



Kayo v Sentu (Environment and Land Appeal 19 & 21 of 2021 (Consolidated)) [2023] KEELC 18417 (KLR) (26 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18417 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL 19 & 21 OF 2021 (CONSOLIDATED)
EM WASHE, J
JUNE 26, 2023
(FORMERLY NAROK ELCA NO.5 “B” OF 2019)**

BETWEEN

EMMANUEL LEKAKENY KAYO APPELLANT

AND

ORAMAT OLE SENTU RESPONDENT

AS CONSOLIDATED WITH

ENVIRONMENT AND LAND APPEAL 21 OF 2021

BETWEEN

EMMANUEL LEKAKENY KAYO APPELLANT

AND

ORAMAT OLE SENTU RESPONDENT

RULING

1. The Appellant (hereinafter referred to as “the Applicant”) has moved this Honourable Court through a Notice of Motion application dated 16th December 2022 (hereinafter referred to as “the present application”) seeking for the following orders; -
 - a. That the instant application be certified urgent and same be heard ex-parte in the first instance. (SPENT)
 - b. That pending the hearing and determination of the instant application, the Honourable Court be pleased to grant an interim order of stay of execution and/or decree issued on the 29th day of



June 2022 together with all consequential orders arising therefrom and/or attendant thereto.
(Spent)

- c. That the Honourable Court be pleased to grant an order of stay of execution and/or enforcement of the judgement and decree issued on the 29th of June 2022 together with consequential orders arising therefrom and/or attendant pending the hearing and determination of the appeal in terms of the Notice of Motion dated 7th day of June 2022.
 - d. Costs of this Application do abide the Appeal.
 - e. Such other and/or further orders as this Honourable Court may deem just and expedient to grant.
2. The grounds in support of the prayers hereinabove have been outlined in the body of the present application and further explained in the supporting affidavit sworn on the 19th December 2022.
 3. The summary of the grounds pleaded by the Applicant are as follows; -
 - a. The Honourable Court determined this Appeal through its judgement pronounced 29th of June 2022.
 - b. The Applicant being dissatisfied with the said judgement pronounced on 29th of June 2022 has filed an Appeal in the Court of Appeal.
 - c. However, pending the hearing and determination of the pending Appeal before the Court of Appeal, the Applicant seeks for a stay of execution of the judgement and decree issued on the 24.10.2022.
 - d. According to the Applicant, the Respondent herein is desirous of executing the said judgement and Decree issued on the 24.10.2022 which includes the eviction of the Respondent from the disputed portion of land which he currently occupies.
 - e. Further to the pending eviction thereof, the Respondent is also seeking costs against the Applicant as part of the execution process.
 - f. In the circumstances thereof, the Applicant is seeking an order of stay of execution against the said judgement and decree issued on the 24.10.2022 as the intended Appeal will be rendered nugatory and an exercise if futility the Respondent proceeds with the said enforcement of the judgement and decree issued on the 24.10.2022.
 - g. The Applicant further pleaded that he will suffer substantial loss if the Respondent is allowed to implement the judgement and decree issued on the 24.10.2022 before the hearing and determination of the intended Appeal.
 - h. The Applicant stated that there was no prejudice which would be suffered by the Respondent if the orders sought in the present application are granted pending the hearing and determination of the intended Appeal before the Court of Appeal.
 - i. The Applicant was willing and ready to offer and or comply with any orders relating to issuance of security thereof.
 4. The present Application was indeed served on the Respondent who filed his Grounds of Opposition dated 26th January 2023.
 5. The Grounds of Opposition dated 26th January 2023 opposed the present Application on the following grounds; -



- a. This Honourable Court did not have the jurisdiction to entertain the present Application filed by the Applicant.
 - b. The issues raised in the present Application should be canvassed and/or dealt with by the Court of Appeal by virtue of the Notice of Appeal filed on the 13th July 2022.
 - c. The Respondents pleaded that the present Application raises similar issues as those determined through a Ruling pronounced on the 29th of June 2021 and therefore is Res Judicata.
 - d. According to the Respondent, the present Application was in fact an abuse of the Court process, lacked sufficient grounds and is merely filed to obstruct justice in these proceedings.
6. The Honourable Court after receipt of the above pleadings directed parties to file their written submissions in support of their pleadings.
 7. The Applicant filed his submissions on the 13th of March 2023 while the Respondent filed his submissions on the 24th of March 2023.
 8. This Honourable Court has gone through the pleadings and the submissions of the parties herein and identified the following issues for determination; -

Issue No. 1- does this honourable court have jurisdiction to entertain the present applicatin?

Issue No. 2- Is the Present Application Res Judicata?

Issue No. 3- has the applicant satisfied the principles of granting a stay of execution pending appeal?

Issue No. 4- who bears the costs of the present application?

9. The issues for determination having been outlined hereinabove, the Honourable Court will proceed to evaluate the same and make its determination as provided hereinbelow; -

Issue No. 1- Does this Honourable Court Have Jurisdiction to Entertain the Present Application?

10. Indeed, Jurisdiction is the very foundation of any legal process before a Court of Law.
11. In the case of the Owners of Motor Vessel “lillian S”-versus- Caltex Oil (kenya) Limited (1989), the Court observed as follows; -

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

12. In another case of Samuel Kamau Macharia & Another -versus- Kenya Commercial Bank Limited & 2 Others (2012) eKLR, the Court held as follows; -

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”



13. In the present Application, the applicant invoked the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010, Order 42 Rule (6) of the Civil procedure Rules, 2010 and Article 45, 50 and 159 (d) of the Kenyan Constitution, 2010.
14. While Order 9 Rule 9 might not be of assistance in the present Application, Order 42 (6) of the Civil Procedure Rules, 2010 indeed grants statutory jurisdiction for applications dealing with Stay of execution in case of appeal.
15. The provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010 state as follows; -

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 an appeal is preferred shall be at liberty, in application being made, to consider such an 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 be apply to the appellate court to have such order set-aside.”
16. The Respondent’s position is that once this Honourable Court pronounces its judgement, it becomes *functus officio*.
17. Further to that, the Respondent submitted that in view of the Notice of Appeal filed on the 20th of December 2022, then this Honourable Court cannot entertain the present Application for the reason that is only the Court of Appeal that can entertain prayers of stay of execution.
18. The Applicant unfortunately did not make any submissions on this aspect.
19. Be as it may, the provisions of Order 42 Rule 6 (1) expressly confer jurisdiction on the Court whose Order is being appealed against to entertain an application for stay pending appeal.
20. Consequently therefore, it is this Honourable Court’s considered view that it has statutory jurisdiction to entertain and determine the present application before.

Issue No. 2- Is the Present Application Res Judicata?

21. The second issue raised is whether or not the present Application is Res Judicata to a similar one determined on the 29th of June 2021.
22. According to the Respondent’s submissions, the Applicant herein having lost in the Trial Court filed a similar Application before this Court pending the hearing and determination of the first Appeal which was determined on 29th of June 2021.
23. Consequently therefore, it is not proper for the Applicant to file another application for stay pending appeal in the same Court.
24. Again, the Applicant did not make any submissions on this issue of Res-Judicata.
25. However, from the understanding of this Honourable Court, the earlier application was seeking a stay of the Trial Court judgement pending the hearing and determination of the first Appeal which was determined on the 29th June 2022.



26. The present application seeks to stay the execution of the judgement pronounced on the 29th of June 2022 pending a second Appeal in the Court of Appeal.
27. Although the two applications for stay of execution may look similar, the judgement which the Applicant in the present Application is seeking to stay execution pending appeal is different from that pronounced by the Trial Court.
28. The present Application is not Res Judicata as alleged by the Respondent and should be heard on its merits.

Issue No. 3- Has the Applicant Satisfied the Principles of Granting A Stay of Execution Pending Appeal?

29. The provisions of Order 42 Rule 6(2) state as follows; -

“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.

30. In the case of *RWW v EKW* [2019] eKLR, the Court made the following observation and/or finding; -

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment.

The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

31. In another case of *Samvir Trustee Limited-versus- Guardian Bank Limited Nairobi (milimani)* HCCC 795 OF 1997, the Learned Judge expressed the following; -

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits



of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

32. Based on the express statutory provisions of the Civil Procedure Rules, 2010 and the authorities provided hereinabove, the main principles of determining applications for stay pending appeal can be broken down into three aspects; -
 - a. Substantial loss.
 - b. Application made without delay
 - c. Provision of Security pending the hearing and determination of the intended appeal.
33. On the aspect of substantial loss, the Applicant is seeking to stay a decision of this Honourable Court directing him to vacate a portion of the property known as L.R.NO.TRANSMARA/OLOMISMIS/766 belonging to the Respondent herein.
34. According to the Ground Report filed by the Sub-County Land Registrar, Transmara East, West and South dated 17th November 2022, the Applicant occupies a portion of approximately 7.89 Acres (3.23 Hectares) in the property known as L.R.NO. TRANSMARA/OLOMISMIS/766.
35. The origin of the dispute in the Trial Court was a boundary dispute between the property known as L.R. No. Transmara/Olomismis/766 belonging to the Respondent and L.R.NO. TRANSMARA/OLOMISMIS/769 occupied by the Appellant.
36. It is important to appreciate that there is no ownership dispute between the two properties known as L.R.No. Transmara/Olomismis/766 and L.R.No. Transmara/Olomismis/769.
37. The issue of simply how the boundaries of these properties namely L.R.No. Transmara/Olomismis/766 and L.R.No. Transmara/Olomismis/769 should be demarcated and if one party is in occupation of some portion which is not within his property to vacate the same.
38. According Paragraph 34 of the Judgement pronounced by this Court on the 29th of June 2022, there is evidence from the Trial Court proceedings that the Applicant herein is cultivating and/or utilising the said portion in dispute for his personal gain.



39. The Orders of this Honourable Court directed that the Applicant be evicted from the portion he occupies within L.R.No. Transmara/Olomismis/766 within 30 days upon receipt of a Ground Report by the Sub-County Land Registrar which was issued on the 17th November 2022.
40. If indeed the applicant is evicted from the disputed portion of land which he has cultivated various crops, then the said process of evicting the Applicant would require the destruction of the crops, trees and/or any structures therein and cause substantial loss.
41. The Respondent's prayer seeking the eviction of the Applicant further confirms that indeed there must be some occupation and/or activities going on within the disputed portion of land and it would be detrimental to the Applicant to be evicted before he exhausts all legal avenues of being heard or fair hearing.
42. The portion of land in dispute is now well described by the Sub-County Land Registrar and whoever wins the second Appeal will not have a difficult to take possession and/or enforce any eviction orders that may be applicable at that time.
43. The Applicant has also raised the issue of costs emanating from the proceedings in the Trial Court as well as the first Appeal herein.
44. The Applicant is of the view that the execution of the judgement pronounced on 29th June 2022 will be enforced through the taxation of the bill of costs and thereafter recovery of such costs.
45. The Applicant submits that this exercise of taxation and recovery of costs is likely to happen before the hearing and determination of the Intended Appeal and therefore render the entire Appeal process an exercise in futility.
46. While this position could be true, the issue of security as one of the conditions to granting a stay of execution is provided for.
47. Looking at these two issues, this Honourable Court is therefore satisfied that the Applicant has proved substantial loss as required by law.
48. The second aspect is whether the present application has been brought before the Court within a reasonable time.
49. In this present case, this Honourable Court pronounced its judgement on the 29th of June 2022.
50. The Applicant herein filed his Notice of Appeal dated 7th July 2022 on the 13th of July 2022.
51. The present Application was then filed on the 20th of December 2022 after the filing of the Sub-County Land Registrar's Ground Report on the 17th of December 2022.
52. In essence therefore, this Honourable Court is satisfied that the present application has been filed without any delay whatsoever.
53. The third and last aspect is the issue of security which is a requirement in the granting of a stay of execution pending Appeal.
54. In the present case, the dispute is a portion of land which is being claimed by the Applicant as well as the Respondent.
55. The intended Appeal before the Court of Appeal is the second Appeal by the Applicant herein.
56. It is only fair and just that the Applicant do provide some costs for these two litigations which have been concluded pending the hearing and determination of the second Appeal before the Court of Appeal.



57. To this end, this Honourable Court assesses a sum of Kenyan Shillings Two Hundred Thousand (KShs 200,000/-) as sufficient security on the costs incurred by the Respondent in the Trial Court and the first Appeal before this Honourable Court.

Issue No. 4- Who Bears the Costs of the Present Application?

58. On this last issue, this Honourable Court is of the view that the costs of the present Application should follow the outcome of the second Appeal before the Court of Appeal.

Conclusion

59. This Honourable Court upon considering the present Application herein dated 16th December 2022, the same is hereby determined as follows; -

- a. The judgement pronounced on the 29th of June 2022 and the subsequent decree issued on the 24th of October 2022 be and are hereby stayed pending the hearing & determination of the appeal filed at the court of appeal.
- b. The applicant herein is ordered to deposit a sum of kshs 200,000/- within 30 days from the date of this ruling as security.
- c. The costs of the application dated 16th December 2022 will abide the outcome of the appeal at the court of appeal.
- d. In default of compliance with order no.2, the stay of execution order will automatically lapse.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON DAY OF 26TH JUNE 2023.

EMMANUEL.M.WASHE

JUDGE

IN THE PRESENCE OF:

Court Assistant: Mr. Ngeno

Advocates for the Applicant: Mr. Mukoya (N/A)

Advocates for the Respondent: Ms. Ochwal

