



**Chepngok v Cheptoo & 2 others (Environment & Land Case  
315 of 2016) [2023] KEELC 22633 (KLR) (13 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 22633 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 315 OF 2016  
JM ONYANGO, J  
JUNE 13, 2023**

**BETWEEN**

**PHILIP KIPLANGAT CHEPNGOK ..... PLAINTIFF**

**AND**

**LUKA KIMUTAI CHEPTOO ..... 1<sup>ST</sup> DEFENDANT**

**THE COUNTY LAND REGISTRAR UASIN GISHU ..... 2<sup>ND</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> Defendant/ Applicant moved the court vide a Notice of Motion dated 6<sup>th</sup> January, 2023 pursuant to Order 42 Rule 6(1), (2), (3) and (4) of the Civil Procedure Rules, Section s 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act Articles 50 and 159 of the Constitution and all other enabling provisions of the law seeking the following orders:
  - a. Spent
  - b. That the Honourable Court be pleased to issue a temporary stay of the Honourable Court's judgment and decree delivered on 7<sup>th</sup> December, 2022 pending the hearing and determination of the application inter partes.
  - c. That the Honourable Court be pleased to grant a stay of execution of the judgment delivered on 7<sup>th</sup> December, 2022 pending the hearing and determination of the appeal against the judgment of the Honourable Justice S.M Kibunja.
  - d. That the costs of this application be in the cause.
2. The application is premised on the grounds stated on the face of the application and the Applicant's Supporting Affidavit sworn on the 6<sup>th</sup> day of January 2023. The gist of the application is that the



court having entered judgment in favour of the plaintiff and issued an injunction restraining the 1<sup>st</sup> Defendant from trespassing on L.R NO. Eldoret Municipality Block 5/567 means that the 1<sup>st</sup> Defendant cannot access his houses on the suit property and he faces imminent eviction. It is his contention that if he is evicted from the suit property, he will suffer substantial loss. He avers that he intends to pursue an appeal against the judgment and should the orders sought not be granted, his appeal shall be rendered nugatory.

3. In opposing the application the plaintiff/Respondent filed a Replying affidavit sworn on 25<sup>th</sup> January 2023. He averred that the Applicant unlawfully took possession of his land and developed it illegally without his consent.
4. It was his contention that the Applicant had failed to demonstrate substantial loss. He averred that contrary to what the Applicant had stated his supporting affidavit, he had in his testimony stated that he had sold the suit property to a third party and given vacant possession to the said third party and his allegations that he would be evicted were merely intended to hoodwink the court.
5. The plaintiff averred that the 1<sup>st</sup> defendant's prayer for continued possession of the suit property would deprive him of his property. He averred that in the event that the court was inclined to grant the order of stay then all income that shall be collected from the suit property should be deposited in a joint interest bearing account so that the applicant does not continue to benefit from a property he acquired illegally. It was his averment that the applicant had not met the threshold for stay of execution.
6. The applicant filed a Further Affidavit to which he annexed a draft Memorandum of Appeal.
7. The application was disposed of by way of written submissions and both parties filed their submissions.

### **Applicant's Submissions**

8. Learned counsel for the applicant submitted that the Applicant had extensively developed the suit property and if he was denied access thereto he would suffer substantial loss. He relied on the case of *Osero & Co Advocates v Easy Properties limited* Civil Application No. 419 of 2011 in which the court held that the cornerstone of the court's jurisdiction in granting a stay of execution under Order 42 rule 6 of the *Civil Procedure Rules* is that substantial loss will occur if a stay is not granted. The court also noted that in an application for stay of execution it was necessary for the court to balance the interests of the parties.
9. He also relied on the case of *New Ocean Transport Company Ltd v M.A Bayusuf & Sons* where the court held that if the applicant was evicted the resultant loss of business amounted the substantial loss. He maintained that the Respondent acquiesced in the construction of the premises on the suit property. He contended that if the application was not granted, the appeal would be rendered nugatory. He submitted that the Applicant was ready to deposit security for costs in the sum of Kshs.100.000 within a specified timeframe failing which the order for stay should lapse. He further relied on the case of *Butt v Rent Restriction Tribunal* (1982)KLR 417 for the proposition that the power to grant a stay was discretionary and the court in exercising its discretion will consider the special circumstances of each case. The court further held that it in the exercise of its discretion, it can order that the applicant provides security for costs.

### **Respondent's Submissions**

10. On his part, learned counsel for the Respondent submitted that the Applicant had not met the three (3) conditions set out under Order 42 rule 6 of the *civil Procedure Rules*. With regards to the first condition which is that the Applicant must demonstrate that he shall suffer substantial loss, counsel



relied on the case of *Machira T/A Machira & Co Advocates v East African Standard* (2002) 2KLR 63 where the court held that the particulars of substantial loss be given and the court's conscience must be satisfied such loss will ensue if a stay is not granted.

11. He submitted that based on the averments in the Applicant's supporting affidavit, he had failed to demonstrate that he would suffer substantial loss as he had not provided any evidence that he resides in the suit property. Counsel contended that the Applicant had in the course of the hearing admitted that he had sold the suit property to a third party and thus his assertion that he faced imminent eviction was not true.
12. Counsel submitted that the applicant's depositions that he would suffer substantial loss were speculative and not supported by any evidence. He relied on the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) for the proposition that the fact that execution has been levied does not amount to substantial loss as execution is a lawful process and one must establish factors which show that the execution will create a state of affairs that will negate the appeal.
13. On question of delay, counsel conceded that the application had been filed without any unreasonable delay.
14. With regard to security for costs, counsel submitted that the Applicant had not offered any security for costs. He proposed that all the rent collected from the suit property during the pendency of the appeal be deposited in a joint income earning account to prevent a situation where the Applicant continues to derive a benefit from an irregularly acquired title.
15. Having considered the application and the submissions of the only issue for determination is whether a stay of execution should be granted pending appeal.
16. The principles that guide the court in an application for stay pending appeal are now settled.
17. The court in the case of *Migotio Plantations Limited v Paul Wanyama Wafula* [2015] eKLR stated as follows:-

The powers of the court to grant stay of execution of the decree are discretionary. The ultimate goal of the court is to preserve the appeal and ensure that the rights of the Appellant are not defeated pending its determination. (*Butt v Rent Restriction Tribunal* [1962] KLR 417)

Therefore, whether the Appellant stands to suffer substantial loss is the cornerstone of the application of stay. However, the court must also consider special circumstances and unique requirements of the case. (See *Butt V Rent Restriction Tribunal supra* at pages 419-420). At this point, there is a valid judgment in force and the court must weigh the Appellant's right to appeal against the equally weighty right of the successful party to enjoy the fruits of his judgment. *Redland Enterprises Limited v Premier Savings & Finance Limited* [2002] 2 KLR 139

18. In the case of *M.O.M Amin Transporters Limited & another v Alexander Ndung'u Mbugua & 2 others* [2017] eKLR the court was of the opinion that all the three conditions had to be met and satisfied simultaneously in order for the court to exercise its discretion and grant a stay of execution.
19. In the instant case, the application was filed without unreasonable delay and the Applicant has expressed willingness to furnish security for costs in the sum of Kshs.100,000. On the other hand, the Respondent has proposed that the Applicant deposits the rental income from the houses on the suit property in a joint interest bearing account. In the special circumstances of this case where the loss that



the Applicant will suffer is that him and his agents will be denied access to the suit property as well as rental income from the premises thereon, the interests of justice would be served if a stay of execution is granted on condition that half the rental income from suit property is deposited in a joint interest bearing account in a reputable bank in the names of the advocates for the Plaintiff and 1<sup>st</sup> Defendant as security for costs pending the hearing and determination of the appeal. The said account shall be opened within a period of 30 days from the date of this ruling. Should the Applicant fail to comply with this order, the order for stay of execution shall automatically lapse.

20. The costs of the application shall be borne by the Applicant.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13<sup>TH</sup> DAY OF JUNE 2023.**

.....

**J.M ONYANGO**

**JUDGE**

In the presence of;

Mr. Murgor for the 1<sup>st</sup> Defendant/Applicant

Miss Rop for the Plaintiffs/Respondents

Court Assistant: A. Onila

