



**Olutukei v King'ori (Environment and Land Appeal E011 of 2023)
[2023] KEELC 16829 (KLR) (17 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16829 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E011 OF 2023**

EC CHERONO, J

APRIL 17, 2023

BETWEEN

NICKSON DICK OLUTUKEI APPELLANT

AND

APPOLLO M KING'ORI RESPONDENT

RULING

- 1 The appellant/applicant vide a Notice of Motion application under Certificate of Urgency dated February 9, 2023 seeks the following Orders;
 1. Spent
 2. Pending the hearing and determination of this application, this Honourable Court be pleased to issue an order of stay of execution of the eviction order as contained in the Judgment in Kimilili PM-ELC 16 of 2019, Nickson Dick Olutukei vs Appollo M King'ori delivered on January 25, 2023 by Hon G Adhiambo, PM.
 3. Pending the hearing and determination of the appeal filed herein, this Honourable Court be pleased to issue an order of stay of execution of the eviction order as contained in the Judgment in Kimilili PM-ELC 16 of 2019, Nickson Dick Olutukei vs Appollo King'ori delivered on January 25, 2023 by Hon G Adhiambo, PM.
 4. Costs of this application be borne by the Respondent
- 2 The application said is premised on 8 grounds shown on the face of the application and the supporting affidavit of Nickson Dick Olutukai and two annexures thereto.
- 3 The application is opposed with a replying affidavit sworn by the respondent on March 6, 2023.



Applicant's Summary Of Facts

- 4 The applicant in the supporting affidavit deposed that he had filed a suit before the Principal Magistrate at Kimilili Law Court for orders to stop the respondent who without any colour of right had issued him a demand Notice to vacate his land parcel NO KIMININI/KIMININI/2946. He stated that being the absolute registered proprietor of the suit land, he wanted the court's protection from the unlawful and illegal actions by the respondent. He stated that by way of a response, the respondent filed a statement of defence and counterclaim on June 10, 2019.
- 5 After the hearing of the suit, the trial Magistrate delivered her Judgment on January 25, 2019 in which she dismissed her suit and ordered him to vacate the suit property within 30 days failing which he was to be evicted. He stated that he was dissatisfied with the entire judgment and preferred the present appeal.
- 6 The applicant said that he is now on the verge of being evicted from a property he is registered as proprietor where he has made substantial developments and that his appeal raises serious questions of law which the trial Court fell into error. He stated that if the impugned judgment and decree are executed before this appeal is heard and determined, there will be extreme and highly prejudicial consequences that would subvert the ends of justice and render the appeal nugatory as the suit property will be out of his reach in addition to demolition of the structures erected thereon.
- 7 He said that he has moved diligently and expeditiously in bringing this application and that he is willing to abide by any condition as may be set by this Honourable Court including furnishing of security for the grant of the orders sought herein.

Respondent's Summary Of Facts

- 8 While opposing the application, the respondent on his part deposed that the application is devoid of merit and is a ploy by the applicant to continue occupying his plot in contravention of the judgment and decree of this Honourable Court.
- 8 He stated that the intended appeal has no probability of success because the expert report by one Amos Simiyu, Bungoma County Surveyor, Peter Pepela, a registered Land Surveyor and Mathew Nandi, the current County Surveyor Bungoma County were categorical that the suit property was and is not part of land parcel NO KIMILILI/KIMILILI/2946 but is part of land parcel NO KIMILILI/KIMILILI/771 registered in the name of the County Council of Bungoma.
- 9 He further stated that there is no way one would challenge the said reports since the said entities are the custodians of all land records.

Applicants Written Submissions

- 10 The applicant through the firm of Bryan Khaemba, KamauKamau & CO Advocates framed the following three issues for determination;
 - i. Whether the Appellant/Applicant stands to suffer substantial loss
 - ii. Whether the Application has been brought without unreasonable delay
 - iii. Whether the Applicant is willing to furnish security as the court may order
 - iv. Whether the appellant/applicant stands to suffer substantial loss
- 11 On this issue, the appellant/applicant submitted that he has been in occupation of the suit parcel of land since sometime in 2017 when he purchased the same and was issued with a title deed. He further



submitted that for over five years in which he has been in quiet occupation and possession of the suit property, he invested heavily in it and has even erected thereon some structures which he uses to conduct his business and other activities that aid him in eking out his livelihood. He submitted in conclusion that he stands to suffer substantial loss as he risks being evicted from a parcel of land that he has enjoyed quiet possession and occupation for over 5 years and his appeal may well be rendered nugatory if execution is allowed to proceed. He cited the following cases in support;

1. [*Peter Nakupang Lowar v Nautu Lowar \(2022\) eKLR*](#)
2. [*Charles Kariuki Njiru v Francis Kimaru Rwaru \(Suing as the Administrator of the estate of Rwara Kimaru alias Benson Rwaru Kimaru \(Deceased\) \(2020\) eKLR*](#)

Whether the application has been brought without unreasonable delay

- 12 The applicant submitted that the present application has been brought without unreasonable delay. He avers that the impugned Judgment of the lower Court was delivered on January 25, 2023 and immediately upon being supplied with a certified copy of the judgment, the applicant preferred this appeal simultaneously with the present application for stay of execution on January 9, 2023.

Whether the applicant is willing to furnish security as the court may direct.

- 13 On the third limb, the applicant at paragraph 11 of his affidavit in support of this application stated that he is ready and willing to furnish any such security as the court may direct. However, the applicant on a without prejudice basis submitted that the decree arising from the judgment of the lower court being a non-monetary decree, the issue of security does not really arise. He submitted that the decree is for the eviction of the appellant from the suit premises and that the furnishing of security is not really necessary for the grant of the orders sought. He cited the following cases in support;

1. [*Anthony Warui Wanjiru v David Niyibizi & Another \(2020\) eKLR*](#)
2. [*Sarah N Sakwa v Elizabeth Wamwanyi t/a Namukhosi Ltd & Another \(2017\) eKLR*](#)
3. [*Praxades Okutoyi v Medical Practitioners & Dentists Board \(2008\) eKLR*](#)

Analysis And Decision

- 14 I have considered the Notice of Motion application dated February 9, 2023, the supporting affidavit of the applicant sworn on even date, the replying affidavit by the respondent sworn on March 6, 2023 and the rival submissions. Order 42 Rule 6(2) CPR sets out three conditions for stay of execution pending appeal as follows;

1. That the application is made without unreasonable delay;
2. Substantial loss may result to the applicant unless the order was made; and
3. 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.
4. On the first condition, the applicant has deposed that the impugned Judgment in the trial Court was delivered on January 25, 2023 and immediately after he was furnished with a certified copy of the Judgment, she lodged this appeal simultaneously with the current application on February 9, 2023. From a simple arithmetic, the applicant took almost 14 days to make this application as well as lodge this appeal. In the circumstances of this case, I find



a period of two weeks not inordinate. The first condition in my view has been satisfied to the satisfaction of this Court.

- 5 The second condition is whether the applicant will suffer substantial loss unless the orders sought is granted. Substantial loss was discussed in numerous decisions by the superior courts. In the case of *Maisi Mwita v Damaris Wanjiku Njeri (2016) eKLR*, the court held thus;

‘The cornerstone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted. What constitutes substantial was broadly discussed by Gikonyo J in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* where it was held inter-alia :-

‘No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.’

- 15 The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein v Chesoni* the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.’
- 16 In the present application, the Applicant has stated that he has been in the suit property for more than five years and that he has invested heavily and uses some of the structures to conduct his businesses. Those arguments in my view are not available to the applicable particularly where the parties went through a full hearing before the trial court rendered itself on the merits of the case. In an application of this nature, the applicant must go beyond and demonstrate how he would suffer substantial loss if the order for stay is not granted since by granting stay would mean that the status quo should remain as it were before the judgment and that would be denying a successful litigant the fruits of his judgment. The mere fact that the appellant/applicant has been in possession and occupation of land for five years which the trial Court after a full hearing found the property to belong to the Respondent is not a ground for stay pending appeal.
- 17 As discussed by Gikonyo J in the case of *James Wangalwa (supra)*, the applicant must show how his appeal will be rendered nugatory unless stay of execution orders are granted. Whereas it is the undoubted right of a party dissatisfied with a judgment to prefer an appeal to the appellate Court, it is important that the court balances that undoubted right with the right of the respondent who is a successful party to enjoy the fruits of his judgment. In doing so, the Court must be satisfied that the applicant has shown the existence of any factors that negate the very essential core of the appeal that has to be prevented by preserving the status quo. The appellant/applicant in my view has failed to satisfy this Honourable court the threshold to enable it exercise its discretion in his favour.
- 18 The third and final condition is whether the applicant has given security for the due performance of the decree that may ultimately be binding on him. At paragraph 11 of his affidavit in support of the application, the applicant has stated that he is willing to abide by any condition that may be given by this Honourable Court for granting the stay orders. On this undertaking, I find that the appellant/applicant has satisfied this court on the third condition.



19 It is trite law that in order to succeed in an application for stay pending appeal under Order 42 Rule 6(2) CPR, an applicant must meet all the three conditions set out thereunder sequentially. The applicant has miserably failed to prove all the three conditions to warrant the exercise of its discretion in favour of the applicant. Having taken into account all the matters stated hereinabove, I find the Notice of Motion application dated January 9, 2023 without merit and the same is hereby dismissed with costs.

READ, SIGNED and DELIVERED in the open Court/Virtually at Bungoma this April 17, 2023

HON. E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr Wamalwa R H/B for Nyantoro

2. Mr Buloa H/B for Khaemba

3. Joy C/A

