



REPUBLIC OF KENYA



KENYA LAW
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**Bett & another v Koech & another (Environment and Land Appeal
33 of 2022) [2023] KEELC 16652 (KLR) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16652 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL 33 OF 2022
LA OMOLLO, J
MARCH 22, 2023**

BETWEEN

CHARLES KIPYEGON BETT 1ST APPELLANT

SONOIYA SERSER 2ND APPELLANT

AND

PHILIP K KOECH 1ST RESPONDENT

COUNTY COUNCIL OF NAKURU 2ND RESPONDENT

RULING

1. This ruling is in respect to the appellants' Notice of Motion application dated October 5, 2022. The said application is brought under order 51 rule 1, order 42 rule 1,2 & 6, section 3A and 63 (e) of the [Civil Procedure Act](#).
2. The application is filed under certificate of urgency and seeks the following orders:
 - i. Spent
 - ii. Spent.
 - iii. That the Honourable court be pleased to grant a stay of execution pending the hearing and determination of the Appeal herein.
 - iv. That the costs of this application be provided for.
3. The application is based on the grounds on its face and supported by the affidavit sworn by the 1st appellant one Charles Kipyegon Bett on the 5th of October, 2022.



Factual Background.

4. The 1st respondent filed a suit before the Chief Magistrate's Court Molo being CM ELC No. 77 of 2019. The 1st respondent sought the following orders:
 - a) A declaration that Plot No. 35 Mukinyai Trading Centre belongs to the Plaintiff and the 3rd Defendants be compelled to transfer the same to Philip Kipkurui Koech.
 - b) An order restraining the defendants/respondents by themselves and/or their agents, assigns and all who claim under through agents and/or wasting constructing thereon, alienating or otherwise interfering with the peaceful, exclusive use and interrupted enjoyment and possession of all that property known as Plot No. 35 Mukinyai Trading Centre.
 - c) Costs of this suit
 - d) Any other relief that this Honourable court may deem fit to grant.
5. The trial court delivered its judgment on June 15, 2022 in favour of the 1st respondent.
6. The appellants being aggrieved by the said judgment approached this court by way of appeal and filed the instant application which seeks a stay of execution from the orders emanating from the judgment by the Trial Court.

Appellants' Contention.

7. The Appellants contend that this application was filed to stay execution and decree issued by the subordinate court in CM ELC No. 77 of 2019.
8. It is their contention that the Learned Magistrate erred by failing to question the whereabouts of the original sale agreement which was never produced in court as evidence of payment of Kshs. 80,000.
9. The appellants further contend that the 1st respondent now wishes to transfer the plot and has already extracted a decree. The 1st appellant contends that they have an arguable appeal and should the 1st Respondent carry out execution, he stands to suffer irreparably.

Respondent's Response.

10. The Respondents did not file any response to the application.

Issues for Determination.

11. The appellants filed their submissions dated December 5, 2022. They gave a brief background of the case and submit that they have filed the instant Appeal as a matter of right as enshrined in *the constitution*.
12. They submit that they have filed their appeal on time adding that the Appeal stands a high chance of success as the same arises out of a contractual relationship in which the 1st Respondent failed to honour his end of the bargain.
13. The appellants submit that it is trite law that courts do not rewrite agreements for litigants. They submit that they have stayed on the suit property for a long time which length of time ought to be considered in whether or not to grant stay.



14. In conclusion, the appellants submit that the 1st respondent is out to demolish their structures. They submit that in the event the said act is not stayed, the appeal would be a mere academic exercise.

Analysis and Determination.

15. After reading through the application and supporting affidavit by the 1st appellant, the main issue for determination is:

Whether the appellants have satisfactorily discharged the conditions necessary for the grant of orders of stay of execution of decree pending Appeal.

16. The law on stay of execution pending Appeal is found in order 42 rule 6 of the *Civil Procedure Rules*. It provides as follows:

“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) (2) 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 1st 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 1st Applicant.” [Emphasis mine].

17. The appellants must meet the three conditions in order for this court to grant orders of stay of execution pending Appeal.

18. The appellants contend that the 1st respondents intends to transfer the suit parcel and have already extracted a decree. They also contend that should the 1st Respondent carry out execution, they stand to suffer irreparable loss.

19. The Court of Appeal in the case of *Mukuma v Abuoga* (1988) KLR 645 stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

20. In the case of *Charles Wabome Gethi v Angela Wairimu Gethi* [2008] eKLR, the Court of Appeal held that:-

“... 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 executes the decree in this suit against them.”

21. The purpose of an order for stay of execution pending Appeal is to preserve the subject matter of the Appeal. I agree with the decision of the court in [RWW Vs EKW](#) (2019) eKLR where it was held that:-

“...the purpose of an application for stay of execution pending an Appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of Appeal are safeguarded and the Appeal if successful, is not rendered nugatory.

However in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.” [Emphasis mine].
22. This means that this court has the delicate task of balancing the competing interests of the successful party in litigation so as not to unnecessarily bar him from enjoying the fruits of judgment and that of the appellant whose Appeal may succeed and be rendered nugatory if stay of execution is not granted.
23. I note that the Respondents have not filed any response in opposition to the present application.
24. On the issue of substantial loss, the appellants state that 1st Respondent intends to transfer the suit plot. They are apprehensive that should the 1st Respondent carry out execution, they stand to suffer irreparably.
25. The appellants must also satisfy the court that the application was made without unreasonable delay. It is a clear fact that the impugned judgment was delivered on June 15, 2022 while the application for stay was filed on October 6, 2022. This is a period of about three months and three weeks. I find that the same does not amount to an inordinate delay in filing this Application.
26. Lastly, the appellants must furnish security for the due performance of the decree. The appellants have expressed that they are willing to offer any security as may be directed by this court. To this end, I shall exercise my discretion regarding the furnishing of security for due performance of the decree and direct that they do so within the time to be stipulated.

Disposition.

27. In the result, the application dated October 5, 2022 is hereby allowed in the following terms:
 - a. A stay of the execution of the judgment/decreed in Molo CMCC ELC No. 77 of 2009 is hereby granted pending hearing and determination of the appellants’ Appeal.
 - b. The appellants are hereby ordered to deposit in a fixed joint interest earning account in the names of counsel for the applicants and 1st respondent parties a sum of Kenya Shillings 100,000 (Kenya Shillings One Hundred Thousand Only) as security for the due performance of the decree within 21 days of the date hereof.
 - c. In the event of failure to comply with the order in (b) above, the order in (a) shall stand vacated.



- d. The appellants shall file and serve a record of Appeal within 60 days of the date hereof.
- e. The costs of this application shall be in the cause.

28. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 28TH DAY OF MARCH, 2023 PERSUANT TO THE NOTICE ISSUED ON 22ND MARCH, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

No appearance for the Appellant/Applicant.

No appearance for the 1st Respondent.

No appearance for the 2nd Respondent.

Court Assistant; Ms. Monica Wanjohi.

