



REPUBLIC OF KENYA



Abere v Ondieki (Appeal 9 of 2022) [2023] KEELC 16494 (KLR) (22 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16494 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII**

APPEAL 9 OF 2022

M SILA, J

MARCH 22, 2023

BETWEEN

ROBERT ABERE APPELLANT

AND

ZABLON MOKUA ONDIEKI RESPONDENT

((Application for stay pending appeal; applicant having filed suit to seek eviction of respondent from suit land; respondent filing counterclaim that the applicant had sold to him part of the suit land and seeking orders to give effect to the sale agreement; judgment entered for the respondent; applicant aggrieved and preferring an appeal to this court; appeal dismissed; applicant now seeking stay pending appeal to the Court of Appeal; principles to be considered; stay granted on condition that half the taxed costs be deposited))

RULING

1. The application before me is that dated 14 December 2022 filed by the unsuccessful appellant. The application seeks stay of execution of the judgment pending appeal to the Court of Appeal and also stay of taxation of the respondent's bill of costs. The application is opposed.
2. To put matters into perspective, the appellant sued the respondent in the suit Kisii CMCC ELC No 84 of 2019. He claimed to be the owner of the land parcel Nyaribari Chache/BB/Boburia/13090 (the suit land) and contended that the respondent had trespassed into the land and started constructing. He wanted the respondent evicted from the land, general damages and costs. The respondent filed defence and counterclaim. He claimed that through a sale agreement dated 13 October 2018, the appellant had sold to him a portion measuring 50 X 100 feet out of the suit land at an agreed purchase price of Kshs 560,000/=. He asked for a mandatory injunction to compel the appellant to execute the completion documents and transfer the portion sold to him. In the alternative he pleaded that since the appellant had declined to sign the application for Land Control Board consent, an order of refund of the money paid should issue. In a judgment delivered on 11 April 2022, the learned trial Magistrate, Hon Mutai, found that the parties had entered into a sale agreement, and under the agreement, the respondent was



to take possession and that there was a payment plan for the balance. He found that occupation of the land by the respondent could not be said to be illegal. He dismissed the case of the appellant. On the counterclaim of the respondent, he entered judgment as follows :-

- a. The balance owed to the plaintiff be cleared within the next 60 days.
 - b. The plaintiff to execute and hand over transfer documents to the defendant for purchased property measuring 50 feet by 100 feet comprised in land parcel Nyaribari Chache/BB/Boburia/13090 within 60 days from the date of this judgment and in default the court Administrator is directed to execute the documents.
 - c. The defendant is granted cost in the counterclaim.
3. Aggrieved, the appellant preferred an appeal before this court. Together with the appeal, he also filed an application for stay of execution of the judgment. The parties entered into a consent staying execution of the judgment pending appeal. The appeal was heard by Onyango J, who delivered judgment on 3 November 2022. She did not find the appeal to have any merit and proceeded to dismiss it with costs. Aggrieved, the appellant filed a Notice of Appeal on 11 November 2022. Prior to that, on 9 November 2022, the respondent filed his bill of costs for taxation. This application was then filed on 14 December 2022. I have already mentioned that it is an application for stay of execution of the judgment and taxation of costs pending appeal.
4. The respondent filed Grounds of Opposition to oppose the motion. It is contended that the decree herein is a negative order and a negative order cannot be stayed; that the applicant has not satisfied the conditions for stay pending appeal as provided for under Rule 5 (2) (b) of the [Court of Appeal Rules](#); that the application is thus incurably defective and should be dismissed.
5. Both Mr Masolo, learned counsel for the applicant, and Mr Godia, learned counsel for the respondent, made brief submissions which I have considered before arriving at my decision.
6. It will be observed that the respondent has contended that the applicant has not met the test for stay of execution as set out in Rule 5 (2) (b) of the [Court of Appeal Rules](#). That contention is misplaced. This Court is not the Court of Appeal and therefore Rule 5 (2) (b) of the [Court of Appeal Rules](#) do not apply. What is operative before this court is Order 42 Rule 6 (2) of the [Civil Procedure Rules, 2010](#), which provides as follows :-
- (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.
7. It will be seen from the above that three elements need to be considered, being:-
- i. Whether the application has been made without unreasonable delay;
 - ii. Whether the applicant will suffer substantial loss if the order for stay is not made;



- iii. Whether the applicant has furnished security for the due performance of the decree in case he loses the appeal.
8. I will be guided by the above principles as I consider this application.
9. The respondent's other argument is that what is before court is a negative order that cannot be stayed. I think he refers to the fact that this suit was dismissed. This is simplistic. It needs to be understood that what was before court was an appeal against orders that were positive in nature. The trial Magistrate had ordered payment of money and also ordered the appellant to execute documents to transfer a portion of the suit land to the respondent. By dismissing the appeal, the orders of the trial Magistrate are now open for execution. That means, that the respondent needs to pay what was perceived to be the balance of the purchase price, and the appellant needs to execute documents to transfer a portion of 50 X 100 of the suit land to the respondent. It cannot therefore be argued that the dismissal of the appeal herein triggered no positive order that needs to be performed.
10. Counsel for the respondent also urged that no appeal has been filed. I have no evidence of an appeal being filed but there is a notice of appeal on record which was filed within time. Under Order 42 Rule 6 (4) the filing of a notice of appeal is sufficient to found an application for stay pending appeal. That provision of the law states as follows :-
 - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
11. I have seen that the applicant has applied for proceedings but I have not seen any confirmation of the proceedings being ready. If that is the case, the applicant may benefit from an extension of time to lodge an appeal.
12. Going back to the principles that I had earlier outlined, on the first item, that of delay, I do find that there has not been any inordinate delay in the filing of this application. Judgment was delivered on 3 November 2022 and this application was filed on 14 December 2022 just above one month after the judgment. Significantly, the judgment of the Magistrates' Court is yet to be executed. On the second principle, that of substantial loss, I am persuaded that if the judgment is executed and the appellant succeeds on appeal, then his appeal may be rendered nugatory. The land will already be subdivided and it is probable that the respondent may waste it by constructing on it. It may not be in the same state as it currently is. It is therefore important that the land be preserved. I am persuaded to issue an order of *status quo* on both possession and title. No party should proceed to interfere with the current *status quo* nor proceed to deal with the land pending hearing and conclusion of the appeal.
13. The last item is security. Given the circumstances herein, I think the only sort of security to be offered is a deposit of the taxed costs. I am not therefore persuaded to stop taxation of costs. I will allow the taxation to proceed, and once taxed, half the taxed costs be deposited in a joint interest earning account.
14. I have deliberately made an order for half of the taxed costs because under the judgment the applicant is to benefit from some payment under the agreement if the Court of Appeal will uphold that agreement. This balance can be set off by any pending costs in case the respondent succeeds on appeal. I will direct that the said half of taxed costs be deposited within 60 days of taxation in a joint interest earning account to be held in the names of counsel for the applicant and respondent.
15. If the said half of the taxed costs are not so deposited as directed above, then the applicant will not benefit from any stay of execution of the judgment and the judgment may be executed.



16. The last issue is the costs of this application. I will order that the costs of this application be costs in the appeal.
17. Orders accordingly.

DATED AND DELIVERED THIS 22 DAY OF MARCH 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

