



**Mudogo v Khasandi & another (Environment and Land Appeal
7 of 2023) [2023] KEELC 19105 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19105 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL 7 OF 2023
EC CHERONO, J
JULY 26, 2023**

BETWEEN

HUDSON LABAN MUDOGO APPLICANT

AND

ROBERT JAMII KHASANDI 1ST RESPONDENT

MOSES MARIKO NYONGA 2ND RESPONDENT

RULING

- 1 The applicant vide a Notice of Motion application dated February 13, 2023 seeks the following orders;
 - a. Spent
 - b. Spent
 - c. That there be a temporary stay of execution of the decree in Kimilili PM ELC No. E005 of 2022 pending hearing and determination of this appeal.
 - d. That costs of this application be in the cause.
- 2 The application is supported by the affidavit of the applicant and grounds shown on the face of the application. The application is further supported by a memorandum of appeal annexed to the supporting affidavit stating the grounds of opposition.
- 3 In response to the said application, the respondents filed a joint replying affidavit dated May 8, 2023.

Applicant's Submissions

- 4 In his supporting affidavit, the applicant deposed that being aggrieved by the judgment of the trial court in Kimilili PM ELC No. E005 of 2022 dated January 23, 2023 he has filed the current appeal raising weighty and triable issues worthy of consideration by this court. The applicant complains that



the trial magistrate failed to scrutinize the evidence by way of oral testimony and documents placed before her. The applicant further deposed that the respondents have since invaded the suit property and build structures thus adversely dealing with the property prior to expiry of his lease and occasioning substantial losses upon him.

1st And 2nd Respondent's Cas

5 In their joint response and submissions, the respondents deposed that the application is bad in law, defective, incompetent, frivolous, vexatious and an abuse of the due process of the law and that it lacks merit. The respondents deposed that there was no execution of the decree in Kimilili PM ELC No. E005 of 2022 as the trial magistrate dismissed the matter with no orders as to costs after the applicant herein failed to prove his case beyond the required threshold. Further that no decree was attached by the applicant in support of his application. In their submissions they argued that the trial court made its determination on merit and this application is made in bad faith. The respondent submitted that the claimant is not worthy of the orders sought and they sought to have the application dismissed with costs to them.

Analysis and Determination

6 This court has carefully considered the application, the affidavits, both in support and opposition thereto, the defendant's submissions as well as the applicable law. Upon perusing the materials before me, this Court finds two issues for determination as follows;

- a. Whether the Applicant has satisfied the criteria for grant of stay of execution pending appeal.
- b. Whether the court can issue stay of execution orders against a negative order.

1. Whether the applicant has satisfied the requirements for grant of an order for stay of execution pending appeal.

The law on stay of execution of judgment is now well settled. For a court to grant the orders of stay of execution pending appeal, the party seeking such orders must satisfy the court that he has placed himself within the legal requirements of Order 42 Rule 6 of the Civil Procedure Rules. The provision states as follows:

“No order for stay of execution shall be made under subrule (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 This Court shall not reinvent the wheel on the import and interpretation of this provision. There are a number of decided cases that lay the basis for and expound on the conditions to be satisfied by an application of this nature. In Civil Appeal No.107 of 2015, Masisi Mwita -vs- Damaris Wanjiku Njeri (2016) eKLR, the court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another..Vs...Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-

“The High Court's discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient Cause, substantial loss would ensue from a refusal



to grant stay, the applicant must furnish security, the application must be made without unreasonable delay.

“In addition, the applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo...Vs...Straman EA Ltd (2013).

- 8 These twin principles go hand in hand and failure to prove one dislodges the other.
- a. As to whether the application has been brought without unreasonable delay, this court notes that it was filed on February 13, 2023 whereas the judgment had been delivered on January 23, 2023 The application was therefore filed 14 days from the date of delivery of the judgment. In addition, the applicant filed a memorandum of Appeal which has been attached to the affidavit and the original thereof is in the court file. This was filed on February 2, 2023 That was only 9 days after the delivery of the judgment. Based on the two steps by the applicant, I find that for the purposes of this application he satisfied this court that there is an appeal in place and that the application was filed without unreasonable delay.
 - b. Will the applicant suffer substantial loss if the orders sought are not granted? To answer this question, this court had to compare the judgment of the trial court with the prayers sought. The prayers sought in the plaint were for damages which were denied for being unsubstantiated. The onus of proving a fact lies on the person alleging the existence of that fact. In the instant application, it is upon the applicant to prove the substantial loss he would suffer if the court declines to issue the orders sought. The applicant has not demonstrated to this court the nature of the substantial loss he would suffer in the event the order sought are not granted. It is not enough to state that the applicant is in occupation of the suit land. Mere mention that substantial loss will be occasioned to the applicant is not enough without being established. This limb of the application fails. Thus, I need not consider whether or not the applicant has offered security in the event of a stay of execution being granted.

2. Can the court issue stay of execution orders against a negative order?

- 9 Suffice to add that the impugned Judgment was a dismissal of the suit and is therefore incapable of execution. I wish to rely on the court of appeal decision in *Ndungu Kinyanjui v Kibicho Kugeria Services & Another* (2007) KLR where the superior court relied on its earlier decision in *David Thiong'o T/A Welcome General Stores v Market Fancy Emporium* (2007) KLR and held thus;
- 10 This court has repeatedly stated in previous decisions, among them, *David Thiong'o T/A Welcome General Stores v Market Fancy Emporium*, Civil application No Nai 47 of 2007---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 refrain 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.”
- 11 I agree with the above decision by the Court of Appeal which is binding on me.
- 12 The upshot of my finding is that the notice of motion application dated February 13, 2023 and filed in court on February 17, 2023 is without merit and the same is hereby dismissed with costs.

Orders accordingly.



READ, DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 26th day of July, 2023.

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HON E C CHERONO

ELC JUDGE

In the presence of

Appellant-present

1st respondent-present

2nd respondent-presen

Joy-Court Assistant

