



**Ogumbo v Kyambo & another (Environment & Land Case
46 of 2019) [2023] KEELC 17959 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17959 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 46 OF 2019**

A NYUKURI, J

MAY 31, 2023

**IN THE MATTER OF SECTION 7, 9 (1), 37 & 38 OF THE
LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA &
ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES**

AND

IN THE MATTER OF ACQUISITION OF L.R. NO. 12715/374

BY WAY OF ADVERSE POSSESSION

BETWEEN

HANNINGTON OLOO OGUMBO PLAINTIFF

AND

ALBERT MAKAU KYAMBO 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

RULING

Introduction

1. Vide an amended Notice of Motion dated September 21, 2021 and amended on November 30, 2021, the Plaintiff/Applicant sought the following orders;
 - a. Spent.
 - b. That the Honourable Court be pleased to grant an order of stay of execution of its judgment/decree delivered on July 16, 2021 pending hearing and determination of intended appeal.
 - c. That the Defendant/Respondent be restrained from encroaching onto the suit property.



- d. That the costs of this application be in the cause.
2. The application was supported by the affidavit of Hanningtone Oloo Ogumbo the Plaintiff, sworn on November 30, 2021. It was the Applicant's case that judgment herein was delivered on July 16, 2021 dismissing the Applicant's suit, which judgment was delivered in the absence of the Applicant. That the Applicant was only made aware of the judgment on August 18, 2021, as he had been informed that the judge was on transfer. Further that the Applicant intends to appeal the said judgment as he has filed application to file appeal out of time vide Civil Application Number E402 of 2021 pending before the Court of Appeal.
3. He stated further that on November 19, 2021, the Defendant using hired goons went to the suit property and demolished his house. According to him, the court did not order his eviction and that therefore the eviction is illegal.
4. The application was opposed. Albert Makau Kyambo the 1st Defendant swore a replying affidavit on September 22, 2021. He stated that when the judgment date of July 16, 2021, was given in court on April 9, 2021, the Applicant's counsel was in court and that on July 16, 2021, the learned Judge was not on transfer as the transfer of judges took effect on September 15, 2021.
5. He stated that the letter of the Applicant's counsel dated August 26, 2021 protesting the delivery of judgment on July 16, 2021 was never served on the Respondent's counsel and that the counsel was also not aware of the Applicant's application for proceedings. He further stated that the application to file appeal out of time has never been served on the Respondent's counsel or the Respondent in person and that no appeal has been filed. He stated further that from the judgment it was evident that the Applicants were in trespass on the suit property and that he had left a 7 feet by 7 feet iron sheet structure on the land which he was not in occupation. That therefore, the Respondent had the right to use his land as he pleased and therefore demolished the iron sheet structure and that the person staying in that structure was arrested although he claimed not to have been paid by the Applicant for a period of eight months.
6. The Respondent stated that he did not need a court order to use his property and that he does not need an eviction order for an Applicant who does not even live on the property.
7. The application was disposed by way of written submissions. On record are the Applicants' submissions dated February 21, 2022 and the Respondent's submissions dated May 11, 2022.

Submissions

8. Counsel for the Applicant submitted that the question raised in the application and supporting affidavit are weighty and serious and unless the orders sought are granted, the Applicant stands to suffer prejudice as his application pending before the Court of Appeal is merited and has higher chances of success. Counsel relied on the case of *Maimme Management Ltd & Davy Koech v. Heritage Bank Limited (in Liquidation)* Civil Application No. Nai 215 of 1998 for the proposition that the court can stay a decision on account of intended appeal.
9. On their part, the 1st Respondent's counsel argued that the application was bad in law as Order 22 which was its basis does not apply in the circumstances of this case. Counsel also argued that the Applicant having applied for leave to file Notice of Appeal together with the appeal in Civil Application No. E402 of 2021 and the same having been dismissed on March 18, 2020, this application cannot stand. Counsel argued that there was no intended appeal. Counsel urged the court to note that the judgment date was taken by consent.



Analysis and determination

10. I have carefully considered the application, the response and submissions. In my considered view, the issue that arise is whether the Applicant has met the threshold for grant of stay of execution and injunction pending intended appeal.
11. I have perused the record and I note that on June 4, 2021, Mr. Ochanda counsel for the Plaintiff and Mr. Mutinda counsel for the Defendant were in court when the judgment date of July 16, 2021 was fixed, and indeed the judgment was delivered on July 16, 2021 as fixed by consent of counsel. Therefore the Applicants protest on delivery of judgment was baseless as the court sat on July 16, 2021 and delivered the judgment albeit in the absence of the Plaintiff and his counsel who were aware of the date, but chose not to attend court, without any reasons.
12. It is not disputed that judgment in this matter was delivered on July 16, 2021, whereof the Plaintiff's suit was dismissed with costs. No Notice of Appeal was filed in 14 days as is required under Rule 75 (2) of the *Court of Appeal Rules 2010*. The record shows that the Notice of Appeal herein was filed on March 23, 2022, which is eight months after the delivery of the judgment. Therefore there is no proper notice of appeal on record. The Applicant stated that he has filed a Civil Application Number E0402 of 2021 in the Court of Appeal seeking leave to file appeal out of time.
13. The application herein was brought under Order 22 Rule 22 and Order 42 Rule 6 of the *Civil Procedure Act*. Order 22 Rule 22 provides for the power of the court to which a decree has been sent for execution, to temporarily stay execution, to enable the judgment debtor apply for stay of execution in the court that passed the decree or to appellate court. That being the case, and as this court is the same court that passed the decree herein and not a court where a decree was sent for execution, that provision is not applicable in the circumstances of this case.
14. As regards Order 42 Rule 6 of the *Civil Procedure Rules*, the same grants jurisdiction to a court that issued a decree to stay execution of its decree pending hearing and determination of an appeal. As I understand that provision, a stay of execution can only issue where an appeal is pending. In the instant matter, there is no appeal pending and therefore a stay of execution pending appeal cannot issue. In any event, even if there was an appeal filed, there would be no stay as the judgment merely gave an order of dismissal which is a negative order incapable of being stayed.
15. On whether an injunction can be issued by this court pending hearing of an appeal to the Court of Appeal, my view is that there is no provision in law clothing this court with jurisdiction to grant injunction pending appeal to the Court of Appeal. The jurisdiction to grant injunction pending appeal provided for in Order 42 Rule 6 (6) is for instances where this court is exercising its appellate jurisdiction in respect of a decision from the subordinate court. In the premises, this court has not jurisdiction to grant an injunction in respect of its decision intended to be appealed before the Court of Appeal.
16. In the premises, I find no merit in the amended notice of motion dated September 21, 2021 and amended on November 30, 2021 and the same is hereby dismissed with costs to the Respondent.
17. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 31ST DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE



In the Presence of;

Mr. Ochanda for Plaintiff/Applicant

No appearance for Defendants

Josephine – Court Assistant

