



Maritim & another v Kibaru & another (Environment & Land Case 126 of 2012 & 60 of 2013 (Consolidated)) [2023] KEELC 17652 (KLR) (23 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17652 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 126 OF 2012 & 60 OF 2013 (CONSOLIDATED)
FM NJOROGE, J
MAY 23, 2023**

BETWEEN

SIMON TOWETT MARITIM PLAINTIFF

AND

JOTHAM MUIRURI KIBARU DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT & LAND CASE 60 OF 2013

BETWEEN

JOTHAM MUIRURI KIBARU PLAINTIFF

AND

JOSEPH RONO DEFENDANT

**SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KIPRONO
BEIBEI NYANGUSI - DECEASED**

RULING

1. This ruling is in respect of the plaintiff's notice of motion application dated February 28, 2023 expressed to be brought under order 42 rule 6(1) & (2), order 51 of the [Civil Procedure Rules](#) and sections 1A, 1B and 3A of the [Civil Procedure Act](#) which sought the following orders:
 - a. Spent
 - b. Spent



- c. That pending the hearing and determination of the intended appeal, this honorable court be pleased to stay the execution of the judgement/decree of January 19, 2023 and/or issue preservatory order maintaining the status quo in respect of land parcel number Dundori Mugwathi Block 2/20.
 - d. That costs of this application be provided for.
2. The application is supported by the affidavit of the plaintiff sworn on February 28, 2023. The grounds on the face of the application and the supporting affidavit are that judgement in this matter was delivered on January 19, 2023; that he instructed his advocates on record to file an appeal against the said judgement; that he also sought for the typed proceedings to enable him prepare a record of appeal; that the judgement was in favour of the defendant; that the judgement deprived him off his entitlement and investment on the suit property; that the appeal lodged raises weighty issues with a high probability of success; that it is in the interest of justice that execution be stayed and the subject matter of the appeal be preserved; that if the judgement of this court is executed, he will suffer substantial loss and the appeal will be rendered nugatory; that he is willing to abide by any conditions set out by this court and that it is in the interest of justice that the court allows his application and preserves the subject matter of the suit property.
3. In response to the application, the defendant filed a replying affidavit sworn on March 22, 2023 and filed on March 24, 2023. He deposed that the plaintiff has never owned the suit property and he cannot therefore suffer substantial loss; that he has lived on the suit property since the year 1992 and has undertaken substantial developments thereon; that the plaintiff has not shown the kind of loss he is going to suffer if the orders sought are not granted; that the plaintiff has not offered any security for the performance of the decree and that it is only fair that the plaintiff deposits the taxed costs in court or in a joint account of both advocates within set timelines as security for due performance of the decree.
4. The application was canvassed by way of written submissions. The plaintiff filed his submissions dated April 18, 2023 on the same date while the defendant filed his submissions dated May 2, 2023 on the same date.
5. The plaintiff in his submissions identified only one issue for determination which is whether an order for stay of execution of the judgement/decree should issue. The plaintiff relied on order 42 rule 6(2) of the *Civil Procedure Rules*, the cases of *Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 others* [eKLR], *Antoine Ndiaye v African Virtual University* [2015] eKLR and *Prilscot Company Limited v Monica Hebo* [2015] eKLR.
6. On whether he stands to suffer substantial loss unless the order of stay is made, the plaintiff relied on the case of *Northwood Service Ltd v Mac & More Solution Ltd* [2015] eKLR and submitted that the court in its judgement held that the defendant had acquired the suit property by way of adverse possession. He also submits that the defendant is on the verge of executing the said judgement which will essentially defeat his interest on the suit property and he will therefore suffer substantial loss unless the order for stay is granted. The plaintiff relied on the cases of *Kipsang Chepkwony v David Kiptoo Cheluget & another* [2014] eKLR and *Re Estate of Michael Kiarri Njoroge (deceased)* [2019] eKLR in support of his arguments.
7. On whether the application has been brought without unreasonable delay, the plaintiff relied on the case of *Turbo Transporters Ltd v Absalom Dora Lumbani* [2012] and submitted that the application has been made without unreasonable delay as judgement in the matter was delivered on January 19, 2023 and the application for stay of execution made on February 28, 2023. On the issue of security, the plaintiff submitted that the circumstances of this case do not warrant security since the defendant



is already in occupation of the suit property. The plaintiff nonetheless submitted that the court can exercise its power by directing that he deposits such security for the due performance of the decree.

8. The defendant in his submissions relied on order 42 rule 6(2) of the Civil Procedure Rules and submitted that the plaintiff has to demonstrate that he will suffer substantial loss if the orders sought are not granted, he has brought the application without unreasonable delay and that he is willing to offer security for due performance of the decree. He relied on the case of Peter Ndungu Ng'ae & 2 others v John Mugane Karomo [2015] eKLR and submitted that the plaintiff has not demonstrated that he will suffer any substantial loss if the orders sought are not granted. The defendant also submitted the plaintiff has never been registered as the owner of the suit property, has never been in occupation since the year 1992 and so he will not suffer any substantial loss. The defendant concedes that the plaintiff's application was filed without unreasonable delay but that he has not offered any security for due performance of the decree. The defendant therefore submits that the court can only order a stay of execution when an offer for security has been made. The defendant concluded his submissions by seeking that the plaintiff's application be dismissed.

Analysis And Determination

9. After considering the application, the replying affidavit and the submissions, the only issue that arises for determination is whether the court should grant orders for stay of execution pending appeal.
10. 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 appeal case of 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 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.”

11. The Court of Appeal in the case of Butt v Rent Restriction Tribunal [1982] KLR 417 gave the following guidelines on how the court should exercise its discretion in granting stay of execution pending appeal:

- “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, a 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.”
12. On whether the application was filed without unreasonable delay, the plaintiff filed the present application on March 8, 2023 while judgement in this matter was delivered on January 19, 2023. There is a notice of appeal on the court record dated January 23, 2023 and lodged on January 24, 2023 and it is therefore my view that for the purposes of this application, there is an appeal in place and the application has been filed without unreasonable delay.
13. On whether the plaintiff will suffer substantial loss if the orders sought are not granted, the plaintiff argued that if orders of stay are not issued, he will suffer substantial loss that cannot be adequately compensated by an award of damages. 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. The court in the case of *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR further held as follows on what constitutes substantial loss:
- “The corner stone 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 loss was broadly discussed by Gikonyo J in the case of *James Wangalwa & another v Agnes Naliaka Cheseto* where it was held *inter alia* that:-
- “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.



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”

15. Finally, I do not subscribe to the view held by the defendant that the court can only order a stay of execution when an offer of security has been made. It is normally for court, to judge whether the principal conditions for the grant of a stay order have been proved after which it orders security. An offer of security per se can not entitle the applicant to stay orders.
16. The foregoing notwithstanding 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. That being the case, the plaintiff's application dated February 28, 2023 lacks merit and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 23RD DAY OF MAY 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

