



Sirtich (Suing as personal and legal representative of the Estate of the Late Michael Kiptum Sirtich - Deceased) v Rono (Environment & Land Case 38 of 2021) [2023] KEELC 18416 (KLR) (22 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18416 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 38 OF 2021
MN MWANYALE, J
JUNE 22, 2023**

BETWEEN

WILSON KIPROP SIRTICH (SUING AS PERSONAL AND LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE MICHAEL KIPTUM SIRTICH - DECEASED) PLAINTIFF

AND

RICHARD KIPTARBEI RONO DEFENDANT

RULING

1. This ruling related to the Notice of Motion dated March 6, 2023 brought under order 42 (6), order 22 (22) of the Civil Procedure Rules and Section 1A and 3A of the Civil Procedure Act. The Applicant is seeking for orders that;
 - i. Spent
 - ii. Spent
 - iii. That, pending the hearing and determination of the intended appeal the Court be pleased to stay the execution of the Judgement delivered by Court on 9th February 2023 together with all consequential orders thereof.
 - iv. That costs of this application be provided for.
2. This application is premised on four grounds set out on the face of it as well as supporting affidavit sworn by Richard Kiptarbei Rono. It is the Applicant's case that having been aggrieved by the Judgment delivered by this Court on 9th February 2023, he lodged a Notice of Appeal, which Notice is annexed to the application. He avers that unless an order for stay of execution is granted, he would be evicted from the suit property. That the intended appeal is arguable with High chances of success.



3. In opposing the application, the Plaintiff/Respondent swore a Replying Affidavit dated 8th May 2023. He deposed that the Applicant has not satisfied the conditions for grant of the orders sought. That there is Notice of Appeal property filed before Court to warrant orders. The Respondent contends that the Notice of Appeal annexed to the instant application was filed out of time and without leave of Court. He urged this Honourable Court to dismiss the application with costs.
4. Directions were taken on 8th May 2023 for disposal of the application by way of written submissions. Both parties have complied by filing their respective submissions.
5. In brief, the Applicant vide written submissions filed on 22nd May 2023, submitted that he had met the ingredients for grant of stay of execution in line with the provisions of order 42 rule 6 of the Civil Procedure Rules. That it was in the interest of justice that stay orders are issued to prevent the appeal being rendered nugatory.
6. Divergently, the Plaintiff/Respondent vide written submissions filed on 22nd May 2023 submitted that the present application did not meet the conditions precedent for grant for the orders sought. That the application was a ploy to deny the estate of the late Michael Kiptum Sirtich from enjoying fruits of their judgment.

It was the Respondent's submissions as well that the Notice of Appeal dated 9th February 2023 was filed out of time and without leave of Court. Essentially, that there was no proper appeal before this Court to warrant grant of the orders sought. What's more, that there was no receipt evidencing payment of filing fees in relation to the Notice of Appeal. In view of the defective Notice of Appeal, the Respondent prayed that the application be dismissed with costs to prevent the ends of justice from being defeated.

Analysis And Determination:

7. I have carefully considered the application for stay, affidavits in support and in opposition, submissions on record as well authorities cited therein. I find one main issue for determination;
 - i. Whether the Applicant is entitled to the orders sought.
8. Prior to determining this issue, I will commence by dealing with a preliminary issue raised by the Respondent vide Replying Affidavit dated 8th May 2023. Paragraph 10 of the Affidavit in question deposed to the impropriety of the Notice of Appeal dated 9th February 2023. Particularly that the said Notice was filed and served out of time and without leave of Court. The Respondent proceeded to Annex a Notice of Appeal allegedly filed on 8th March 2023. The Applicant on his part had also annexed copy of Notice of Appeal. However, a keen look at the said Notice reveals no Court stamp to prove its filing date.
9. In view of these contrasting assertions, the Court took the liberty to peruse its record. Upon perusal of the record, this Court established that indeed there is a Notice of Appeal duly filed on 17th February 2023 as well as a receipt evidencing payment of Court's filing fees. This therefore settles the issue as to when the Notice of Appeal dated 9th February 2023 was filed. As regards whether the same was filed within time, Rule 77 (2) of the [Court of Appeal Rules](#), 2022 (the applicable rules in this case) provides that;
 - (2) Each notice under sub-rule (1) shall subject to rules 84 and 97, be ledged within Fourteen plays after the date of the decision against the decision for which appeal is lodged."



10. It is not in dispute that the judgment intended to be appealed against was delivered on 9th February, 2023 while the Notice of Appeal was filed on 17th February 2023 as aforementioned. This is a period of exactly seven (7) days between the date of delivery of judgement and date of filing Notice of Appeal. I therefore find that the Notice of Appeal dated 9th February 2023 is properly on record having been filed within the timeline set out under Rule 77 (2) of the *Court of Appeal Rules, 2022*.
11. I now wish to delve into the substantive issue whether the Applicant is entitled to the orders sought.
12. The principles guiding stay of execution pending appeal are well settled. These principles are provided under order 42 rule 6 (2) of the *Civil Procedure Rules* which state that:

“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 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.”
13. Thus, an Applicant ought to satisfy the Court that:
 - i. Substantial loss may result to him if the order is not made
 - ii. The application has been made without unreasonable delay and
 - iii. Security for the due performance of a decree or order.
14. The Court of Appeal in the case of *Butt -vs- Rent Restriction Tribunal* (1982) KLR 417 gave guidance on how a Court ought to exercise its discretionary power to grant stay of execution pending appeal. The Court held that;
 - a) the power of the Court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 - b) Secondly, 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 the appeal Court reverse the judge’s discretion.
 - c) Thirdly, 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
 - d) Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order for stay of execution to lapse.”
15. There are numerous other decisions binding this Court on the issue of stay of execution pending appeal, which this Court appreciates and wishes not to belabor the point.
16. Back to the instant application, the first criterion as set out under order 42 rule 6 (2); whether the Applicant shall suffer substantial loss if, the stay order is not made. The Court of Appeal in the case of



Kenya Shell Limited -vs- Benjamin Karuga Kibiru and Another (1986) eKLR observed the following as regards substantial loss;

“it is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there were no evidence of substantial loss to the Applicant, it would be a rear case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, it the corner stone of both jurisdictions for granting a stay.”

17. From the foregoing, the Applicant has to show the loss they are likely to suffer if an order for stay is not granted. The Applicant herein submitted that he is apprehensive that in the implementation of the Court’s decree, the Respondent will forcefully evict him from the suit property, which he has been in occupation since 1978 as his home with permanent. Further this Court is alive to the fact that the original title deed over the suit property has already been collected by the Respondent as ordered by this Court vide its judgement delivered on 9th February 2023. In the Court’s view therefore, the Applicant has demonstrated the specific substantial loss he is likely to suffer it stay of execution order is not granted.
18. As regards the second criterion; whether the application has been brought without unreasonable delay, judgement being appealed against was delivered on 9th February, 2023 while this application was filed on 9th March 2023. This translated to one month’s period, which in the Court’s opinion does not amount to inordinate delay.
19. On the last criterion; security for due performance of the decree, the Applicant submitted his willingness to provide reasonable security considering he is a peasant farmers. Given that the original title deed is in the custody of the Plaintiff/Respondent, that the current value of the suit land cannot be a curtained at this point and that no specific sum was brought for the, this Court proceed to exercise its discretion and find that security for du performance of the decree in this case does not suffice.
20. Accordingly, the Applicant is granted an opportunity to pursue his appeal in the Court of Appeal vide an Order for stay of execution of the Judgment of this Court delivered on 9th February 2023 together with all consequently orders thereof pending the hearing and determination of intended Appeal; the record be filed with 30 days from date of this Ruling failure to which the stay orders lapse.

DATED AND DELIVERED AT KAPSABET THIS 22ND DAY OF JUNE, 2023.

HON. M. N. MWANYALE,

JUDGE.

