



**Biwott & another v Koima (Environment & Land Case
371 of 2015) [2023] KEELC 18205 (KLR) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18205 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 371 OF 2015**

JM ONYANGO, J

JUNE 14, 2023

BETWEEN

SIMON KIMAGUT BIWOTT 1ST PLAINTIFF

JOHNSTONE KIPCHUMBA LEL 2ND PLAINTIFF

AND

ZAKARIA KEMEI KOIMA DEFENDANT

RULING

1. By a notice of motion dated August 27, 2019 the plaintiffs/applicants filed an application seeking a stay of execution pending appeal.
2. The application is based on the grounds set out on the face of the notice of motion and the supporting affidavit of Simon Kimagut Biwott, the 1st plaintiff/applicant herein, sworn on the August 27, 2019. The gist of the application is that the applicants being dissatisfied with the judgment of this honourable court delivered on the July 11, 2019 have lodged an appeal in the Court of Appeal and they have duly filed a notice of appeal. The applicants are apprehensive that the respondent will execute the judgment to their detriment thus rendering their appeal nugatory.
3. The application is opposed by the defendant/respondent through his replying affidavit sworn on November 27, 2019. In the said affidavit, he avers that the applicants' application has been overtaken by events as the decree has been enforced and he is in occupation of the suit land.
4. The application was disposed of by way of written submissions and both parties filed their submissions and authorities.
5. Having considered the application, affidavits, and rival submissions and authorities relied on by the parties the only issue for determination is whether the applicants should be granted a stay of execution pending appeal.



Analysis and Determination

6. Order 42 rule 6 of the [Civil Procedure Rules](#) sets out the conditions that one should meet in order to qualify for an order of stay pending appeal. In particular order 42 rule 6(2) 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.
7. In order to grant the order for stay of execution, the court must be satisfied that the above three conditions have been met. With regard to substantial loss, it has been submitted that the applicants' title will be rectified or cancelled and *in lieu* thereof another entry will be made confirming the respondent as the lessee for the remainder of the lease period which will terminate in the year 2110. It was further submitted that since the respondent was declared to have acquired the suit land by way of adverse possession, he would not suffer any prejudice as he would continue to use the land while it is still registered in the applicants' names as they await the outcome of the appeal.
8. The applicants relied on the case of [Samvir Trustee Limited v Guardian Bank Limited](#) [2007]eKLR where the court held that:-

“the court in considering whether to grant or refuse an application for stay of execution is empowered to see whether there exist any special circumstances that 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 the successful party is not impeded from enjoying the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is *prima facie* entitled to the fruits of his judgment hence the consequence of a judgment is that it has defined the rights of a party with definite conclusion. The respondent is asserting that matured right against the execution pending appeal and the court must ensure that parties fight out on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure that the execution of one party's rights should not defeat or derogate the rights of the other. The court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrives within the corridors of the court”
9. It was submitted that the fact the applicants had been denied access to the suit property which measures over 20 acres and that the court had ordered for the cancellation of their title amounted to substantial loss.
10. On his part the defendant submitted that there was nothing to stay as he was in occupation of the suit property and ownership had been effected in his favour. He further argued that even though judgment had been delivered 4 years ago the applicants had failed to pursue their appeal. He added that the applicants had failed to demonstrate the kind of loss they stand to suffer.
11. With regard to second condition, which is the issue of delay, the applicants averred that they had been prevented from filing the application earlier due to lack of funds.



12. As far as the third condition is concerned, applicants have not offered any security for costs.
13. The applicants have acknowledged that the respondent is in occupation of the suit property and they only seek to prevent the respondent from having the title transferred to his name. If what the respondent has stated that the title has already been transferred to his name is true, then indeed there would be nothing to stay. Furthermore, the applicants have not satisfied all the three conditions for stay of execution.
14. In the case of *Kiplangat Kotut v Rose Jebor Kipngok* [2015] eKLR the court observed as follows:

“ Evidently, the three (3) prerequisite conditions set out in the said order 42 rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously. “
15. From the above analysis it is clear that the applicants have not met all the three conditions for stay pending appeal. In the premises, I have come to the inescapable conclusion that the application lacks merit and the same is hereby dismissed with costs to the respondent.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 14TH DAY OF JUNE 2023.

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J.M ONYANGO

JUDGE

In the Presence of;

1. Mr. Murgor for the Plaintiffs/Applicants

2. Mr. Wainaina for Mr. Momanyi for the Defendant/Respondent

Court Assistant: A. Oniala

