



County Government of Migori & another v Ogada & another (Environment and Land Appeal 45 of 2021) [2023] KEELC 18616 (KLR) (27 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18616 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL 45 OF 2021**

**MN KULLOW, J
JUNE 27, 2023**

BETWEEN

COUNTY GOVERNMENT OF MIGORI 1ST APPELLANT

CHIEF HEALTH OFFICER 2ND APPELLANT

AND

GEORGE OUMA OGADA 1ST RESPONDENT

TOBIAS OBILO ANDURU 2ND RESPONDENT

RULING

1. By Notice of Motion dated 25th May, 2023 and filed under Certificate of Urgency, the Appellants/ Applicants sought for the following orders: -
 - a. Spent.
 - b. This Honorable Court be pleased to grant temporary stay of execution of the decree of the lower court rendered on 09/11/2021 but wrongly dated 10/02/2022 together with all the consequential orders and proceedings elsewhere JR No. 7 of 2023 before this Honourable Court pending hearing and determination of this Application.
 - c. This Honorable Court be pleased to grant temporary stay of execution of the decree of the lower court rendered on 09/11/2021 but wrongly dated 10/02/2022 together with all the consequential orders and proceedings elsewhere JR No. 7 of 2023 before this Honourable Court pending hearing and determination of this Appeal.
 - d. Costs of the Application be provided for.
2. The application is based on the 6 grounds on its face and the Supporting Affidavit sworn by the County Secretary of the 1st Applicant; Oscar Olima on even date. He avers that he was appointed into the office



end of the year 2022 and only learnt of the matter when the execution proceedings in Judicial Review No. 7 of 2023 were brought to his attention.

3. It is his contention that the claim herein involves huge sums of public funds of about Kshs. 10,000,000/= and the delay in prosecuting the matter since the filing of the Appeal has been occasioned by the previous persons occupying various positions in the previous county government administration.
4. He further argued that the Appeal as filed raises weighty and triable issues touching on issues of illegalities and locus standi of the Respondents to institute the suit in the trial court.
5. It was his claim that the 1st Applicant stands to suffer substantial loss if execution of the impugned decree is allowed to proceed since the 1st Respondent does not have any known means of income; thus, in the event that the Appeal is successful, the 1st Respondent may be unable to refund the colossal public monies. He maintained that the delay in filing the application had been explained and that the issue of security does not lie against the Applicants.
6. The application was opposed, the 1st Respondent filed a Replying Affidavit sworn on 05.06.2023. It was his contention that the instant Application was an abuse of the court process since this court had already issued an order of stay of execution on the 27/09/2022 vide ELC Misc. Application No. 3 of 2022. However, the Applicants persistently refused and/or failed to comply with the directions given by the court.
7. He maintained that he is the registered proprietor of the suit parcel No. Suna East/ Wasweta I/ 604 and averred that the continued occupation of the said land by the Applicants is illegal and unlawful. He further deposed that he has never donated the subject land for any public use as alleged by the Applicants.
8. He dismissed the Application as having been filed after an unreasonable delay and argued that he stands to suffer prejudice if the same is allowed and thus urged the court to dismiss the Application.
9. This court issued directions that the Application be canvassed by way of written submissions; both parties filed their rival submissions together with authorities which I have read and taken into account in arriving at my Ruling.

Analysis And Determination

10. From the pleadings and the rival submissions before this court, it is my considered opinion that the sole issue arising for determination is whether an Order for Stay of Execution can issue against the judgment of the trial court dated 9/11/2021 and decree issued on 10/02/2022 in the circumstances;
11. Order 42 Rule 6(1) of the *Civil Procedure Rules*, 2010 empowers the court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. It provides as follows: -
 - (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. (emphasis mine)
12. The purpose and objective of the order for stay of execution is to preserve the substratum of the appeal in order to ensure that the appeal is not rendered nugatory and to safeguard the right of the



Appellant who is exercising his right of appeal. See *Consolidated Marine. vs. Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi).

13. The first condition to be proved is whether substantial loss may result to the Applicant if the stay of execution order is not granted. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma vs Abuoga* (1988) KLR 645 where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

14. The onus is on the Applicant to demonstrate the substantial loss and damages he would suffer if the order for stay of execution sought is not granted. It is not sufficient to merely state that substantial loss may occasion on the applicant without demonstrating the same to the court. (See *New Stanley Hotel Ltd -vs- Arcade Tobacconist* (1980) KLR 757).

15. It is the Applicant’s assertion it is a government organ, wholly funded by public funds. That the decretal sum if paid would be withdrawn from the public fund and the general public is thus bound to suffer substantial loss. Further, that the same may jeopardize other essential public services and other projects that the Appellant is mandated by law to deliver to the public.

16. He further maintained that the Respondent has no known source of income and thus if the decretal sum is paid to the Respondent, the colossal amount from the public fund may not be recovered in the event that the Appeal is successful.

17. The Respondent on the other hand maintained that the Appellant/ Applicant is in illegal occupation of his land and thus he ought to be paid the value of the said land as per the decree of the trial court.

18. In totality of the foregoing, I find and hold that the Applicants have satisfactorily proved the substantial loss that they are likely to suffer unless an order for stay of execution is granted. He has demonstrated that the 1st Respondent is in the process of executing the decree vide Judicial Review No. 7 of 2023 hence the need to grant the orders for stay of execution as sought in the interest of justice.

19. The second condition is whether the Application has been filed without undue delay. The Trial court issued its judgment on the 9th November, 2021 while the instant Application was filed on the 25/05/2023. The Applicant in giving an explanation for the said delay occasioned in filing the Application; stated the changes in the administration in the county government and the process for the change of officials in the county government following the general election. This court takes judicial notice of the process in the change of regimes and the appointment of the respective officials after the general election and thus accordingly finds that the explanation is sufficient in the circumstances.

20. The final condition to be proved is on the deposit of security for costs for the due performance as the court may direct. It was the Applicant’s contention that Order 42 Rule 8 exempts it from providing security before granting an order for stay of execution as sought. The Respondent on the other hand submitted that if this court is inclined to grant an order for stay of execution, then the Appellant should be directed to pay him half of the decretal amount.

21. In the case of *Aron C. Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates* the court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the



respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

Conclusion

22. In the premises, I accordingly find that the Application dated 25th May, 2023 is merited and I proceed to allow the same on the following terms: -
- a. An Order for Stay of Execution of the judgment and decree of the lower court rendered on 09/11/2021 but erroneously dated 10/02/2022 be and is hereby issued together with all consequential orders arising therefrom pending the hearing and determination of the Appeal.
 - b. Further, an Order of Stay of Proceedings be and is hereby issued in ELC Judicial Review Case No. 7 of 2023 pending the hearing and determination of the Appeal.
 - c. The Applicant to deposit a Banker’s Guarantee equivalent to the decretal sum of Kshs. 9,200,000/= in court being Security for Costs for the due performance of the decree within 45 days from the date of this Ruling.
 - d. Failure to comply with order (c) hereinabove, Order (a) and (b) hereinabove shall automatically lapse.
 - e. Costs of the Application to abide the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 27TH DAY OF JUNE, 2023.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

.....for the Applicant/ Appellant

.....for the Respondent

Tom Maurice - Court Assistant

