



**Wanjau v Kairegi & 4 others (Environment and Land Appeal
E040 of 2022) [2023] KEELC 18295 (KLR) (20 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18295 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E040 OF 2022**

**MD MWANGI, J
JUNE 20, 2023**

BETWEEN

NAFTALY WAMBUGU WANJAU APPELLANT

AND

AMOS KIMANI 1ST RESPONDENT

KIRAGU KAIREGI 2ND RESPONDENT

DAVID MWANGI KIRAGU 3RD RESPONDENT

JANE MUGUREGURE NDUNGU 4TH RESPONDENT

GEOSTAR PROPERTIES COMPANY LIMITED 5TH RESPONDENT

(In respect of the Notice of Motion dated 31st January 2023 seeking for orders of stay of execution of the judgment dated 19th May 2023 and the subsequent decree of the magistrate's court pending hearing and determination of the appeal in this case)

RULING

Background

1. The Appellant herein was the Plaintiff in the Nairobi Chief Magistrate's Civil Case No 6275 of 2019. His case was dismissed by the court which instead upheld the counter-claim against him declaring the 1st Respondent herein as the owner of the suit property and directing the 5th Respondent to cancel and revoke the Appellant's certificate of ownership of the suit property. The Appellant was dissatisfied with the Judgment of the court and consequently appealed to this court against the entire judgment of the Magistrate's court.
2. Pending the hearing and determination of the appeal, the Appellant prays for a stay of execution of the Judgment/Decree of the Magistrate's Court. The grounds upon which the application is grounded



are on the face of the application and in the Supporting Affidavit sworn by the Appellant on January 31, 2023.

3. The deponent avers that he is likely to suffer substantial loss unless the orders of stay are granted. The Judgment of the Magistrate's court directed that the 1st Respondent is the owner of the suit property and ordered the 5th Respondent to cancel and revoke his title. The Appellant asserts that he has had possession and occupation of the suit property and there was no imputation directly or indirectly that he had obtained the certificate fraudulently.
4. The Appellant argues that his application has been brought without undue delay. He further affirms that his appeal has high chances of success.

Response to the application.

5. The application was opposed by the 1st, 3rd and 4th Respondents who filed a joint replying affidavit sworn by one David Mwai Kiragu.
6. The deponent avers that he already extracted the order arising from the Judgment appealed from and went ahead to implement the directions of the court and that there is nothing to preserve at this stage. The deponent asserts that the application is overtaken by events since the 1st Respondent has already executed the judgment by transferring the ownership of the suit property in his name on May 27, 2022 and subsequently transferring the same to a 3rd party Lilian Njeri Nyagaki. He exhibited the certificates issued to the new owner Lilian Njeri Nyagaki.
7. The deponent further asserts that the Appellant's application is actuated by malice and bad faith, the sole intention being to deny the Respondents the fruits of their judgment. He states that the Appellant had filed a similar application before the Magistrate's Court which was however dismissed on November 2, 2022.
8. The deponent states that the application by the Appellant has not been brought without undue delay as alleged. The application was filed over 2 months after the dismissal of the application before the Magistrate's court which amounts to unreasonable and inordinate delay. He prays for the dismissal of the application.

Court's directions.

9. The court's directions were that the application be canvassed by way of written submissions. Both sides complied and the court has had the opportunity to read the submissions filed.

Issues for determination

10. The Court of Appeal in *Halal and Another Vs Thornton & Turnip Ltd (1990) eKLR*, in not so many words set the preconditions for the grant of an order of stay of execution pending appeal. The court stated that:-

' Thus the superior court's discretion is fettered by three conditions. Firstly, the Applicant must establish a sufficient cause; secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant stay; and thirdly, the Applicant must furnish security. The application must off course be made without unreasonable delay.'

11. Having considered the Application by the Appellant, the replying affidavit on behalf of the 1st, 3rd & 4th Respondents, and the submissions filed, the court is of the view that the issues for determination in this matter are: -



- a. Whether the application has been made without unreasonable delay.
- b. Whether the Appellant has demonstrated substantial loss he is likely to suffer unless the orders sought are granted.
- c. Who bears the costs of the application.

Analysis and determination.

A. Whether the application has been made without unreasonable delay.

12. As already pointed out, the Appellants application is dated January 31, 2023, whereas the judgment appealed from was delivered on May 19, 2022. The Appellant in his submissions avers that his earlier application for stay before the Magistrate's court was dismissed on November 2, 2022. Apparently it took him a total of 90 days after his application was disallowed by the Magistrate's court before filing the current application in this court. No explanation has been offered for the delay of 90 days.
13. As to whether the application was made without unreasonable delay, my finding is that there was unreasonable delay on the part of the Applicant. The period of 90 days by all standards and considering the circumstances of this case is unreasonable delay.

B. Whether the Applicant has demonstrated the substantial loss he is likely to suffer unless the orders sought are not granted.

14. In the case of *James Wangalwa & another -Vs- Agnes Naliaka Cheseto (2012) eKLR*, the court opined that the issue of substantial loss is the cornerstone of the jurisdiction of the court in granting stay of execution pending appeal under Order 42 rule 6 of the *Civil Procedure Rules*. However, the fact that the process of execution has been put in motion or is likely to be put in motion, by itself does not amount to substantial loss. This is so because execution is a lawful process. The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal.
15. The court in *Jason Ngumba Kagu & 2 others -Vs- Iatra Africa Assurance Company Ltd (2014) eKLR* held that the court must perform a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal.
16. The Respondents in this matter filed a replying affidavit stating that the transfer of the certificate of title to the 1st Respondent has already been effected. In essence, execution has already happened. The Appellant/Applicant did not respond and or deny the averments in the replying affidavit. So, as it is, the uncontroverted evidence before the court is that execution has already been completed. The horse has already bolted, so to speak. What then is there to stay?
17. The Appellant's application is therefore overtaken by events. Additionally, the Appellant has not explained the unreasonable delay in filing the application; neither has he demonstrated the substantial loss he is likely to suffer if the orders sought are not granted. Accordingly, I dismiss the application with costs for want of merits.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE 2023.

M.D. MWANGI

JUDGE



In the virtual presence of

No appearance by the parties.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

