



Otieno (Suing as the Personal Representative of Johana Kawa Nyagigo & Benjamin Otieno Kawa - Both (Deceased)) v Odira & 2 others (Environment & Land Case 749 of 2017) [2023] KEELC 18159 (KLR) (13 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18159 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 749 OF 2017**

MN KULLOW, J

JUNE 13, 2023

BETWEEN

TOM JARED OTIENO PLAINTIFF

**SUING AS THE PERSONAL REPRESENTATIVE OF JOHANA KAWA
NYAGIGO & BENJAMIN OTIENO KAWA - BOTH (DECEASED)**

AND

JOASH OUMA ODIRA 1ST DEFENDANT

**LEAH AUMA ORAGO (SUED AS THE LEGAL REPRESENTATIVE OF DORIS
OGWENO OSURE - DECEASED) 2ND DEFENDANT**

JOASH ODONGO OMWAGA 3RD DEFENDANT

RULING

1. By Notice of Motion dated March 28, 2023, the Plaintiff/ Applicant sought for the following orders: -
 - a. Spent.
 - b. This Honourable Court be pleased to grant an Order of Stay of Execution of the Decree/ Judgment herein together with all the consequential orders therefrom pending the hearing and determination of this Application.
 - c. This Honourable Court be pleased to grant an Order of Stay of Execution of the Decree/ Judgment herein together with all the consequential orders therefrom pending the hearing and determination of the Intended Appeal before the Court of Appeal.
 - d. Costs of this application be provided for.



2. The application is premised on the 9 grounds on its face and on the Applicant's Supporting Affidavit sworn on even date and further supported with annexures marked "TJO" 1 & 2. The applicant contends that judgment was rendered in the matter on February 16, 2023, whose effect was to dismiss his case and further order that they vacate a portion of the suit land. Aggrieved by the said judgment and decree, he intends to lodge an Appeal at the Court of Appeal and he avers that he has already filed a Notice of Appeal.
3. It is his claim that as a family, they stand to be rendered homeless and destitute as the defendants are threatening them with eviction in violation of the provisions of section 152 of the *Land Act* and as a result they stand to suffer irreparable loss.
4. Further, it is his contention that the intended Appeal shall be rendered nugatory if execution of the decree proceeds hence the need to preserve the subject matter pending the hearing and determination of the intended Appeal.
5. He also stated that the Application was filed without undue delay and that he is ready and willing to abide by any fair and just conditions on security for the due performance of the decree as may be set by the Honourable Court.
6. The application was opposed; the Defendants/ Respondents filed a Statement of Grounds of Opposition dated May 8, 2023. They dismissed the Application as being premature, misconceived and legally untenable since the same does not disclose any reasonable cause of action and is further aimed at defeating the due process of court.
7. It is their contention that the Applicant has not established the prerequisite conditions set out in Order 42 Rule 6 of the *Civil Procedure Rules*; no proof of substantial loss has been provided to warrant the grant of the orders of stay of execution. They therefore urged the court to dismiss the Application with costs.
8. On March 29, 2023, I issued directions for the disposal of the Application by way of written submissions; both parties filed their rival submissions which I have read and taken into consideration.
9. It is my considered opinion that the sole issue arising for determination includes;
 - i. Whether an Order for Stay of Execution can issue against the judgment and decree dated February 16, 2023.
10. The purpose and objective of the order for stay of execution is to preserve the substratum of the appeal in order to ensure that the appeal is not defeated. See Consolidated *Marine vs Nampijja & Another*, Civil App No 93 of 1989 (Nairobi).
11. The principles guiding the grant of an Order for Stay of Execution are provided under Order 42 6(2) which states 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. (emphasis mine.)



12. The first element to be proved is whether substantial loss may result to the Applicant unless an order for stay of execution is granted. Substantial loss was explained in *Kenya Shell Limited vs Kibiru* [1986] KLR 410, where it was held as follows: -

“It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an Appeal would be rendered nugatory by some other events. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the Respondents should be kept out of their money....”

(See also *Silverstein vs Chesoni* [2002] 1 KLR 867)

13. An Applicant seeking an order for stay of execution is duty bound to demonstrate the loss he is likely to suffer in the event that the same is not granted and give sufficient cause to enable the court exercise its discretion in his favor. The Applicant herein contends that they are currently in occupation of the subject land together with their families and if the defendants make good their threat by executing the decree in their favor and evict them, they stand to suffer irreparable loss and risk being rendered homeless and destitute.
14. The Respondent on the other hand maintained that the Applicant had not demonstrated any substantial loss that he is likely to suffer as provided under Order 42 Rule 6 of the *Civil Procedure Rules*.
15. I have referred to the judgment of this court and I note that this court ordered the plaintiff and the beneficiaries/ dependants of the estate of the late Johana Kawa Nyagigo and Benjamin Otieno Kawa to vacate a portion of the suit parcel LR No Kanyamkago/ Kajulu/ 2063 which they occupy within 90 days. It is not in dispute that the Plaintiff and his family are still in occupation of the suit land and the effect of the said orders if executed would be to render the plaintiff and the other beneficiaries occupying the portion of land in dispute, homeless and destitute. I therefore find that the Applicant has sufficiently demonstrated the substantial loss that he is likely to suffer.
16. The second and third elements to be proved are whether the Application was filed without unreasonable delay and deposit for security for costs for the due performance of the decree. The instant Application was filed on March 28, 2023 while the Judgment in the matter was rendered February 16, 2023; that is within 1 month and 12 days. Even though the Applicant has not given an explanation of the 42 days’ delay in filing the Application, it is my considered view that the said delay does not amount to inordinate delay and I therefore find in favor of the Applicant.
17. Further, at paragraph 12 of his Supporting Affidavit, the Applicant has demonstrated his readiness and willingness to abide by any fair and just conditions as may be set on the security for costs by the court.
18. The purpose of a Stay of Execution Order pending Appeal was discussed in *RWW vs EKW* [2019] eKLR where the court stated as follows: -

“The purpose of an Application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs...”



19. I have however noted that the Applicant only annexed a copy of the Notice of Appeal dated February 17, 2023. At the time of writing this Ruling, there was no proof of whether the Appeal has already been lodged at the court of Appeal in the form of a duly filed Memorandum of Appeal. Thus, this court does not have the benefit of ascertaining whether an Appeal has been filed and I do therefore acknowledge the dangers of granting the orders sought at this stage.
20. In view of the foregoing; I find that the Applicant has sufficiently proved all the three grounds as provided under Order 42 Rule 6(2) above, to the required threshold and is therefore entitled to the reliefs sought. However, given the circumstances of the case, there is need to issue conditional stay of execution in balancing the rights of both parties herein; the right of appeal against an equal right of the respondents in enjoying the fruits of their judgment.

Conclusion

21. In the upshot, I accordingly find that the Application dated March 28, 2023 is partially merited and I proceed to allow the same on the following terms: -
 - a. An Order for Stay of Execution of the Decree and Judgment dated February 16, 2023 together with all consequential orders arising therefrom be and is hereby issued for a period of 60 days.
 - b. The Applicant is hereby ordered to file the Memorandum of Appeal at the Court of Appeal within 15 days and thereafter file an Application seeking the extension of the stay orders issued herein at the Court of Appeal.
 - c. Failure to comply with order (b) hereinabove, Order (a) hereinabove shall automatically lapse.
 - d. Costs of the Application to abide the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 13TH DAY OF JUNE, 2023.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Mr. Oywer for the Plaintiff/ Applicant

Mr. Wafula for the 1st and 2nd Defendants/ Respondents

Court Assistant- Tom Maurice/ Victor

