



**Wanzala v Okoth (Environment & Land Case 111 of 2017)
[2023] KEELC 16367 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16367 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 111 OF 2017**

**BN OLAO, J
MARCH 23, 2023**

BETWEEN

STEPHEN JAGONGO WANZALA APPLICANT

AND

JAMES OTIENO OKOTH RESPONDENT

RULING

1. I have before me for determination, the Notice of Motion dated 7th February 2023 by Stephen Jagongo Wanzala (the Applicant herein) and which is predicated on the provisions of Order 42 Rule 6 of the [Civil Procedure Rules](#). He seeks against James Otieno Okoth (the Respondent herein) the following orders:
 1. Spent
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 3. The execution of the judgment dated 26th January 2023 and any subsequent proceedings thereof be stayed pending the hearing and determination of the Applicant's appeal.
 4. Costs of this application to abide the results of the appeal.
2. The application is premised on the grounds set out therein and supported by the Applicant's affidavit of even date.
3. The basis of the application is that the judgment dated 26th January 2023 has excluded the Applicant from the ownership of the whole suit land where he lives with the family and the whole of it has been given to the Respondent. That the Respondent is now in the process of selling the suit land which is registered in the name of the Applicant. That the Respondent is now in a hurry to execute the said judgment which was based on wrong principles and he has already filed an appeal challenging it.



Unless the orders sought are granted, he will suffer serious injustice and prejudice including irreparable damages should his appeal succeed.

4. The Applicant has annexed to the application the following documents:
 1. Document headed “Reasons for Appeal”.
 2. Notice of Appeal.
 3. Copy of judgment delivered on 26th January 2023.
5. In opposition to the application, the Respondent filed a replying affidavit dated 27th February 2023 in which he described the application as fundamentally defective and which should be dismissed with costs. He added that the judgment sought to be stayed was a negative decree since the Applicant’s suit seeking to evict him from the land parcel No Marachi/esikoma/2314 was dismissed and that was a negative order and so there is nothing to stay. That the Applicant has his own parcel of land which he occupies and so the judgment being appealed has not rendered him landless. Further, that the Applicant has not demonstrated that the Respondent is about to sell the land and in any event, the appeal is not arguable. Annexed to the application is the decree drawn on 13th February 2023.
6. When the application was placed before me on 7th February 2023, I directed that it be canvassed by way of written submissions.
7. Submissions were subsequently filed by the Applicant acting in person and by Mr Okutta instructed by the firm of Ouma-okutta & Associates Advocates for the Respondent.
8. I have considered the application, the rival affidavits and annexures as well as the submissions.
9. The Applicant seeks the main remedy that there be a stay of execution of the judgment delivered on 26th January 2023 and the subsequent decree pending an intended appeal. The Applicant filed a Notice of Appeal on 2nd February 2023 just a week following the delivery of the judgment sought to be appealed.
10. Order 42 Rule 6(1) and (2) of the [Civil Procedure Rules](#) provides that:

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- (1) “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”
- (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.”
Emphasis mine.



Flowing from the above, the Applicant was required to satisfy the following conditions to justify the grant of the order of stay of execution pending appeal;

1. Show sufficient cause.
2. Demonstrate that unless the orders sought is granted, he stands to suffer substantial loss.
3. File the application without unreasonable delay.
4. Offer Security

The jurisdiction of this Court while considering an application such as this was circumscribed by the Court of Appeal in the case of *Visbham Ravji Halai & Another v Thornton & Turpin* (1963) LTD 1990 KLR 365 where it was held:

“Thus the Superior Court’s discretion is fettered by three conditions; Firstly, the applicant must establish a sufficient cause; secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

In *Kenya Shell Ltd - V- Benjamin Kibiru & Another* 1986 KLR 410, PLATT Ag. J.A (as he then was) said:

“It is usually a good rule to see if order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various form is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money”. Emphasis mine.

11. The Applicant filed a Notice of Appeal on 2nd February 2023 intimating his intention to appeal the judgment delivered on 26th January 2023. That is sufficient cause. He then filed this application on 7th February 2023 just about 14 days after the judgment. I am satisfied that he approached this Court without unreasonable delay. The Applicant has therefore satisfied two requirements under Order 42 Rule 6 of the *Civil Procedure Rules*.
12. However, to be entitled to the orders sought, he must satisfy all the four requirements provided for in the law. With regard to substantial loss and which is the “cornerstone” of such an application, the Applicant has stated in ground (c) of the Notice of Motion that:
 - (c) “The Respondent has no property other than the suit land and in case the appeal succeeds after the suit land has been transferred to the Respondents buyer, the Applicant stands to suffer serious injustice and irreparable damage.”

In paragraph 8 of his supporting affidavit, he has deponed as follows:

8. “That unless this Honourable Court is pleased to grant the orders herein, I stand to suffer serious injustice and irreparable damages in case the appeal succeeds.”



13. Other than those mere averments, the Applicant has not demonstrated what substantial loss, if any, he will suffer if the order of stay of execution is not granted. In paragraph 7 of the same affidavit, he has deponed thus:

7. “That I swear this affidavit and state that the order given herein on 26/1/2023 restraining me and my family to enter on my land on which I live having my home thereon since 1988 depending on it up (sic) date was based on wrong principle of law and shall cause serious injustice and irreparable damages to me in case the appeal succeeds.”

In rebuttal to the above averments, the Respondent has in his replying affidavit deponed, inter alia, that the judgment is infact a negative order (paragraph 7), that the Applicant infact has his own portion of land inherited from his father and therefore, it is not true that this judgment has rendered him landless (paragraph 8) and there is nothing to show that the Respondent is about to sell the land (paragraph 9). On the issue of substantial loss, the Applicant has only made un-proved allegations. There is nothing to suggest that the Respondent intends to sell the land subject of this suit and render him landless. As was held in *Macharia T/a Macharia & Company Advocates v East African Standard* (no 2) 2002 2 KLR;

“If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant’s business (eg appeal or intended appeal).”

The Court went on to add:

“Moreover, a court will not order a stay upon a mere vague speculation, there must be the clearest ground of necessity disclosed on evidence ... Another common factor in favour of the applicant is whether to proceed further or to execute may destroy the subject matter of the action and deprive the appellant or intended appellant of the means of prosecuting the appeal or intended appeal.” Emphasis mine.

The Applicant’s dispositions remain, in my view, mere averments. They do not meet the threshold of establishing substantial loss.

14. Most importantly, I agree with the Respondent that the judgment sought to be stayed is essentially a negative order which is not capable of being stayed. I have looked at the judgment delivered on 26th January 2023. It is clear that by this plaint, the Applicant sought the eviction of the Respondent, his relatives and agents from the land parcel No Marachi/esikoma/2314. By his counter-claim, the Respondent sought the cancellation of the Applicant’s title over the land parcel No Marachi/esikoma/354, the eviction of the Applicant from the said title and an order restraining the Applicant from entering, constructing or interfering with the Respondent’s quiet possession of the same.

15. Having heard the parties, Omollo J issued the following disposal orders:

1. The Applicant’s suit was dismissed with costs.
2. An order was issued restraining the Applicant from entering into, constructing on, or in any way interfering with the Respondent’s tile No Marachi/esikoma/2314.

Basically therefore, the judgment being appealed or sought to be appealed did not interfere with the Applicant’s title to the land parcel No Marachi/esikoma/354 while the Respondent retained his



occupation and possession of the title No Marachi/esikoma/2314. This is how Omollo J addressed the issue in the penultimate paragraph of the said judgment before making the disposal orders at paragraph 36:

“Consequently, I make a finding that the Plaintiff is not entitled to orders of eviction as sought. His case is hereby dismissed. The counter-claim is allowed in terms of prayer 4 but the injunction is restricted to land parcel number Marachi/esikoma/2314.”

Basically therefore, no orders of eviction were issued against either of the parties nor were any titles cancelled. The Respondent and his family were decreed to remain in the land parcel No Marachi/esikoma/2314. It cannot therefore be correct for the Applicant to allege, as he has done in paragraph (a) of the grounds upon which the Notice of Motion is founded, that:

- a. “The effects of the decision made herein on 26/1/2023 has excluded the Applicant from his ownership of the whole suit land on which he live (sic) with his family and gave the same to the Respondent.”

My understanding of the judgement is that the Applicant retained parcel No Marachi/esikoma/354 while the Respondent retained Marachi/esikoma/2314. It cannot be true for the Applicant to claim that he has lost all the land.

16. This was therefore a negative order. There is really nothing capable of being executed except for costs. And as was held in *Western College Of Arts & Applied Sciences v Oranga & Others* 1976 80 1 KLR, a negative order is not capable of being stayed. See also *Co-operative Bank Of Kenya Ltd v Banking Insurance & Finance Union Kenya* 2015 eKLR and *Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah* 2008 eKLR. An order of stay of execution is not therefore merited in the circumstances of this case.
17. Finally, the Applicant was also required to offer security. Nowhere in his application has he offered any security nor even pleaded that he is willing to abide by any conditions which this Court may impose as a condition of an order of stay of execution. And as was held in *Wycliffe Sikuku Wakusaka v Philip Kaita Wekesa* 2020 eKLR:

“The offer of security must of course come from the Applicant himself as a sign of good faith to demonstrate that the application for stay of execution pending appeal is being perused in the interest of justice and not merely as a decoy to obstruct and delay the Respondent’s right to enjoy the fruits of his judgment.”

The Applicant has not surmounted that hurdle.

18. The up-shot of the above is that having considered the Notice of Motion dated 7th February 2023, the Applicant has only satisfied the requirements of sufficient cause and of approaching the court without unreasonable delay. However, he has not demonstrated substantial loss which is the cornerstone of such an application and neither has he offered any security. The judgment sought to be stayed is also, in my view, essentially a negative order not capable of being stayed.
19. The Notice of Motion dated 7th February is therefore devoid of merit. It is accordingly dismissed with costs.

BOAZ N. OLAO

JUDGE

23RD MARCH 2023



RULING DATED, SIGNED AND DELIVERED IN OPEN COURT ON THIS 23RD DAY OF MARCH 2023.

Plaintiff/Applicant Present in person.

Mr. Ashioya for Mr. Okutta for Defendant/Respondent – Present.

BOAZ N. OLAO

JUDGE

23RD MARCH 2023

