



**Bartingei v Wekesa & another (Environment & Land Case  
588 of 2012) [2023] KEELC 18907 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18907 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 588 OF 2012**

**JM ONYANGO, J**

**JULY 25, 2023**

**BETWEEN**

**JOHN BARTINGEI ..... PLAINTIFF**

**AND**

**COSMAS MAKHANU WEKESA ..... 1<sup>ST</sup> DEFENDANT**

**JAMES BARGOKWET KASIKA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion dated February 17, 2023 the 2<sup>nd</sup> Defendant Applicant filed an application seeking and stay of execution of the judgment dated April 21, 2020 and all consequential orders thereto and that the Warrants of attachment and sale of the Defendants loose and movable properties issued on February 1, 2023 be lifted pending the hearing and determination of the Notice of Motion dated June 2, 2020 inter partes. The Applicant further sought that the Notice of Motion dated June 2, 2020 be listed for hearing inter partes and that the Supplementary affidavit sworn by 2<sup>nd</sup> Defendant be deemed as duly filed subject to payment of the necessary court fees.
2. The application is anchored on the grounds set out in the Notice of Motion and the Supporting Affidavit of James Bargokwet Kasika and Komen Philip Kipchirchir Advocate. In his affidavit he explains that after judgment was delivered against him on May 6, 2020, he immediately filed an application for stay of execution but he was prevented from prosecuting the said application owing to the Covid -19 pandemic and his poor health. He depones that he filed a Notice of appeal but he has not yet filed a memorandum of appeal as he has not yet been supplied with a certified copy of the proceedings. The affidavit of his advocate Philip Kipchirchir corroborates the contents of the applicant's affidavit.
3. The application is resisted by the Plaintiff/Respondent through his Replying affidavit sworn on March 10, 2023 in which he deposes that the application is fatally defective, misconceived and an abuse of



the court process. He avers that the Applicant has not established substantial loss nor has he offered any security for costs and that the applicant has therefore not met the legal threshold for grant of an order of stay pending appeal. He accuses the Applicant of being indolent. He states that even though the decree was prepared in 2020, the Applicant had not taken any step to file the appeal and he only saw the need to reinstate the appeal when he was faced with execution of the decree. He adds that the applicant has not demonstrated that he would suffer any prejudice if the application was not allowed. conversely, the Respondent would be prejudiced if the order of stay was granted as he would be denied the right to enjoy the fruits of his judgment.

4. The application was disposed of through written submissions and both parties filed their respective submissions which I have considered.

### **Applicant's Submissions**

5. In his submissions dated June 5, 2023 learned counsel for the Applicant relied on the case of *Butt v Rent restriction Tribunal* [1997] which sets out the principles that should guide the court in considering whether or not to grant a stay pending appeal. In the said case, the court held 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.
6. He also relied on the case of *Geoffrey Muriungi & Anotherr v John Rukunga M'imonyo suing as the legal representative of the estate of Kinoti Simon Rukunga ( Deceased)* [2016] eKLR where the court held that the purpose of a stay pending appeal is to prevent the successful appellant from becoming a holder of a barren result for reasons that he cannot realize the fruits of his success in the appeal.
7. It was his contention that if a stay is not granted the Applicant is apprehensive that the suit land will be exposed to adverse dealings by the Respondent including sale, transfer lease or mortgage to third parties which would in turn affect the substratum of the intended appeal thus rendering it nugatory.
8. Counsel further submitted that following the delivery of the judgment on April 21, 2020 the Applicant had filed a Notice of Appeal on May 18, 2020 after which he filed an application for stay on June 2, 2020 but the same could not be heard due to the Covid -19 pandemic. He was therefore of the view that the application had been filed timeously.
9. He urged the court to grant the application so that he could be granted a chance to exercise his right of appeal. He submitted that the Applicant was willing to meet all the conditions for granting a stay pending appeal.

### **Respondent's Submissions**

10. On his part, learned counsel in his submissions dated April 11, 2023 pointed out that the Applicant had filed an application dated June 2, 2020 seeking the same orders which was dismissed on February 12, 2020.
11. He submitted that the applicant had not established that he would suffer substantial loss as he conceded that he has never been in possession of the suit land. It was counsel's contention that the applicant had not established factors which demonstrate that execution will create a state of affairs that will have an irreparable effect.
12. On the question of delay, counsel noted that the Applicant had initially filed an application for stay dated June 2, 2020. He pointed out that the applicant had only filed a Notice of Appeal but he had not yet file a Memorandum of Appeal. He submitted that before the instant application was filed, the



Respondent had already initiated the process of execution and the order of stay would not serve any purpose as the decree had been registered at the Lands office on June 11, 2020.

13. Having considered the application and rival submissions the main issue for determination is whether the applicant has met the threshold for the grant of a stay pending appeal.

### **Analysis and Determination**

14. The principles that guide the courts in the exercise of their discretion to grant a stay of execution are now well settled. The substantive provision for grant of stay pending appeal is to be found under Order 42 Rule 6 of the *Civil Procedure Rules*.

Order 42 Rule 6 provides in part as follows: -

"6.

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (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.
- (3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule 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."



15. In the case of *MOM Amin Transporters Limited & Another v Alexander Ndung'u Mbugua & 2 Others* [2017] eKLR the court held 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. The court stated as follows:

“In the cases of *Kiplagat Kotut vs Rose Jebor Kipngok* [2015] eKLR, *Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others* [2012] eKLR and *Kenya Shell Limited vs Kibiru (Supra)*, the common thread was that a stay of execution will not be granted unless the conditions in Order 42 Rule 6 of the Civil Procedure Rules are satisfied.

16. I will now proceed to determine whether the Applicant has met all the conditions for stay pending appeal.

17. The first condition is that the applicant must demonstrate that he shall suffer substantial loss. In the case of *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR the court considered the question of what constitutes substantial loss. Mativo J stated as follows:-

“The corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted. What constitutes substantial loss was broadly discussed by Gikonyo J in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* where it was held inter alia that:-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein vs. Chesoni*, the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”

18. In the present application, it is common ground the Applicant has never been in possession of the suit property. Other than stating that he will suffer substantial loss the applicant has not demonstrated what loss he will suffer if the order of stay is not granted.

19. On the question of delay, the applicant filed an application dated June 2, 2020 seeking similar orders which was dismissed on December 2, 2020. He then filed the instant application almost three years later after the Plaintiff initiated the process of execution. In the circumstances, the application was not filed promptly.

20. Finally, with regard to security for costs, the applicant has indicated that he is willing to abide by any conditions that the court may impose. That is neither here nor there. What is noteworthy is that the applicant has not satisfied all the conditions set out under Order 42 Rule 6 of the *Civil Procedure Rules*.

21. Accordingly, the application lacks merit and it is dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25<sup>TH</sup> DAY OF JULY 2023.**

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**J.M ONYANGO**

**JUDGE**

**In the presence of;**

**1. Mr. Osewe Atieno for the Respondent**

**2. No appearance for the Applicant**

**Court Assistant: A. Oniala**

