



**Oyaro v Mwangeka & another (Environment and Land Appeal
22 of 2022) [2023] KEELC 16379 (KLR) (21 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16379 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 22 OF 2022
NA MATHEKA, J
MARCH 21, 2023**

BETWEEN

ESTHER KEMUNTO OYARO APPELLANT

AND

MICHAEL MWANGEKA 1ST RESPONDENT

JANE MWANGEKA 2ND RESPONDENT

(The Applicant lodged an application on 9th September 2022 seeking stay of judgement dated 28th April 2022 and consequential orders issued on 29th August 2022.)

RULING

1. The application is dated 9th September 2022 seeking the following orders:-
 - i. That the application be certified as urgent, heard *ex parte* and service thereof be dispensed in the first instance.
 - ii. That pending the hearing and determination of the application *inter parte* this Honourable Court be pleased to grant stay of execution of the judgement/decree delivered on April 28, 2022 and August 29, 2022.
 - iii. That pending the hearing and determination of both the application and the appeal herein the Land Registrar Taita Taveta County be restrained and/ or stopped from effecting transfer or transferring land parcel known as VOI CR 13016/257 to the Plaintiffs/Respondents herein or their authorized agents or third party.
 - iv. That pending the hearing and determination of the appeal this Honourable Court be pleased to grant a stay of execution of the judgement/decree delivered on April 28, 2022 and the ruling delivered on August 29, 2022.



- v. That costs of the application be provided for.
2. It is based on the grounds that they are seeking stay of execution of the judgement delivered on April 28, 2022 and consequential orders issued on August 29, 2022 pending hearing and determination of this appeal. That the Plaintiffs/Respondents are currently improving /blustering the suit property and may dispose it off if this suit is not heard.
 3. The Respondents state:-
 - a. That the said application is vexatious, lacks merit and is an abuse of the Court's process.
 - b. That the Appellant has not demonstrated that he has an arguable appeal with any chance of success.
 - c. That the orders sort by the Applicant are tantamount to eviction orders against them as they are in current occupation of the suit property.
 - d. That the proceedings and judgment of the trial court confirmed that they have been in continuous occupation of the suit property.
 - e. That the judgment forming the subject matter of the current application was delivered by this Honorable Court on April 28, 2022.
 - f. That they filed the suit under the doctrine of adverse possession whereby they sort to have the suit property registered in their names as they had been in occupation of the same for the last twenty years.
 - g. That the threats of actual physical harm as well as eviction by the Appellant to them is what led to them filing the instant matter before the trial Court.
 - h. That they led evidence in the matter herein to show that they had made several improvements on the suit property including but not limited to building a dwelling house as well as fencing the suit property and residing on the same.
 - i. That they had also demonstrated to the court through the evidence that they adduced that the Appellant engaged in several acts of destruction of the improvements they had undertaken on the suit property which included *inter alia* destruction of the roof of his house as well as his fence.
 4. This Court has considered the chamber summons dated September 9, 2022, replying affidavit dated September 30, 2022, Respondent's submissions dated November 25, 2022, Applicants submissions dated November 14, 2022, Lower Courts judgment dated April 28, 22 and ruling delivered on August 29, 2022.
 5. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:

"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."



6. The Court of Appeal further provided in *Samvir Trustee Limited vs Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997 that the Court should consider the following in grant of stay pending appeal;

"Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions."

7. From material before me the Applicant lodged an application on September 9, 2022 seeking stay of judgement dated April 28, 2022 and consequential orders issued on August 29, 2022. The application was made 11 days after consequential orders were made and this was certainly done without any delay in my considered opinion. Upon perusal of Applicant's Memorandum of Appeal dated May 24, 2022 I also find that the Applicant raise triable issues that is, whether transfer of suit property by Voi Development Company to the Applicant was invalid and whether the Learned Magistrate erred in constructively dispossessing the Applicant of her parcel of land.
8. On further perusal of judgment dated April 28, 2022 orders I make the observations that there are orders to transfer suit property into the names of the Respondents and extinguishing the title of the Applicant as registered owner of suit property. I find that these orders are grave and if not stayed the Applicant may suffer substantial loss and the appeal may also be rendered nugatory should they succeed. Consequently, I find that the application is merited and order that the *status quo* be maintained pending the hearing and determination of this Appeal. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21ST DAY OF MARCH 2023.



N.A. MATHEKA
JUDGE

