



**Ogondo & another (Suing as the Personal Representatives of the Estate of Salmon Ndalo Obede) v Kenya Railways Corporation; Attorney General & 3 others (Defendant) (Environment & Land Case 813 of 2015) [2023] KEELC 22615 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 22615 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 813 OF 2015**

**E ASATI, J**

**MAY 18, 2023**

**BETWEEN**

**JULIA KEMUNTO OGONDO ..... 1<sup>ST</sup> PLAINTIFF**

**MARGARET MORARA MAINYA ..... 2<sup>ND</sup> PLAINTIFF**

**SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF  
SALMON NDALO OBEDE**

**AND**

**KENYA RAILWAYS CORPORATION ..... DEFENDANT**

**AND**

**THE ATTORNEY GENERAL ..... DEFENDANT**

**MASENO UNIVERSITY ..... DEFENDANT**

**MAYEAIR HOLDINGS LTD ..... DEFENDANT**

**REDEEMED GOSPEL CHURCH ..... DEFENDANT**

**RULING**

**Introduction**

1. This ruling is in respect of three (3) applications filed by parties who were aggrieved by the Judgement delivered herein on 30<sup>th</sup> September 2022 and have preferred appeal to the Court of Appeal. These applications are: -
  - a. the Notice of Motion dated 18<sup>th</sup> October, 2022 filed on behalf of Maseno University, the 2<sup>nd</sup> Defendant in the Counter Claim,



- b. the Notice of Motion dated 31<sup>st</sup> October, 2022 filed on behalf of Mayfair Holdings, the 3<sup>rd</sup> Defendant in the Counter Claim
  - c. and the Notice of Motion dated 31<sup>st</sup> October 2022 filed on behalf of the Plaintiffs.
2. All the 3 applications are brought pursuant to the provisions of Sections 1A, AB and 3A of the [Civil Procedure Act](#) and Order 42 Rules 6 and 7, Order 51 Rule 1 and Order 22 Rule 22(1) [Civil Procedure Rules](#) 2010. All the applications seek similar orders in respect of the respective land parcel claimed by each of the Applicants. The applications seek for:-
    - a. an order of stay of execution of the Judgement and decree issued herein on 30<sup>th</sup> September, 2022 by the Honourable Justice A. Ombwayo pending the hearing and determination of the appeal to Court of Appeal.
    - b. an order restraining the Land Registrar from cancelling the title Kisumu/Municipality/Block 7/385 for the 2<sup>nd</sup> Defendant in the Counter-claim, Kisumu/Municipality/Block 7/407 for the Plaintiffs and Kisumu/Municipality/Block 7/384 for the 3<sup>rd</sup> Defendant in the Counterclaim (the suit lands for purposes of this ruling).
  3. The grounds upon which the applications were brought are contained on the face of the applications and the averments in the Supporting Affidavits sworn on behalf of the Applicants.
  4. The applications were opposed vide the contents of the Affidavits in reply sworn by Stanley Gitari on 1<sup>st</sup> February, 2023 in reply to the application dated 18<sup>th</sup> October, 2022, Affidavit in Reply sworn by Stanley Gitari on 1<sup>st</sup> February, 2023 in reply to the Plaintiff's Application dated 31<sup>st</sup> October, 2022 and Affidavit in Reply sworn by the same deponent on the 9<sup>th</sup> February, 2023 in reply to the 3<sup>rd</sup> Defendant in the counter-claim's application dated 31<sup>st</sup> October, 2022.
  5. By consent of the parties, the applications were canvassed together by way of written submissions.

### **Determination**

6. The law on grant of orders of stay of execution of judgement, decrees or orders pending appeal in the High Court is found in Order 42 [Civil Procedure Rules](#). Order 42 Rule 6(2) provides that no order for stay of execution shall be made unless: -
  - a. The court is satisfied that substantial loss may result to the applicant unless the order is made and that he application is 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. On substantial loss, the 2<sup>nd</sup> Defendant in the counterclaim's case is that it stands to suffer irreparable harm given that Kisumu/Municipality/Block 7/385 houses the Applicant's teaching faculty and students and if the stay is not granted, the academic year and activities therein will be disrupted. That the applicant purchased the property in the year 2005 for Kshs. 224,000,000/- which property was already developed with a 4 storied office block, shops and several apartments and car parking space.

That the applicant being a public university uses the building as a campus and has enrolled hundreds of students who take their lectures and study in the library therein. That the applicant has also rented out some spaces to tenants who carry on business such as laundry, salons and barber shops, restaurants and bookshops. That if execution of the court decree is not stayed, the Applicant will be in breach of its contracts with enrolled students, lecturers and tenants hence will suffer substantial loss and irreparable



loss. The students and tenants will be put in precarious and embarrassing situations from which they may not recover.

To its Supporting Affidavit sworn by Joy Akinyi on 18<sup>th</sup> October, 2022 was annexed a copy of sale agreement for purchase of the suit property.

8. In his submissions on substantial loss, Counsel for the 2<sup>nd</sup> Defendant in the counter claim asked the court to take judicial notice that the Applicant is a public university offering higher education to thousands of students on the suit property and that part of the property is let out to tenants. Counsel relied on the case of *Peter Nakupang Lowar v Naufu Lowar* to submit that eviction following long occupation constituted substantial loss and also the case of *Butt v Rent Restriction Tribunal* (1979)eKLR in support of his submissions.
9. The Plaintiff and the 3<sup>rd</sup> Defendant in the counter-claim stated that the court in the judgement granted an order restraining the Plaintiff from entering or dealing with the suit property in any way. That the judgement did not give time allowance within which to vacate the suit land. That the Applicant is the registered owner of the suit land having been allocated the same as per the law.
10. It was submitted on behalf of the Plaintiff vide the written submissions filed by the firm of Otieno, Yogo & Ojuro Company Advocates that the Applicants have already lost the suit property through demolitions despite there being an injunction in place. That the loss should not be extended further by making the property to be out of plaintiffs' reach if the appeal is successful.
11. The Defendant/Respondent stated in the Affidavit in Reply in respect of the application by the 2<sup>nd</sup> Defendant in the counter claim that the findings in the judgement on the illegality of the creation of the suit property Kisumu/Municipality/Block 7/285 strips the Applicant of the proprietorship thereof and the Applicant ought to honour and satisfy the decree. That the Applicant has not approached the Respondent with any proposal on how to hand over the suit property or make any request to occupy the building in order to continue with its Kisumu Town Campus operations. That the Respondent is the successful litigant and holder of a decree and it will be unjust for the Respondent's enjoyment of the fruits of the judgement to be impeded by orders granted on an application with no attempts to disclose the ground of the intended appeal.

Similar grounds were raised in respect of the applications by the Plaintiff and the 3<sup>rd</sup> Defendant in the counter-claim.

12. It was submitted on behalf of the Respondent as regards substantial loss that no sufficient cause has been shown for grant of the orders sought.

That the notice of appeal attached to the application does not contain the grounds of appeal. That without disclosing the grounds of appeal in the intended appeal it is impossible for the court to ascertain whether the appeals are arguable or not. Counsel relied on the case of George Masibayi Wafula to submit that the significance of annexing a draft Memorandum of Appeal to an application for stay is to demonstrate the grounds of appeal thereby enable the court to determine as to the arguability of the appeal which is an important consideration when deciding an application of this nature. Counsel further relied on the case of *Nicholas Mutuku Mwasuma v Patricia Mweni Kilonzo* [2022]eKLR and *Samvis Trustee Limited v Gaudencia Bank Limited Nairobi* (Milimani HCCC 795 of 1997. That the finding of the court in the judgement was that the suit lands were created from a sub-division process that was conducted illegally and fraudulently. That the scale tips in favour of the Defendant in respect of the two applications dated 31<sup>st</sup> October, 2022.

Similar submissions were made in respect of the application dated 18<sup>th</sup> October, 2022 by the 2<sup>nd</sup> Defendant in the counter-claim.



13. On the issue of substantial loss, on the basis of the grounds raised by the Applicant and particularly the 2<sup>nd</sup> Defendant in the counter claim, I find that substantial loss has been demonstrated. In [\*Dr. Daniel Chebutuk Rotich v Morgan Kimaset Chebutuk\*](#) the court observed that:

“Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an Applicant is likely to suffer if stay of execution is not granted and the Applicant is therefore forced to pay the decretal sum.”

The burden of proof lies with the Applicants to prove that substantial loss will result to them if the order sought is not granted. In this case I find that the applicants have discharged that burden.

14. On whether or not the applications were brought without undue delay, the judgement appealed against was delivered on 30<sup>th</sup> September, 2023 and the applications filed within one (1) month from then. I find that the applications were brought without unreasonable delay.
15. The next consideration is provision of security. Though there was no mention of security in the application dated 18<sup>th</sup> December, 2022, in the submissions made on behalf of the 2<sup>nd</sup> Defendant in the counter claim, Counsel submitted that performance of the decree by the applicant (2<sup>nd</sup> Defendant in the counter-claim) mean that the Applicant vacates the suit land and pay the costs of the suit. That no security is necessary for an obligation to vacate a property in obedience of court orders. The Applicant invited the court to take judicial notice of the Applicant’s economic stature. That it has capacity to settle the decree without difficulty.

That the costs have not been determined. That there is no possibility that the Respondent/decreed holder will have difficulty in recovering the same so as to require the giving of security. Counsel submitted that the court has unfettered discretion to dispense with the requirement that the Applicant give security for costs but that if the court is inclined to order for the furnishing of security then an undertaking by the Applicant or a guarantee by the Bank or Insurance Company will be adequate.

That there is no requirement in Order 42 Rule 6 of the [\*Civil Procedure Rules\*](#) that the Applicant demonstrate that the appeal is arguable. That that requirement is a preserve of the Court of Appeal under the provisions of Rule 5(2)(b) of the [\*Court of Appeal Rules\*](#).

16. The Plaintiff and the 3<sup>rd</sup> Defendant in the counter-claim in their respective applications dated 31<sup>st</sup> October, 2022 did not give any undertaking on provisions of security. But it was submitted on behalf of the Plaintiff that the suit property has been fenced off and taken over by the Defendant. That the Defendant has therefore no loss to suffer if the stay is granted as they are in possession. That however, the Plaintiff is not averse to the court considering the security to be put forth by the Applicants and that it should be minimal.

Similar submissions were made on behalf of the 3<sup>rd</sup> Defendant in the counter-claim.

17. It was submitted on behalf of the Defendant/Respondent on the issue of provision of security that the Applicants have made no effort to offer security for due performance of the decree. That they are in violation of the principles in the George Masibayi Wafula case which makes offering of security a pre-requisite for granting of such application.
18. The purpose of the requirement for security as stated in the case of [\*Aron C. Sharma vs Ashana Raikundalia t/a Raikundaria & Co Advocates & 2 others\*](#) [2014]eKLR is to guarantee the due



performance of such decree or order as may ultimately be binding on the applicant. In the case of *Butt vs Rent Restriction Tribunal* [1982]KLR 417 the court held, inter alia, that:

“a) The power of the court to grant or refuse an Application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal

b) The general principle in granting or refusing a stay is: if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory...”

In the case of *Shell Kenya Ltd v Benjamin Karuga Kibiru & Another* [1986] eKLR 410 the court stated that

“if it is shown that execution would render a proposed appeal nugatory then a stay can properly be granted.”

The award in the judgement being non-monetary save for the costs and given that the costs are yet to be computed and taxed or agreed on it is not possible at this stage to determine the amount of the decree or order that will ultimately be binding on the applicants to settle. This is therefore an appropriate case for provision of bank guarantee as security in terms of order 42 rule 6 (2) (b) *Civil Procedure Rules*.

19. The second prayer in the application is for an order restraining the Land Registrar from cancelling titles in respect of the suit lands to avoid rendering the appeal nugatory by transfer of ownership of the suit lands. It is just in the circumstances of this case that status quo of the registers in respect of the suit land as at the date of this ruling be maintained, pending hearing and determination of the appeal.
20. In conclusion, I find that the applications are merited and I allow them as follows;
  - i. An order of stay of execution of the judgement and decree issued herein on 30/09/2022 is granted pending hearing and determination of the applicants’ respective appeals to the Court of Appeal.
  - ii. The Applicants in each of the applications to provide as security, a bank guarantee from reputable banks for payment of such sums as will be required for the due performance of the decree or orders herein in the sum of Kshs.2,000,000 (Two million) within 45 days hereof. In default the stay order issued herein shall lapse.
  - iii. Status quo of the registers of the suit lands obtaining as at the date hereof be maintained pending hearing and determination of the appeals to the Court Appeal.
  - iv. Costs of the Application to the Defendant/Respondent.

Orders accordingly.

**RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 18TH DAY OF MAY 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

**In the presence of:**

Maureen- Court Assistant.

Odhiambo Anthony Advocate for Wasuna for the for the 2nd Defendant in the Counter-claim/Applicants.



Yogo Advocate for the Plaintiff and for the 3rd Defendant in the counter-claim/applicants.

Okero Advocate for the Defendant/Respondent.

