition this Honourable Court may give for the due performance of the decree herein.

15. In that regard, since the applicant has demonstrated her willingness to comply with any conditions that this Honourable Court may give for the due performance of the decree should the orders be granted, I will give a conditional stay. The upshot of my analysis is that the application dated January 19, 2023 is partly merited and the same is allowed in the following terms:

- a. An order of stay of execution of the Judgment of Lady Justice Jacqueline Mogeni ELC Case No 28 of 2020 is stayed for a period of ninety days.
- b. The costs of this application to abide this appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28<sup>TH</sup> DAY OF MARCH 2023.**

**MOGENI J**

**JUDGE**

**Ruling read in virtual court in the presence of:**

Mr.Opole holding brief Mr Munge for the 1<sup>st</sup> Defendant/Applicant

Mr Kibenya for the 2<sup>nd</sup> Defendant/Respondent

Ms.Ogano holding brief for Mr Mosuyo for Plaintiff/Respondent

Ms. Caroline Sagina: Court Assistant.

