



Kurji v Dacha (Administrator of the Estate of James Romanue Dacha – Deceased) & 3 others (Environment and Land Appeal E005 of 2023) [2023] KEELC 18943 (KLR) (19 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18943 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E005 OF 2023**

**E ASATI, J
JULY 19, 2023**

BETWEEN

HIRANI KANJI KURJI APPELLANT

AND

ANNE ACHIENG DACHA (ADMINISTRATOR OF THE ESTATE OF JAMES ROMANUE DACHA – DECEASED) 1ST RESPONDENT

ROSE ALUOCH OPIYO 2ND RESPONDENT

COUNTY LAND REGISTRAR – KISUMU COUNTY 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion application dated February 24, 2023 stated to be brought pursuant to the provisions of Section 1A, 1B and 3A *Civil Procedure Act*, order 42 rule 6 and order 51 rule 1 *Civil Procedure Rules, 2010*. The application seeks for an order of stay of execution pending hearing and determination of the appeal herein.
2. The application is based on the grounds that the appeal which has already been filed has good chances of success. That the 1st Respondent has shown her intentions to execute the decree of the lower court and if execution takes place the Applicant will suffer irreparable loss and prejudice as the appeal will be rendered nugatory. That the applicant is willing to furnish such security as the court may order for due performance of the decree.

The application was supported by the averments in the Supporting Affidavit of Hirani Kanji Kurji sworn on February 24, 2023.



3. The application was opposed vide grounds of opposition dated 14th March, 2023 filed on behalf of the 1st Respondent, Anne Achieng Dacha. It was the case of the 1st Respondent that there is no provision in law permitting this court to grant the orders sought in the application. That in other word, this court has no jurisdiction to hear the application and grant the orders sought. That the application is wholly misconceived and is based on misunderstanding of the law. That the application is deficient in fact and is an abuse of the court process.
4. The application was canvassed by way of written submissions. The applicants' written submissions were dated April 14, 2023 and the 1st Respondent's submissions May 10, 2023

Submissions by the Applicant

5. It was submitted on behalf of the applicant that the 1st Respondent is desirous of executing the decree in Kisumu CMC ELC No 55 of 2018 which would entail transfer and/or alienation of the suit property thereby render the application and the appeal nugatory. That if the suit land is transferred the applicant will suffer substantial loss. Reliance was placed on the case of *James Wangaliwa & another v Agnes Nekesa Cheseto* (2012) eKLR and *G.N. Mwema t/a Mt. View Maternity & Nursing Home v Miriam Maalim Bisban & Another* (2018) eKLR to submit that the Applicant has a reasonable apprehension that if stay is not granted, he may lose the suit property. That the applicant is willing to furnish security as the court may order for due performance of the decree. That the applicant had satisfied the conditions in Order 42 Rule (6) for the grant of the order of stay of execution pending appeal.

1st Respondent's Submissions

6. Submissions were made on behalf of the 1st Respondent that from the provisions of Order 42 Rule 6, an application for stay of execution should first be made to the trial court and only come to the appellate court if it so desired.

That the principles governing an application for stay of execution as set out in Order 42 Rule 6(2) are only three (3). Firstly, an applicant must prove that he will suffer substantial loss unless an order of stay of execution is granted. Secondly, that the application must be made without unreasonable delay and thirdly, that the applicant must offer and provide such security as the court may direct for the due performance of such order or decree that will ultimately be binding on the applicant.

That there is no proof that substantial loss will accrue to the Applicant if the application is not granted. Counsel relied on the case of *Antoine Ndiaye –vs African Virtual University* [2015] eKLR to submit that substantial loss is the cornerstone of an application for stay of execution pending appeal.

That an application for stay of execution pending appeal must be made without unreasonable delay. There is no reason why the applicant had to wait for a month before filing the application. That a successful party has every right to execute the decree and further that the appeal does not have a good chance of success.

7. Adjudicating an application for stay of execution pending appeal is about balancing the competing interests of the Appellant and the Respondent; while the Respondent is eager to execute the judgement so as to enjoy the fruits thereof, the applicant's interest is to preserve the status quo pending the outcome of the appeal. In the case of *Absolom Dova v Tarbo Transporters* [2013]eKLR the court held that;

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition



that both parties have rights; the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The courts in balancing the two competing rights focus on their reconciliation.”

8. The decree of the lower court herein, a copy of which is attached to the application and marked HKK-2a, is inter alia for an order directing the Land Registrar Kisumu to cancel certain entries made in the register in respect of the suit land and restore the name of the deceased as the registered proprietor of the suit land. The applicant submitted that if this happens, he will suffer substantial loss and the appeal shall be rendered nugatory.

9. In *Patrick Kalava Kulamba & Another vs. Philip Kamosu and Roda Ndanu Philip (Suing as the Legal Representative of the Estate of Jackline Ndinda Philip (Deceased))* [2016] eKLR it was held:

“ 12. For the purposes of this case, the operational words are as underlined above. Thus, whether an application for stay pending appeal has been allowed or rejected in the lower court, the High Court “shall be at liberty...to consider” an application for stay made to it and to make any order it deems fit. The High Court in that capacity exercises what can be termed “original jurisdiction”. And from my reading of the rule, the jurisdiction is not dependent on whether or not a similar application had been made in the lower court, or the fate thereof...

17. So long as an appeal from the substantive decision of the lower court has been lodged, an application under Order 42 Rule 6 (1) of the Civil Procedure Rules can be entertained afresh in the High Court. I believe that was part of the distinction that the Court of Appeal was making in the Githunguri Case concerning the court’s original jurisdiction, vis-à-vis the appellate jurisdiction and the innovation behind Rule 5 (2) b (as it is now). The foregoing has a bearing on the interpretation of Order 42 Rule 6 (6) of the *Civil Procedure Rules* and in particular the highlighted phrased therein”.

10. I have considered the application, the Grounds of Opposition and the submissions made. I am satisfied that a case has been made out for issuance of the orders sought I allow the application and make the following orders;

- i. An order of stay of execution of the judgement dated January 26, 2023 in Kisumu CMC ELC Case No 55 of 2018 is hereby granted pending hearing and determination of the appeal herein.
- ii. The applicant to deposit within 45 days hereof, Kshs 200,000 as security in a joint interest earning account in the joint names of Counsel for the applicant and Counsel for the 1st Respondent herein. In default of making such deposit, the stay order will lapse.
- iii. Cost to the 1st Respondent.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 19TH DAY OF JULY 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

**E. ASATI,
JUDGE.**



In the presence of:

Maureen- Court Assistant.

No appearance for the Appellant/Applicant.

No appearance for the 1st Respondent.

