



Ooko v Khayadi (Sued on Behalf of Emily Khayadi Khayesi - Deceased) (Environment and Land Appeal 2 of 2023) [2023] KEELC 18533 (KLR) (15 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18533 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL 2 OF 2023
MN KULLOW, J
JUNE 15, 2023**

BETWEEN

LEONARD OOKO APPELLANT

AND

**FRED KHAYADI (SUED ON BEHALF OF EMILY KHAYADI KHAYESI -
DECEASED) RESPONDENT**

RULING

1. By Notice of Motion dated March 21, 2023, the appellant/ applicants sought for the following orders: -
 - a. Spent.
 - b. That pending the hearing and determination of this Application, this Honourable Court be pleased to grant interim order of execution of the judgment and/or decree issued on 26/1/2023
 - c. That pending the hearing and determination of the Appeal in terms of the Memorandum of Appeal herein (erroneously indicated as Notice of Appeal), this Honourable Court be pleased to grant interim order of execution of the judgment and/or decree issued on 26/1/2023.
 - d. Cost of this Application be provided for.
2. The application is premised on the ground on its face and on the applicant's supporting affidavit sworn one even date. He avers that judgment was delivered in the matter on 26/1/2023, whose effect was to order for his eviction from the suit land within 90 days. Aggrieved by the said decision, he lodged the instant Appeal which raises pertinent issues of law.
3. It is his claim that following the delivery of judgment in his favor; the Respondent is keen and desirous to execute the same, whose effect would be to evict him from the said land; where he has erected his home and has been in occupation since 1987.



4. He is therefore apprehensive that unless the orders for stay of execution sought are granted, he stands to suffer irreparable loss and the appeal will be rendered nugatory. He thus urged the court to allow the Application and grant the orders sought.
5. The application was opposed; the Respondent filed a Replying Affidavit sworn on April 13, 2023. It is his claim that Emily Kayadi Khayesi is the registered owner of the suit parcel of land and had been enjoying a quiet possession thereof until she left to reside in the USA and left him to take care of the land.
6. It is further his claim that sometimes in the year 2017, the Applicant trespassed into the suit land; started cultivating and developing a structure thereon. He consequently filed the lower court suit, which was heard and determined in his favor. He thus maintained that if the Application is allowed he stands to suffer irreparable loss.
7. It was also his contention that the Appeal and Application as filed are frivolous, vexatious and do not raise arguable issues to warrant the grant of the orders sought. Further, he argued that the orders issued by the trial court are negative orders incapable of stay and thus urged the court to dismiss the Application with costs.
8. The Application was canvassed by way of written submissions. Both parties filed their respective submissions which I have read and taken into account in arriving at my decision.
9. It is my considered opinion that the issues arising for determination are as follows;
 - i. Whether an Order for Stay of Execution can issue against the Judgment and Decree dated 26/01/2023.
10. The purpose and objective of an order for stay of execution is to preserve the substratum of the appeal by ensuring that the appeal is not rendered nugatory and the appellant's right of Appeal is safeguarded. See *Consolidated Marine v Nampijja & another*, Civil App No93 of 1989 (Nairobi).
11. Order 42 Rule 6(1) of the [Civil Procedure Rules](#) outlines the conditions to be considered in an Application for stay of execution. These conditions are couched in mandatory terms and must all be satisfied by an applicant to warrant the grant of the said Order for Stay of Execution. The section provides as follows: -
 - (2) 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.
12. The first ground to be established is whether substantial loss may result to the Applicant unless an order for stay of execution is granted and the onus is on the Applicant to demonstrate the substantial loss he stands to suffer. Substantial loss was defined in [James Wangalwa & another v Agnes Naliaka Cheseto](#) [2012] eKLR, where the court expressed itself as follows: -

“No doubt, in law, 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. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the



CPR. 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.” (emphasis mine)

13. As earlier stated, the applicant is under a duty to demonstrate a sufficient cause to warrant the grant of the orders sought. It is not enough to merely state that substantial loss may occasion without any explanation and demonstration of the loss and/or damages that would be suffered. (See *Kenya Shell Limited v Kibiru* [1986] KLR410 at page 417.)
14. The applicant contends that he has been in occupation of the suit land since the year 1987, where he has erected his home. It is his claim that the effect of the trial court judgment and decree was to order for his eviction from the said land and if executed, he stands to suffer irreparable loss and further that the appeal may be rendered nugatory.
15. The Respondent on the other hand argued that the Appeal and Application as filed are frivolous, vexatious and do not raise any arguable issues to warrant the grant of the orders sought. He further stated that that the orders sought to be stayed by the Applicant are negative orders incapable of being stayed. Negative Orders was discussed by the Court of Appeal in their decision in *Ndungu Kinyanjui v Kibichoi Kugeria Services & another* [2007] eKLR where it was held as follows: -

“.....that in an application under Rule 5(2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum, there would be nothing arising out of that decision for this court to enforce or to restrain by injunction... the decision of February 9, 2007 in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. Accordingly, no order of stay can properly issue relating to it...” (emphasis mine)
16. By a judgment dated January 26, 2023 the trial court entered judgment in favor of the Plaintiff and issued the following orders: -
 - a. A declaration be and is hereby made that Emily Khayadi Khayesi, the plaintiff herein is the lawfully registered proprietor of land parcel Suna East/ Wasweta I/ 11759.
 - b. The defendant, Leonard Omondi Ooko be and is hereby ordered to vacate land parcel No. Suna East/ Wasweta I/ 11759 within 90 days from the date hereof and in default he shall be forcibly evicted therefrom.
 - c. A Permanent Injunction be and is hereby issued restraining the defendant whether by himself, his servants, agents or anyone claiming under him from re-entering or trespassing onto land parcel No. Suna East/ Wasweta I/ 11759. The order shall remain suspended for 90 days from the date of this judgment.
 - d. The Officer Commanding Police Division Suna East to ensure compliance of the orders of this court.
 - e. The Plaintiff is awarded costs of the suit to be borne by the defendant.



17. The orders above as issued by the trial court, in my view are not negative orders; the applicant was ordered to give vacant possession of the suit land and in default eviction orders would issue. The effect of these orders was to direct the applicant to vacate the suit parcel, stop the Applicant from further occupation of the suit land and to forcefully remove him from the said land in the event of default. These orders are thus capable of being stayed and the allegations by the respondent are misconceived in the circumstances.
18. In view of the foregoing, it is my considered opinion that the appellant/ applicant has sufficiently demonstrated the substantial loss he is likely to suffer as a result of the eviction orders issued, upon failure to voluntarily vacate the suit land within 90 days. He risks being rendered homeless and destitute if the said orders are executed. Further, the dispute herein is on the ownership of the suit parcel and therefore, there is need to protect the substratum of the appeal to prevent the appeal from being rendered nugatory.
19. The Application herein was filed on 21/03/2023 whereas the trial court order was issued on 26/1/2023; which period is more than the 30days. The applicants have not given any explanation for the over 30 days' delay in filing of the instant Application. However, despite the failure to provide an explanation of the delay period, I find that the 23 days' delay does not amount to inordinate delay in the circumstances.
20. The last element to be considered is the deposit for the security for costs for the due performance of the decree. The applicant has not demonstrated his willingness and readiness to deposit any security for costs as may be directed by the court.
21. The respondent on the other hand, in his submission urged the court to order the Applicant to deposit Kshs. 1,000,000/= within reasonable time as security for costs pending the determination of the Appeal.
22. With regards to the said proposal by the respondent on the amount to be deposited as security for costs. I wish to point out that the amount of security to be deposited in an Application for stay of execution must be reasonable and the same should not be used to impede the Appellant's access to justice as a condition precedent before a matter is heard. (See Supreme Court decision in Petition No. 16 (E023) of 2021 *Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others*). It is therefore my finding that the amount of Kshs. 1,000,000/= proposed by the Respondent is unreasonable in the circumstances.
23. I am however guided by the decision in *Butt v Rent Restriction Tribunal* (1982) KLR 417 where the court outlined the factors to be considered in determining the amount to deposited as security for costs. The court held that;
 - “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. 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.
 3. 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.



4. The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. 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 for costs as ordered will cause the order for stay of execution to lapse”.

24. In light of the above, I find that there is need for the Applicant to deposit security for costs. The amount to be deposited will however be balanced against the Appellant’s right of appeal, against an equally important right of the Respondent to enjoy the fruits of his judgment. The totality of the foregoing is that the Applicant has proved his case to the required standard to warrant the grant of the orders sought.

Conclusion

25. In the upshot, I accordingly find that the Application dated March 21, 2023 is merited and is hereby allowed on the following terms: -
- i. An Order for Stay of Execution of the judgment and decree issued on January 26, 2023 together with all consequential orders arising therefrom be and is hereby issued pending the hearing and determination of the Appeal.
 - ii. The Applicant to deposit a sum of Kshs. 100,000/= in the court’s account being Security for Costs for the due performance of the decree within 30 days from the date of this Ruling.
 - iii. The Applicant is further directed to file the Record of Appeal within 45 days from the date of this Ruling.
 - iv. Failure to comply with orders (ii) and (iii) hereinabove, Order (i) hereinabove shall automatically lapse.
 - v. Costs of the Application to abide the Appeal.

26 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 15TH DAY OF JUNE, 2023.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Mr. Awino for the Appellant/ Applicant

Mr. Singei for the Respondent

Court Assistant- Tom Maurice/ Victor

