



Kirobon Farmers Co. Ltd v Nyarangi (Environment & Land Case 29 of 2017) [2023] KEELC 16801 (KLR) (13 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16801 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 29 OF 2017**

FM NJOROGE, J

APRIL 13, 2023

BETWEEN

KIROBON FARMERS CO. LTD PLAINTIFF

AND

SAMUEL ONCHURU NYARANGI DEFENDANT

RULING

1. This ruling is in respect of the application dated 18/07/2022 filed by the Plaintiff and brought under Section 1A, 1B, 3A and 63(e) of the [Civil Procedure Act](#) and Order 42, 43 and 51 of the [Civil Procedure Rules](#) which sought the following orders:
 - a. Spent
 - b. Spent
 - c. That the honorable court be pleased to order stay of execution of the judgement and decree issued on 21st June, 2022 in Nakuru HC ELC No. 29 of 2017 and all consequential orders therein pending the hearing and determination of the relevant appeal filed in the Court of Appeal.
 - d. That costs of this application be provided for.
2. The application is supported by the supporting affidavit of Samuel K. Birir the Plaintiff's chairman sworn on 19/07/2022. The grounds on the face of the application and the supporting affidavit are that the applicant is the owner of LR No. Molo South/Langwenda 17/1 (Seguton); that judgement was delivered against the Plaintiff on 21/06/2022; that being dissatisfied with the said judgement, the Plaintiff has filed an appeal; that the respondent may execute the judgement at any time; that unless stay is granted, the members of the plaintiff stand to suffer substantial loss; that the plaintiff has an



arguable appeal; that the Land Registrar made entries on the green card of the suit property without informing the plaintiff and that the plaintiff is willing to deposit reasonable security for costs.

3. In response to the application, the defendant filed a replying affidavit sworn on 26/09/2022 and filed on 27/09/2022. He deposes that after delivery of the judgment on 21/06/2022 the plaintiff used the office of the Directorate of Criminal Investigations to summon his farm caretaker one Bethsaida Mongina on 08/07/2022; that on the said date the plaintiff ploughed the entire parcel of land and planted maize while his caretaker was at the offices of the Directorate of Criminal Investigations; that they only left two portions of the land where the houses are located; that there is no resolution attached to the affidavit of Samuel K. Birir allowing him to swear the affidavit on behalf of the Plaintiff who is a limited liability company; that the plaintiff is not the owner of the suit property as the title issued on 21/03/2016 was cancelled by the Registrar of Lands on 08/08/2018; that he has been in possession of the suit property; that the plaintiff has been trying to evict him; that the current value of the suit property is Kshs.100,000,000 and that the plaintiff should be compelled to deposit security for costs commensurate to the value of the land.
4. The defendant filed his submissions dated 28/02/2023 on the same date while the plaintiff did not file any submissions.
5. The defendant submitted that the plaintiff through its agents have been harassing him since the court delivered its judgement on 21/06/2022 and then reiterated the contents of his replying affidavit to the application. The defendant relied on Order 42 Rule 6 of the Civil Procedure Rules, the cases of *Canvass Manufacturers Ltd vs Stephen Reuben Karunditu* Civil Application No. 158 of 1994, (1994) LLR 4853, *Stephen Wanjobi vs Central Glass Industries Ltd Nairobi* HCC No. 6726 of 1991 as cited in the case of *Teresiah Wairimu v Wanjiku Mwangi* [2018] eKLR and submitted that for a court to grant an order for stay of execution, there must be sufficient cause, risk of substantial loss, no unreasonable delay and that security and the grant of stay is discretionary.
6. The defendant submitted that the plaintiff has not demonstrated sufficient cause or substantial loss that it will suffer if stay pending appeal is not granted. The defendant further submitted that the court should consider the prejudice he is likely to suffer if it grants orders of stay pending appeal. The defendant also submitted that should the court be inclined to grant the same then the plaintiff should deposit a sum of Kshs.100,000,000/= being the value of the suit property.
7. The defendant further relied on the case of *Butt vs Rent Restriction Tribunal* [1982] KLR 417 and submitted the court should consider the undisputed fact that both the plaintiff and the defendant are in occupation of the suit property and the conduct of the plaintiff's agents after the delivery of the judgment in this matter.

Analysis and determination

8. After considering the application, the replying affidavit and the submissions, the only issue that arises for determination is whether the court should grant orders of stay of execution pending appeal.
9. Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules provides as follows:
 - (1) 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 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.
10. In Civil Appeal No.107 of 2015, *Masisi Mwita -vs- Damaris Wanjiku Njeri* (2016) eKLR, the Court held that:

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & Another..Vs...Thornton & Turpin Ltd*, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-

“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.”

In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo...vs...Straman EA Ltd* (2013) as follows:-

“In addition, the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory.”

These twin principles go hand in hand and failure to prove one dislodges the other.”

11. On whether the application was filed without unreasonable delay, the plaintiff filed the present application on 19/07/2022 while judgement was delivered on 21/06/2022. There is a Notice of Appeal on the court record dated 22/06/2022 and it is therefore my view that for the purposes of this application, there is an appeal in place and the application was filed without unreasonable delay.
12. On whether the plaintiff will suffer substantial loss if the orders sought are not granted, the plaintiff stated that unless stay is granted, it stands to suffer substantial loss as the defendant might execute the judgement and occupy its parcel of land. The defendant on the other hand argued that both the plaintiff and the defendant are in possession of the suit property and so the plaintiff will not suffer any substantial loss.
13. The court in the case of *Elishaphan Omollo Nyasita v Gradus Atieno Othim & another* [2019] eKLR held as follows:

“ 11. It is trite law that it is not merely sufficient for the applicant to state that he or rather she is likely to suffer substantial loss if the application for stay of execution sought is not allowed. The applicant has not shown the damage or loss that he is likely to suffer if the order sought in the application is not granted. Moreover, to grant the order aforesaid would deny a successful litigant (respondent) the fruits of his Judgment as held in Kenya Shell Ltd case (supra).”



14. It is my view that the plaintiff in this matter has not demonstrated the substantial loss he stands to suffer if the orders of stay of execution are not granted. Consequently, the plaintiff's application dated 18/07/2022 lacks merit and it is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 13TH DAY OF APRIL 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

