**Solomon v Ogalo & 3 others (Environment & Land Case 041 of 2016) [2023] KEELC 19018 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19018 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ENVIRONMENT & LAND CASE 041 OF 2016**

**FO NYAGAKA, J**

**JULY 24, 2023**

**BETWEEN**

**PETER MURIUKI SOLOMON ..... PLAINTIFF**

**AND**

**PETER MIDIMO OGALO ..... 1ST DEFENDANT**

**LAND REGISTRAR TRANS NZOIA COUNTY ..... 2ND DEFENDANT**

**NATIONAL LAND COMMISSION ..... 3RD DEFENDANT**

**ATTORNEY GENERAL ..... 4TH DEFENDANT**

**RULING**

## The Application

1. The Plaintiff/Applicant moved this Court vide his application dated 05/04/2023. He brought it under Order 42 Rule 6(1), Order 51 Rule 1 of the Civil Procedure Rules (2010) and Sections 1A, 3A, and 63 (c) and (e) of the *Civil Procedure Act* 2010 (Chapter 21) Laws of Kenya and "All other enabling provisions of the Law (sic)." He sought the following reliefs:-

    1. ...spent.

    2. ...spent.

    3. That pending the hearing and determination of the intended appeal to the Court of Appeal there be issued an order of stay of eviction of the Applicants and or an order of stay of execution against the judgement of the Honourable Justice Dr IUR Fred Nyagaka in Kitale Environment and Land Case No 41/2016 delivered on 27/03/2023.

    4. That the cost of this application be provided for.

2. The Application was grounded on four (4) points and supported by the Affidavit of Peter Muriuki Solomon, the Plaintiff. The grounds were that the Plaintiff was aggrieved by the judgment of this Court delivered on 27/3/2023 and appealed against it. As a result, the Plaintiff/Applicant was apprehensive that he could be evicted from the suit property any time if orders of stay of execution against the judgement were not granted. The Plaintiff contended that he was ready to furnish such security as this Court would deem just, the instant application had been made without delay, was merited and that the Court had wide and unfettered discretion to allow the application.

3. In support of the Application, the Applicant deponed that on 27/3/2023, this Court delivered judgement by which it ordered the cancellation of the title issued to the 1st Defendant and allowing the counter-claim of the 1st Defendant which sought for eviction of the Plaintiff from the suit property. He annexed a copy of the excerpt of the judgement and marked it as "PMS-1". He further deponed that being dissatisfied with the judgment he filed a notice of appeal in the superior court on 31/03/2023. He annexed a copy of the notice of appeal and marked it as "PMS-2a".

4. He asserted that there being no orders of stay of execution issued, the Respondent was likely to proceed to execute the judgement or decree thereby evicting him and his family from the suit property. He further deponed that substantial loss would be occasioned upon his family and himself as he had established a matrimonial home and ran on the suit property a business which was the source of his livelihood and if they were evicted, his family and himself would be left destitute. He annexed and marked as "PMS-4" copies of photographs showing the houses and development on the suit property. He further swore that his intended appeal had chances of success since it raised serious issues of law and fact thereby having an arguable appeal and if the execution was not stayed the appeal would be rendered nugatory. Consequently, he deponed that no prejudice would be suffered by the Respondent if the Application was allowed and that instead he would suffer loss that could not be compensated with damages and that the application was made without delay and was merited.

**The Response**

5. The Application was opposed by way of a Replying Affidavit sworn on 13/4/2023 by the 1st Defendant/Respondent. He contended that the Application filed by the Plaintiff/Applicant did not satisfy the requirements for granting of stay of execution pending appeal as no security has been offered and or provided nor had substantial loss been demonstrated.

6. He argued that the instant application was merely intended to protract the matter unnecessarily by preventing the Respondent from recovering his property thereby denying him as the successful party from enjoying the fruits of his judgment. He contended that the suit property being registered in his name and this Court having found that the Plaintiff/Applicant was in unlawful occupation and use thereof, the Applicant could not purport to have any better right over it and the intended appeal would not be rendered nugatory if stay is not granted.

7. He further argued that the Applicants had not demonstrated by annexing a valuation report the substantial loss he was likely to suffer wherein an award of damages would not be able to meet in the unlikely event that he succeeded on appeal. He averred that the Applicant had not annexed a draft memorandum of appeal to indicate seriousness on his part in pursuing the intended appeal. The he deponed that if the Court would be inclined to grant the said stay the same ought to be conditional on the time frame of filing and serving a Record of Appeal and deposit of monies to act as security for costs.

**Submissions**

8. This court issued directions regarding the filing of written submissions. Nevertheless, the record reveals that the Applicant did not file written submissions in support of his application as there is no copy both in the court file or the online court filing system.

9. However, on his part the 1st Respondent complied by filing his written submissions on 08/05/2023. In them he reemphasised the grounds as espoused by way of depositions in his Replying Affidavit. He stated that the grounds for grant of an order of stay of execution were provided for in Order 42 Rule 6 of the Civil Procedure Rules and that the Applicant had not provided security for due performance of the decree and urged the Court to give a condition of security being deposited for between Kshs. 500,000/= to 800,000/=. He repeated that the suit was registered in his name since 1994 when he had a grant in his name. He argued that the Plot was not a residential home and therefore it was misleading of the Applicant to contend that the suit land had his matrimonial home put up on it. He urged that this was an application for dismissal.

**Issues, Analysis and Disposition**

10. The Application seeks the stay of execution of this Court's judgment dated and delivered on 27/03/2023 wherein an eviction order was issued against the Applicant from the suit property. I have considered the application, the facts thereof, the law, the submissions by the Applicant. I am of the view that two issues lie before me for determination. These are:

    a. Whether the Plaintiff has demonstrated reasons for grant of the orders for stay of execution pending appeal.

    b. Who to pay the costs of the Application.

**a. Whether the Plaintiff has demonstrated reasons for the grant of the orders for stay of execution pending appeal**

11. It is trite law that the power of a court to grant stay of execution is discretionary and it must not be exercised capriciously or whimsically but in a way that does not prevent a party from pursuing its appeal so much so that the same is not rendered nugatory should the appellate Court overturn the trial court's decision. This was the holding in Butt vs. Rent Restriction Tribunal (1979) e KLR.

12. Ultimately, and as the position in law is, the purpose of stay of execution is to preserve the subject matter in dispute while at the same time trying to balance the interests of the parties and the circumstances of the case. This was the holding in the Court Appeal case of RWW vs. EKW (2019) eKLR wherein 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.
>
> Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent."

13. Accordingly, the principles guiding the grant of a stay of execution pending appeal are well settled. For this Court and the subordinate courts, they are provided for under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules. It provides:

> " (1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 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."

14. Further, in Masisi Mwita -vs- Damaris Wanjiku Njeri Civil Appeal No.107 of 2015, (2016) eKLR, the Court espoused the principles for grant of stay by stating 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) as follows: -
> >
> > "In addition, the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory."
>
> These twin principles go hand in hand and failure to prove one dislodges the other."

15. Thus, an Applicant seeking stay of execution of a decree or order pending appeal is obligated to satisfy the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules. These are that he must (a) show a sufficient cause for that, (b) demonstrate that substantial loss may result to him as the Applicant unless the order is made, and (c) that he provides such security as the court orders for the

due performance of such decree or order as may ultimately be binding on the Applicant has been given. Moreover, the Application for stay must of course be made without any unreasonable delay.

16. In terms of the first principle about showing sufficient cause, for the grant of the order of stay of execution, it must be borne that the law itself provides that it is not automatic that once a party appeals from an order or judgment he/she is given a stay of execution or proceedings. It means he/she must go beyond that obvious fact and meet the conditions for stay. Equally this court is alive to the fact that Respondent being the successful litigant ought to be allowed to enjoy the fruits of his judgment. However, the Court can exercise its discretion to stay the execution of the said judgement. In so doing, the first and foremost point to consider is whether or not there is sufficient cause to deprive the Respondent from enjoying the fruits of its judgment. Sufficient cause has been explained by courts time and again.

17. The same question was posed in Okiya Omtata Okoiti & another v Okiya Omtata Okoiti & 4 others [2016] eKLR and the Court answered as follows:

> "In The Hon. Attorney General vs the Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of 2011 (ur) Musinga, JA saw sufficient cause to be: "Sufficient cause" or "good cause" in law means:
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> > ".....the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused".
>
> See Black's Law Dictionary, 9th Edition, page 251.
>
> Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

18. Again, parties ought to be clear in their mind that Sufficient cause means bona fide or genuine and more than inaction on the part of a party. But in The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others the Court of Appeal in Tanzania expressed that there is difficulty in bringing out the clear meaning of the phrase "sufficient cause".

19. However, in Parimal v. Veena, (2011) 3 SCC 545, the Supreme Court of India observed that:-

> "sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously".

20. The above meaning imports the idea of good faith, honesty, blamelessness and diligence in action. Thus, in the case of Halal & Another -vs- Thornton & Turpin [1963] Ltd [1990] eKLR the Court of Appeal has held that:

> " ....thus the superior court's discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must of course, 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 the case of Hassan Guyo Wakalo -vs- Straman EA Ltd (2013) as follows:
>
> "In addition, the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory."
>
> These two principles go hand in hand and failure to prove one dislodges the other."

21. In the instant case, the Applicant contended that he would likely be evicted from the suit property if orders of stay were not granted thereby rendering the appeal herein nugatory. Nevertheless, one thing is clear: there is evidence that the suit property is registered in the name of the 1st Respondent and the Court already found that the Applicant had been in illegal occupation to the exclusion of the rightful owner. He is so to say trespasser who should not be permitted to hang onto one's property endlessly through the use of court processes. To this end, in my humble view, his appeal cannot be rendered nugatory as the suit property was not his to begin with. Further he asserts that his appeal raises serious issues of law and fact and in so doing they have an arguable appeal. However, I note that there is no memorandum of appeal attached to the instant application to which the Applicant can rely on the face of it to say it has an arguable appeal. Apart from arguing from a hollow point that the intended appeal is arguable merely because of filing a Notice of Appeal, there is no material demonstrate that.

22. Therefore, I find that the 1st Respondent stands to be worse off than the Applicant if he, having being found to be the registered proprietor of the suit property, is denied the use and occupation of the suit property as a result of the illegal occupation by the Applicant. Thus, this court finds that the Applicant has not established sufficient cause to warrant the grant of a stay of execution and I am persuaded that the 1st Respondent ought to be allowed to enjoy the fruits of his judgement. The 1st Respondent has already suffered more prejudice than necessary be being denied of the use and occupation of the property and greater prejudice would be suffered to deprive him of the use thereof after judgment.

23. On the second principle, being substantial loss to be demonstrated, this Court is not bound to consider it once there is no sufficient cause that is shown by the Appellant. Suffice it to say that substantial loss was aptly defined in the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR, 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 ... 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."

24. Similarly, in Century Oil Trading Company Ltd -vs- Kenya Shell Ltd Nairobi (Milimani) HCMCA No. 156 of 2007, Kimaru J observed as follows: -

> " The word "substantial" cannot mean the ordinary loss to which every Judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the code expressly prohibits stay of execution as an ordinary rule, it is clear the words "substantial loss" must mean something in addition to all and different from that which is ordinary. Where execution of a monetary decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The Court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The Court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment."

25. In view of the above authorities, the onus was on the Applicant to show that the loss he was likely to suffer if the stay order was not granted is of a considerable amount and peculiarity as not to be compensated by an award of damages should the judgment be overturned by the superior court. In the instant application, the Applicant contends that he would suffer substantial loss if stay of execution was not granted because his family have been in occupation of the suit property for over 41 years since 1982. Further he asserts that he has also made major investments in terms of construction of the suit property having constructed his matrimonial home and a furniture shop which is his main source of livelihood for his family and himself and if they are evicted, they will be left destitute. However, in the case of Charles Wahome Gethi vs. Angela Wairimu Gethi [2008] eKLR, the Court of Appeal when faced with a similar issue stated that-

> "... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them."

26. Guided by the above authority, I am of the view that it's still not sufficient for the Applicant to state they reside, or eke out a living and or they made major investments in the suit property for the same to be termed as substantial loss. In any event, when the Applicant was given a temporary occupation licence to be on the parcel of land the condition thereon, which he admitted in evidence, was that he was to be on it on a temporary basis and was not to build any permanent structures on it. Moreover, by the Applicant arguing that the property is his matrimonial home and the family would be rendered destitute, it is farfetched. The property was a commercial and not a residential property. Again, not evidence was led at the hearing that the Applicant's family resided on the property. Thus, when, if indeed true, he proceeded to put up permanent structures thereon he did it contrary to the conditions of the licence and illegally so, and at his peril. His illegal actions and structures cannot entitle him to continue remaining on the Respondent's land.

27. Besides, the intended execution process that is set to be undertaken by the 1st Defendant/Respondent of evicting the Plaintiff/Applicant from the suit process is actually a lawful process and the same does not amount to substantial loss. This is on account of the fact that if it happens, the same would be

carried out pursuant to a court order. The court in James Wangalwa Supra pronounced itself on the issue of execution not taking the place of substantial loss by affirming 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 Civil Procedure Rules. This is so because execution is a lawful process".

28. Furthermore, I agree with the assertions of the Respondents that the Applicants ought to have, at the very least, attached a valuation report to indicate the value of the purported matrimonial home and or the furniture business to enable this Court to substantially determine whether the Applicant would suffer any substantial loss in order to grant the order of stay. It is not enough for an Applicant to say that he will suffer substantial loss, he ought to have quantified the said loss or put in material value and shown that it would be of such a peculiar nature that it cannot be compensated should the Appeal succeed. This would have enabled this court to ascertain that the loss the Applicant would suffer would be substantial that it would take long or call for a colossal sum of money to restore to its original position. Temporary structures do not take this. To this end, the Applicant has failed to satisfy the second limb also.

29. The third principle, that an Applicant must surmount, and which is couched in mandatory terms for purposes of being granted a stay order pending appeal is that he or she must furnish security. Thus, the Applicant must establish and or fulfil his readiness and or willingness to provide such security that the court may deem fit and or expedient in the circumstances of the case.

30. The Applicant has asserted that it is ready to furnish such security as the court may deem fit. He did not provide any basis or quantum thereto. The 1st Respondent has in turn urged this Court to order for a deposit of the sum between Kshs. 500,000/= to Kshs. 800,000/= to be deposited in a joint interest earning account in the names of both parties being security for costs by the Plaintiff/Applicant and that the record of appeal to be filed within a specific period to be determined by court. In the case of Arun C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates & 2 others [2014] eKLR, the court addressed itself on the purposes and essence of deposit of security by aptly stating that;

> 'The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor...Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.'

31. Further in the case of RWW vs. EKW [2019] eKLR, 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.

> Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent."

32. From the above persuasive decisions, it is clear that the issue of security is discretionary and it is upon the court to determine the same. Mere statements about preparedness to offer security for costs are not enough. In any event, the Applicant failed to show sufficient cause for the grant of stay of execution. He also failed to demonstrate any substantial loss that may result from the execution taking place. It is trite that substantial loss is the cornerstone for grating of stay of execution and if the same is absent this Court's discretion lies with the allowing the Respondent to enjoy the fruits of their judgment. I am persuaded by the court in Kenya Shell Limited -vs- Benjamin Karuga Kibiru & Another [1986] eKLR; where the court espoused the issue of substantial loss being the cornerstones of jurisdiction for grating stay by stating 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 event. 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.

33. Thus, in the instant Application the third limb also fails. Lastly, on the issue of the Application being brought without undue delay, I find that it is not in dispute that the impugned judgement was delivered on 27/3/2023 and the Application for stay of execution against the said judgement was filed on 06/04/2023 which was only nine (9) days after the judgment. I thus find that the Application has been brought without undue delay but that does not dislodge the first three sequential limbs that he ought to have satisfied. Delay is only considered as a last shot if one satisfies all the other limbs as set out under Order 42 Rule 6(2).

34. The upshot of this is I find that the Applicant has failed to meet the mandatory tenets under which this application would have been successful. Therefore, the Court, is of the view that the Application fails miserably.

**b. Who bears the cost of the Application?**

35. It is clear that the prayers by the Applicant have not been granted. Since costs follow the event, the Applicant shall bear the costs of the application.

36. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 24TH DAY OF JULY, 2023.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC KITALE**