



**Turgut v Letting & 3 others (Environment & Land Case
E003 of 2023) [2023] KEELC 16624 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16624 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E003 OF 2023
MN MWANYALE, J
MARCH 28, 2023**

BETWEEN

ROSA JESANG TURGUT PLAINTIFF

AND

MARY LETTING 1ST DEFENDANT

KIPKAREN DIVISION LAND CONTROL BOARD 2ND DEFENDANT

THE LAND REGISTRAR NANDI COUNT 3RD DEFENDANT

THE COUNTY SURVEYOR NANDI 4TH DEFENDANT

RULING

1. This ruling is in respect of the notice of motion of application dated March 1, 2023 seeking a stay of execution against the orders made in the judgment delivered in Kapsabet Environment and Land Case No 5 of 2020 pending hearing and determination of the appeals.
2. The application is grounded on grounds that:
 - i. The appeal raises arguable issues with high chance of success.
 - ii. The applicant shall suffer irreparable damage
 - iii. No prejudice will be occasioned to the 1st respondent.
3. It is further supported by the supporting affidavit of the applicant Rosa Jesang Turgut, who depones on the grounds set out in paragraph 2 above and has annexed copies of the application for proceedings and the impugned judgment.
4. The application is expressed to be brought under section 3A of the *Civil Procedure Act*, order 42(6) and 5(a) of the *Civil Procedure Rules*.



5. In opposition to the application a replying affidavit by the 1st respondent Mary Letting was filed where the 1st respondent opposes the stay application saying the same is not truthful, and that the applicant be ordered to deposit Kshs 100,000/- in a joint interest earning account of the advocates on record.
6. At the *ex parte* stage, no interim orders were issued as the application as drafted did not seek any interim reliefs.
7. Parties were directed to file submissions and they complied although the 1st respondent filed out of time, her submissions were none the less considered.
8. In her submissions the applicant framed three issues for determination and submitted on them.
The issues were:
 - i. Will the applicant suffer substantial loss unless the sought orders are made.
 - ii. Has the applicant made the application seeking stay orders without unreasonable delay.
 - iii. Has the applicant given such security for due performance of such decreed or order as may ultimately bind on her.
9. On her part, the 1st respondent has raised three issues for determination, as here follows: -
 - a. As to whether the application merits to warrant the orders sought.
 - b. As to whether the application will suffer irreparable harm if stay is not granted and balance of convenience favours granting stay.
 - c. As to whether the applicant is ready to deposit Kshs 100,000/- as security for costs under 42 rule 14 before the appeal is allowed.
 From the application, the supporting and replying affidavits on record the court frames the following as issues for determination;
 - i. Whether the applicant has merit; the conditions for grant of stay of execution under order 42(6).
 - ii. Whether the application is merited?
10. The conditions for grant of stay of execution for a decree passed by the subordinate court to an appellate court under order 42(6) of the *Civil Procedure Rules* which provide as follows”

“No order of stay of execution shall be made under sub rule (i) unless;

 - a. The court is satisfied that substantial loss, may result to the applicant unless the order is made, and the application has been made without undue delay,
 - b. Such security as the court orders for due performance of the such decree or order as may ultimately be binding on him as been given by the applicant.
11. The impugned judgment herein was delivered on February 15, 2023 and a memorandum of appeal lodged on February 22, 2023.
12. The application for stay under consideration was filed on March 15, 2023. The appellant in her affidavit and her submissions has not addressed the court as whether the application was filed timely.
13. The respondent in her submission and affidavit has not equal addressed whether the application was filed timely but has gone to attack the grounds of appeal as if arguing the appeal itself.



14. Although the parties have not addressed the first principle of grant of stay under order 42(6)(2) the court makes a finding that the application was filed within 30 days after delivery of the judgment and was thus filed timely.
15. The court shall not now proceed to determine whether substantial loss shall be occasioned to the applicant which is the second principle to be considered.
16. The applicant in her affidavit depones the appeal will be rendered nugatory if stay is not granted as she will lose 4 acres of land.
17. The 1st respondent has not addressed this 2nd principle but has averred that there is no competent appeal and that she was dragged to court without cause.
18. The court has perused the impugned judgment and finds that both the plaintiff's claim and the defendant's counterclaim were both dismissed.
19. Having dismissed the plaintiff suit and defendant's counterclaim, there is nothing capable of execution in the said judgment except for costs as the remarks on the survey made by the learned magistrate were made "*obiter*" and are incapable of execution. As the decree arising from the judgment would be a dismissal order, which is a negative order on its own. In *Kaushik Panchatia & 3 others v Prime Bank* the court stated, "a negative order is incapable of being stayed because there is nothing to stay. It therefore follows that in light of the above threshold, we have no mandate to grant a stay order in the manner prayed by the applicants." The Court of Appeal made it clear that a negative order is not capable of being stayed for costs"
20. From the above, the court finds no substantial loss will arise to the applicants and that the application is so far as it seeks to stay a dismissal of the plaintiff suit and a dismissal of the defendant's counterclaim has no merits.

The application is hereby dismissed. Costs in the cause.

DATED AT KAPSABET THIS 28TH DAY OF MARCH 2023

HON. M. N. MWANYALE

JUDGE

In the presence of:

1. Mr. Rugut for Respondent
2. N/a for Mr. Orina for Applicant duly notified.

