



REPUBLIC OF KENYA



KENYA LAW
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**Nyakora v Okune (Environment and Land Appeal E029 of 2022)
[2023] KEELC 19094 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19094 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E029 OF 2022**

E ASATI, J

JULY 27, 2023

BETWEEN

GODWIN CRISPIN NYAKORA APPELLANT

AND

ABDALA OGOLA OKUNE ALIAS FRANCIS OGOLA OKUNE .. RESPONDENT

*(Being an appeal from the decision of the Honourable Amos Kiprop Makoross,
dated and delivered on 24//.5.2022 in Tamu SRM's ELC No. E3 of 2020)*

RULING

1. This ruling is in respect of the application dated February 6, 2023 stated to be brought pursuant to the provisions of Order 21 Rule 8 Order 42 Rule 6(1) and Order 51 Rule 1 and 3 of the [Civil Procedure Rules](#) and section 1A, 1B and 3A of the [Civil Procedure Act](#).

Prayer 1 and 2 of the application are now spent. The outstanding prayers are prayer 3 and 4 which are prayers for an order of stay of execution and for costs.

2. The grounds upon which the application was brought were that the court delivered a judgement dated January 26, 2023 in favour of the appellant. That the respondent being dissatisfied with the judgement had lodged a Notice of Appeal to appeal to the court of Appeal. That the applicant is now exposed to execution of the decree and if this happens, the appeal will be rendered nugatory. That if the order of stay of execution is not granted, the applicant is likely to be evicted from the suit land which is the place he has known to be home for over ten years. That the application has been made without unreasonable delay.

The application was supported by the contents of the supporting affidavit sworn by the applicant on February 6, 2023 and the annexures thereto.



3. The application was opposed vide the grounds of opposition contained in the replying affidavit sworn by the appellant on February 21, 2023. It was the Appellant's case that this court having delivered its judgement in the appeal is now *funtus officio* and cannot re-open the case again. That the *ex parte* orders given by the court have been overtaken by events as he has been reinstated as the legal owner of the suit land in compliance with the judgement. That there is no evidence that the applicant is in danger of eviction. That the applicant is engaging delaying tactics to waste the court's time and that the same amounts to abuse of court process.
4. The application was canvassed by way of written submission. It was submitted on behalf of the applicant vide written submissions dated March 20, 2023 that the ground for grant of an order of stay of execution pending appeal under Order 42 Rule 6 of the *Civil Procedure Rules* are that the applicant must demonstrate that substantial loss may result to him unless the order is made; that the application is made without unreasonable delay and that 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.
Counsel submitted further that the judgement was delivered on January 26, 2023 and the application filed on February 6, 2023 after the Notice of Appeal had been lodged and certified copies of proceedings, requested for. That in the circumstances, the application was filed timeously.
5. On substantial loss, Counsel relied on the case of *Mukuma v Abuoga* (1988) eKLR 645 where substantial loss was defined as "what has to be prevented by preserving the status quo because such loss would render the appeal nugatory". Counsel also relied on the case of *Daniel Kipkoskei Kimeli v Titus Barmasai* (2019) eKLR where it was held that the most important limb of the application for stay of execution pending appeal is proof of substantial loss. Counsel submitted that the applicant has his home of more than 10 years on the suit land. That if the judgement is executed, the Applicant will be rendered homeless. That such loss as would be suffered by the applicant is substantial and the same would render the appeal to the Court of Appeal nugatory should it succeed.
6. As concerns security for performance of the decree, Counsel submitted that the applicant is ready and willing to abide by the conditions that the court will give in granting the orders sought. That the Applicant is willing and ready to preserve the suit parcel of land in its current state with a view to maintaining the status quo, pending the hearing and determination of the appeal to the Court of Appeal. That this will protect the interest of both parties.
7. The Appellant vide his written submissions dated March 16, 2023 submitted that the Honourable court has no jurisdiction as the appeal is to the Court of Appeal and that the court is *funtus officio*. The Appellant relied on the case of *Telkom Kenya Limited v John Ochanda* [2014] eKLR to support his submissions.
8. The appellant filed further submissions dated May 10, 2023 in reply to the applicant's submissions. He pointed out that the only matter for the court to decide is whether it has jurisdiction to hear the application having rendered the judgement. The Appellant submitted that Order 42 Rule (6) does not cover a situation where the order sought to be stayed has already been executed. That the application has been overtaken by events. The appellant relied on the case of *Florence Cheruget v Cheptum Murei Annah* [2022] eKLR to support his submissions. That the averment that the suit property is the only place the applicant calls home is false because the applicant was only a caretaker/employee on the land. That the suit land is now registered in the name of the appellant in execution of the judgement.
9. The argument advanced by the appellant in opposition to the application is that the decree has already been executed and hence the current application for stay of execution has been overtaken by event, that hence the court has become *funtus officio* and lacks jurisdiction to entertain the application. To



prove the execution of the decree, the appellant attached to his replying affidavit a copy of certificate of official search in respect of the suit land. The same was marked “GCN1”.

The said document shows that the suit land was registered in the name of the Appellant on May 16, 2011 and title issued to him on the same date.

This was long before the suit was filed and hence cannot by any means be said to have been done in execution of the judgement of this court dated 26/1/2023. I do not find evidence of execution of the judgement. The substantive prayer in the plaint was for an order of injunction barring the applicant from trespassing onto the suit land. The judgement sought to be stayed allowed the appellant’s claim in the plaint. What that means is that the applicant is restrained from trespassing onto the suit land. He was also ordered to pay costs. Execution of the judgement will therefore entail prevention of the applicant from entering the suit land and recovery of the costs.

10. On the submission that the court has become functus officio, the correct position in law is that even after delivery of judgement the court still has jurisdiction to handle certain matters in the case inclusive of matters related to review, stay of execution and the execution of the judgement. The principle of functus officio does not apply to such as they do not amount to re-opening of the case or sitting on appeal in the same matter. The Court of Appeal discussed the principle of functus officio in the case of *Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR relied on by the appellant herein and held:-

“the doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once a final judgment has been entered and a decree issued.

There do exist certain exceptions and these have been captured in *Jersey Evening Post Ltd v Ai Thani* [2002] JLR 542 at 550 thus:

“a court is functus officio when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded and the court functus when its judgment or order has been perfected. The purpose of the doctrine is to provide finality.”

11. The applicant has exhibited to the court a Notice of Appeal to the Court of Appeal dated February 2, 2023. It is attached to the supporting affidavit. Also attached to the Supporting Affidavit is a letter dated February 2, 2023 addressed to the Deputy Registrar, requested for certified copies of proceedings and judgement.

Under Order 42 Rule 6(4) an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court, Notice of Appeal has been given.

12. I am satisfied that the Applicant has satisfied the conditions for grant of an order of stay of execution pending appeal. I allow the application and make the following order: -
- i. an order of stay of execution of the judgement and decree herein is granted pending hearing and determination of the appeal to the Court of Appeal
 - ii. the applicant do deposit, within 45 days hereof Kshs 100,000/= in a joint interest earning account in the joint names of the appellant and Counsel for the applicant failing which the order of stay of execution will lapse.
 - iii. Costs of the application are awarded to the appellant.



Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 27TH DAY OF JULY 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen- Court Assistant.

Appellant in person

Achieng for the Respondent/Applicant.

