



REPUBLIC OF KENYA



KENYA LAW
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**Attorney General & 2 others v Ntutu (Petition 26 of 2017)
[2023] KEELC 16207 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16207 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
PETITION 26 OF 2017
CG MBOGO, J
MARCH 16, 2023**

BETWEEN

THE ATTORNEY GENERAL 1ST APPLICANT

THE INSPECTOR GENERAL OF POLICE 2ND APPLICANT

THE OCPD NAROK 3RD APPLICANT

AND

KITILAI OLE NTUTU RESPONDENT

RULING

1. Before this court for determination is a notice of motion application dated 28th October, 2022 expressed to be brought under Sections 1A,1B,3,3A and 63 (e) of the *Civil Procedure Act* and Order 42 Rule 6 and Order 51 of the *Civil Procedure Rules* seeking the following orders: -
 1. Spent.
 2. That pending the hearing and determination of this application, this honourable court be pleased to grant a stay of execution of the judgment and decree of the Environment and Land Court at Narok delivered on 8th July, 2022 by Hon. Justice Mohammed N. Kullow in Narok ELC Petition No. 26 of 2017.
 3. That there be stay of execution of the judgment by Hon. Justice Mohammed No. Kullow delivered on 8th July, 2022 in Narok ELC Petition No. 26 of 2017 pending the hearing and determination of the intended appeal.
 4. That costs of this application be provided for.



2. The application is premised on the grounds inter alia that judgment was delivered on 8th July, 2022 in favour of the respondent and the applicants are yet to obtain a copy of the judgment in order to file an appeal despite numerous follow ups.
3. The application is supported by the affidavit of Fredrick S. Kinaibei, the Officer Commanding the Narok Police Station which was sworn on 28th October, 2022. The applicants deposed that judgment was delivered on 8th July, 2022 in favour of the respondent and that since then, they have made follow up requesting for a copy of the judgment, decree and typed proceedings without success. Further, that the Deputy Registrar on 27th October, 2022 indicated that the file is yet to be returned to the Narok registry to enable the court act on their request.
4. The applicants further deposed that they are in occupation of the land and they will suffer irreversible harm if stay of execution is not granted. Further, that on 24th October, 2022 the respondent visited their offices and informed them that he obtained a favourable judgment and would wish to execute the same.
5. The applicants further submitted that the Narok Police Station has been in possession and occupation of the suit land since time immemorial and have utilized the same by housing police officers and even using the same as a police garage and as such stay is necessary as it is for the greater public interest.
6. The application was canvassed by way of written submissions. The applicants filed written submissions dated 21st February, 2023. The applicants submitted that an application for stay of execution is obliged to satisfy the conditions set out in Order 42 Rule 6 (2) of the *Civil Procedure Rules*. The applicants relied on the cases of *Butt versus Rent Restriction Tribunal* [1979], *RWW versus EKW* [2019] eKLR and *Lucia Abaja Otieno & 2 Others versus Filgona Omogo Okoth* [2018] eKLR.
7. The applicants further submitted that in considering such an application, the court must not make a definitive finding of either fact or law at this stage as doing so may embarrass the ultimate hearing of the main appeal and that whether or not the appeal will be rendered nugatory depends on whether or not what is sought to be stayed is reversible or otherwise.
8. The respondent's counsel despite appearing in court virtually on two occasions and intimating to this court their intention of filing a response, failed to do so. As it is, the application is unopposed.
9. Be that as it may, I have considered the application, written submissions and authorities cited and the issue for determination is whether the application has merit.
10. Order 42 Rule 6 of the *Civil Procedure Rules* gives provision on the law concerning stay of execution pending appeal which stipulates 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) 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.”

11. There are three conditions for granting of stay order pending Appeal pursuant to the above cited provision as follows: -

- i. The Court is satisfied that substantial loss may result to the applicant unless stay of execution is ordered;
- ii. The application is brought without undue delay and
- iii. 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.

12. The question now is whether the applicants have satisfactorily discharged the conditions warranting the grant of stay of execution of judgment pending appeal and what orders should the court make.

13. The purpose of stay of execution is to preserve the substratum of the case as was held in the case of *Consolidated Marine. vs. Nampijja & Another*, Nairobi Civil App.No.93 of 1989, where the court held that: -

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

14. It is the applicants’ contention that they are in possession of the suit property since time immemorial and they use the same property as a police garage and for housing. For this reason, the applicants contended that they would suffer substantial loss if stay is not granted.

15. On what amounts to substantial loss, the Court of Appeal in the case of *Mukuma vs 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.”

16. I have considered the submission of the applicant and a look at the judgment delivered on 8th July, 2022 by my brother Kullow J reads as follows;

- “ 1. A declaration that the respondents have encroached to the petitioner land and thus violated the petitioner’s constitution right to private party under Article 40 and 64 of the Constitution.
- 2. That a permanent injunction do issue against the respondent, their employees and/or servant from encroaching, constructing on or depriving the petitioner or trespassing on the petitioner property Narok/Township/214 Narok county.



3. An order do hereby issue to the surveyor Narok County to proceed and fix and determine the boundaries between the 2 parcels and place respective person.
 4. That each party shall bear the cost of the petition.”
17. The contention by the applicants that they utilise the suit land as a police garage is not contested and taking into consideration that the role and function of the police being that of maintenance and enforcement of law and order; it is likely that if the orders sought are not granted, substantial loss would be suffered.
 18. On the other hand, this court has to balance the interest of the applicants who are seeking to preserve the status quo pending the hearing of the intended appeal so that the appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment. In other words, this court should not only consider the interest of the applicant but has also to consider, in all fairness, the interest of the respondent who has been denied the fruits of his judgment.
 19. On the second condition, it is not in dispute that the impugned judgment was delivered on the 8th July 2022. However, the court file was brought to Narok Law Courts on 19th January, 2023 from Migori Law Courts and therefore it was not available to the applicants to file their intended memorandum of appeal and to obtain relevant documents i.e. typed proceedings, certified copy of the judgment and decree. For this reason, I cannot say that the application is brought without undue delay as the delay is obviously, not on the account of the applicants.
 20. As to the mandatory provision of security, I find that Order 42 Rule 6 (2) (b) of the *Civil Procedure Rules* stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending appeal is that (s)he must furnish security. The applicants in this case have not pleaded nor submitted on this issue. In the case of *Aron C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates* the court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”
 21. The grant of stay remains a discretionary order that must also take into account the fact that the court ought not to make a practice of denying a successful litigant the fruits of their judgment.
 22. In *Butt v Rent Restriction Tribunal* [1979] the court of appeal gave guidance on how discretion should be exercised as follows:
 1. “The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.



3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the [Civil Procedure Rules](#), can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."
23. I am of the view that this is a matter of public interest and also the application for stay is not opposed. In that case and so as not to prevent an appeal, I shall allow the said application on the following terms;
- i. Stay of the execution of the judgment delivered on 8th July, 2022 is granted pending hearing and determination of the applicants' intended appeal.
 - ii. The applicants shall deposit security of Kshs.250,000/= in a joint interest earning account within 45 days from the date of delivery of this ruling. In default, the stay orders shall automatically lapse.
 - iii. I make no orders as to costs. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL on this 16th day of MARCH, 2023.

MBOGO C.G.

JUDGE

16/3/2023.

In the presence of:

CA:Chuma

