



**Nyaboga v Nyakoe & another (Environment & Land Case  
168 of 2015) [2023] KEELC 17575 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17575 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 168 OF 2015**

**M SILA, J**

**MAY 18, 2023**

**BETWEEN**

**JEMIMAH MORAA NYABOGA ..... PLAINTIFF**

**AND**

**SISILIA NYAKOE ..... 1<sup>ST</sup> DEFENDANT**

**VINCENT MAOBE NYAKOE ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

(Application for stay pending appeal; judgment delivered in favour of plaintiff for eviction of the applicant, a permanent injunction, special and general damages; defendants seeking stay pending appeal; court not persuaded to issue stay on eviction and permanent injunction given that the applicants reside elsewhere; no substantial loss if they continue residing in the other land where they have their residence; stay however issued on the monetary aspect of the decree and costs subject to the same being deposited in 60 days).

1. The application before me is that dated February 20, 2023 filed by the defendants. The applicants seek orders of stay of execution of the judgment delivered on February 1, 2023 pending hearing and determination of an intended appeal to the Court of Appeal. The application is opposed.
2. To put matters into context, the plaintiff/respondent commenced this suit vide a plaint filed on May 7, 2015. She pleaded to be the registered proprietor of the land parcel West Kitutu/Bogusero/2234 (the suit land) and claimed that the defendants/applicants had entered the land, cut down trees, and generally interfered with her possession. In the suit, she asked for a declaration that she is the rightful owner of the suit land, an order of eviction, a permanent injunction to restrain the applicants from the land, special damages of Kshs 359,118/= for loss occasioned by cutting of trees, general damages for trespass, costs and interest. The applicants filed defence and counterclaim. I heard the suit and delivered judgment on February 1, 2023 in favour of the plaintiff. I more or less made the following orders :-



- i. Declared the plaintiff/respondent to be the rightful owner of the suit land;
  - ii. Issued an order that the applicants should vacate the land within 30 days of the date of judgment and in default they be evicted;
  - iii. Issued an order of permanent injunction;
  - iv. Entered judgment for the sum of Kshs 359,118/= as special damages;
  - v. Entered judgment for the sum of Kshs 300,000/= as general damages for trespass; and
  - vi. The applicants to shoulder the costs of the suit and the counterclaim.
3. Aggrieved, the applicants filed a notice of appeal on February 9, 2023 and followed it up with this application for execution of the judgment to be stayed pending hearing of the appeal. The supporting affidavit is sworn by the 2<sup>nd</sup> defendant. It is a brief affidavit which deposes that they have filed the notice of appeal and intend to file an appeal against the judgment. He decries that they stand to suffer substantial loss by losing the whole of the suit land which he says is where they stay. He does not think that the respondent stands to be prejudiced in any way if the order of stay is granted. He swears that the application is not aimed at denying the respondent the fruits of the judgment but contends that if they succeed on appeal, their success will be rendered nugatory.
4. The respondent filed Grounds of Opposition to oppose the application. It is contended that the application is premature; that the applicants have not highlighted the nature of loss that they stand to suffer; that they do not reside in the suit land; that they have not demonstrated any willingness to offer security for the performance of the decree; that the application is contrary to Sections 24, 25, 26 and 27 of the Land Registration Act; that the application is an attempt to obstruct and/or delay the due process of the court.
5. I invited counsel to file written submissions and I have taken note of the submissions filed by Mr Okenye, learned counsel for the applicants, and Mr Mulisa, learned counsel for the respondent.
6. This is an application for stay pending appeal and I stand guided by the principles outlined in Order 42 Rule 6 (2) which provides as follows :-
- (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.
7. From the above, three issues emerge and which the applicant needs to satisfy :-
- i. That the application has been made without unreasonable delay;
  - ii. That the applicant demonstrates that he stands to suffer substantial loss unless the order of stay is made;
  - iii. That the applicant offers such security for the due performance of the decree in the event that he loses the appeal.
8. In considering the three principles, the court also needs to be alive to the purpose of issuing an order of stay which is to preserve the subject matter so that in the event of success of the appeal, the subject matter will not be found to have been lost.



9. Starting with the first principle above, the judgment was delivered on February 1, 2023 and this application was filed on February 24, 2023. I am of opinion that the applicants lodged their application without unreasonable delay.
10. . The second principle is that the applicants need to demonstrate that they stand to suffer substantial loss. Within this application, they have urged that they will suffer substantial loss because they reside on the suit land. This is refuted by the respondent who contends that the applicants reside on another parcel of land. I have gone through the evidence presented and it is indeed correct that the applicants did state that they reside in neighbouring land which is owned by one Roman Kerongo. It is not therefore true that the applicants reside on the land though it appears that they started cultivating it just before this suit was filed. I do not see what substantial loss the applicants stand to suffer if they continue residing in the land of Roman Kerongo while the appeal is being heard since this is where they have been residing all along.
11. I am also not persuaded that they stand to suffer substantial loss if they do not cultivate or use the land while the appeal is pending. The evidence shows that they were not using the land prior to the year 2015 or thereabouts and yet they continued with their lives. Thus, I am not persuaded to stay the part of the judgment related to the eviction of the applicants from the suit land and the order of permanent injunction stopping them from interfering with the suit land. In essence while the appeal is pending, it is the plaintiff/respondent who is entitled to the use and possession of the suit land.
12. There was a money decree in the judgment for the sum of Kshs 359,118/= as special damages and Kshs 300,000/= as general damages. I am prepared to stay execution of this part of the judgment subject to the applicants making available this sum, within the next sixty (60) days, and thereafter having it deposited in a joint interest earning account to be held in the names of counsel for the applicants and respondent. The deposit of this sum constitutes security for the performance of the monetary aspect of the decree. If this sum is not so availed and deposited as above, then no security will have been offered and the applicants will not be entitled to stay this part of the judgment meaning that the respondent will be at liberty to execute the monetary part of the decree.
13. In addition to the above, the taxed costs also need to be deposited within sixty (60) days of taxation or else the respondent will be at liberty to execute for the same.
14. So that the subject matter may be preserved, in my discretion, I will issue an order restraining the respondent from selling, charging, or otherwise adversely dealing with the title to the suit land, until the appeal is concluded.
15. The costs of this application will be costs in the appeal.
16. Orders accordingly.

**DATED AND DELIVERED AT KISII THIS 18 DAY OF MAY 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

