



**Okuthe v Okumu (Environment and Land Appeal E006 of 2023)
[2023] KEELC 20407 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20407 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL E006 OF 2023
MN KULLOW, J
SEPTEMBER 29, 2023**

BETWEEN

JOSEPH AGUNGA OKUTHE APPLICANT

AND

GEOFFREY OKUMU RESPONDENT

RULING

1. By Notice of Motion dated May 18, 2023 and filed under Certificate of Urgency, the Appellant/ Applicant sought the following orders that: -
 - a. Spent.
 - b. The Respondent herein be stopped from continuing to build/ building on LR No SUNA EAST/ WASWETA I/ 8623 and LR No 8534/ 130 pending inter-partes hearing of this Application.
 - c. The Respondent herein be stopped from continuing to build/ building on LR No SUNA EAST/ WASWETA I/ 8623 and LR No 8534/ 130 pending the determination of the Appeal herein lodged.
 - d. This court do order for stay of execution of orders of the Lower Court dated April 12, 2023.
 - e. The status quo prevailing on LR No SUNA EAST/ WASWETA I/ 8623 and LR No 8534/ 130 be maintained pending the hearing and determination of this Appeal.
 - f. The Officer Commanding Migori Police Station do supervise the execution of the Orders herein.
 - g. Costs of the Application be provided for.



2. The application is based on the 14 grounds on its face and on the Applicant's Supporting Affidavit sworn on even date and a Further Affidavit sworn on the June 23, 2023. It was his contention that on January 13, 2023; the Respondent filed an Application in the trial court, seeking to discharge the orders of injunction in force in CMELC CASE NO 100 of 2019. The said Application was heard and determined vide a ruling dated April 12, 2023; whose effect was to discharge the orders of temporary injunction issued and in the alternative, he was directed to deposit a sum of Kshs 76,037,001/= in court within 15 days from the date of the said ruling.
3. That pursuant to the said ruling of April 12, 2023; the Respondent has moved into the suit land No Suna East/ Wasweta I/8623 and which is also registered as LR No 8534/130 and restarted construction of a storey building.
4. It was his claim that he stands to suffer substantial loss since the Respondent's Agent had issued a verbal notice to his tenants on the May 12, 2023; for the tenants to vacate as he intended to demolish the buildings on a portion of the subject land to enable him continue with his construction. He thus argued that unless the orders of stay of execution sought are granted, the appeal and the proceedings in the trial court stands to be rendered nugatory.
5. In his Further Affidavit, he reiterated that there are developments on the subject land LR No Suna East/ Wasweta I/8623, which are his main source of livelihood and income since he is a retired civil servant. He maintained that he stands to suffer substantial loss if the developments on the said land are demolished despite him being a bonafide title holder of the suit land, which title has never been challenged.
6. On the issue of the deposit of security of Kshs 76,037,001/=as directed by the trial magistrate; it was his contention that the developments being carried out in the suit land were made during the pendency of the injunction orders issued by the trial court. He further averred that the trial court operated in a vacuum in issuing the said order and directing the Appellant to deposit Kshs 76, 037,001/=; since the same were in excess of his pecuniary jurisdiction as a Senior Principal Magistrate, which is capped at Kshs 15,000,000/= as per the provisions of section 7 of the Magistrate's Court Act. He thus dismissed the said orders as being a nullity.
7. He further demonstrated his willingness and readiness to abide by any lawful conditions set by this honorable court for the deposit of security for costs. In conclusion, he urged the court to issue the orders sought in the Application.
8. The application was opposed, the Respondent filed a Replying Affidavit sworn on June 2, 2023 together with annexures marked GO 1 – 3. The Respondent stated that he lodged an Application dated January 13, 2023 in the trial court, seeking to discharge an order of injunction and/or in the alternative, the Appellant be directed to deposit security if the orders of injunction were to remain in force. The said Application was heard and determined vide a Ruling rendered on April 12, 2023.
9. It was his contention that prior to his Application dated January 13, 2023; by consent, parties agreed that a joint survey be undertaken on the suit land. The same was done and consequently, a report dated October 31, 2022 was filed in court on the November 16, 2022.
10. Further, it is his claim that the said Survey Report revealed that that the Appellant had no prima facie case to anchor his basis for an order of injunction in accordance to the well-established threshold on injunction. He averred that he had initiated a multi-million project on the suit land that had been stalled by the orders of injunction in force since the year 2019, hence the need for the Application and orders seeking to discharge the said injunction orders. He thus averred that the trial court considered the circumstances of the case in ordering that the Appellant deposit the sum of Kshs 76,037,001/=



and maintained that it is not illegal for the court to issue an order for deposit of security to keep orders of injunction.

11. On the order for stay of execution sought in the instant Application; it was his contention that the Applicant had not demonstrated any substantial loss that he is likely to suffer. He averred that the survey report filed in the trial court gave a correct picture of the actual position on the ground. He further stated that the Appellant had not demonstrated his willingness and readiness to provide any security. He urged the court that in the event that the orders for stay of execution sought are granted then the Appellant should be ordered to deposit a sum of Kshs 40,000,000/= which is fair in the circumstances since the project aimed to be stayed is of Kshs 76,000,000/=.
12. The Application was canvassed by way of written submissions; both parties filed their rival submissions together with authorities which I have read and carefully considered.

Analysis And Determination

13. From the pleadings and the rival submissions before this court, it is my considered opinion that the main issue arising for determination is whether an Order for Stay of Execution can issue against the ruling and order of the trial court rendered on April 12, 2023 in Migori CMELC No 100 of 2019 in the circumstances;
14. Order 42 Rule 6(1) of the *Civil Procedure Rules*, 2010 empowers the court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. It sets out the grounds to be considered and provides as follows: -
 - (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.
15. The purpose and objective of the order for stay of execution is to preserve the substratum of the appeal in order to ensure that the appeal is not rendered nugatory. See *Consolidated Marine vs Nampijja & Another, Civil App No 93 of 1989 (Nairobi)*.
16. The 3 conditions that must be satisfied by an Applicant to warrant the grant of an order of stay of execution pending appeal, as provided under Order 42 Rule (2) above includes: -
 - i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
 - ii. The application is brought without undue delay and
 - iii. 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.
17. With these conditions in mind, I will proceed to determine whether the Applicant has met the said threshold. The first ground to be established is whether substantial loss may result to the Applicant if an Order stay of execution is not granted. As to what amounts to substantial loss; courts have held that



it is what has to be prevented by preserving the status quo. In *Shell Ltd vs Kibiru and Another [1986] KLR 410* Platt JA stated that;

' Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.
That is what has to be prevented...'

18. It is the Applicant's claim that he stands to suffer substantial loss if the orders for stay of execution sought are not granted. It is his contention that on the May 12, 2023; Respondent's Agent issued a verbal notice to his tenants to vacate as the Respondent intended to demolishing the developments on the suit land No Suna East/ Wasweta I/ 8623 and which would in turn render the Appeal nugatory.
19. It is further his claim that he has developments on the suit land which are his source of livelihood and if the same are demolished then he stands to suffer substantial loss hence the need for stay of execution of the Orders of April 12, 2023, whose effect was to discharge the order of temporary injunction in force.
20. The Respondent on the other hand avers that by consent of the parties, a Joint Survey was carried out on the suit land and thereafter a Report dated October 13, 2023 was filed in court. That the said Survey Report revealed that the Applicant had no prima facie case to anchor his basis for the order of injunction hence the need for the same to be discharged.
21. He dismissed the allegations by the Applicant that he would suffer substantial loss and maintained that the Survey Report showed the contrary. It was his claim that his multi-million project has stalled by virtue of the temporary injunction orders since the year 2019.
22. I have critically considered the rival position taken by both parties herein. I have also looked at the ruling of the trial court which is the subject of the instant Appeal and whose effect was to discharge the injunction orders and/or in the alternative to direct the Appellant herein to deposit Kshs 76,037,000/= . At the center of the said Ruling is the Survey Report dated October 13, 2022.
23. While I do acknowledge the legitimate concerns raised by both parties herein particularly on the findings of the Survey Report dated October 13, 2022, this court is also mindful not to substantively comment on the said Report at this interlocutory stage as the same would amount to delving on the merits of the Appeal. It is therefore important for the court to take into account the competing interests of both parties by critically weighing the purpose and effects of the orders sought herein.
24. The Respondent has not denied the allegations of issuing eviction notices to the Appellant's tenants or his intentions to demolish the Applicant's developments on the suit land with the view of continuing his construction thereon. The Applicant on the other hand has also not challenged the existence of the said Survey Report or its effects as averred by the Respondent, in his Further Affidavit.
25. In view of the foregoing, I find and hold that the Applicant have satisfactorily proved that they are likely to suffer substantial loss unless orders for stay of execution are granted.
26. The second limb is whether the Application has been filed without undue delay. The Trial court issued its ruling on April 12, 2023 while the instant Application was filed on the May 18, 2023. This period does not in my view amount to inordinate delay.
27. The last limb to be proved is on the deposit of security for costs for the due performance of the decree as the court may direct. The Applicant in his Further Affidavit demonstrated his willingness to abide by any conditions as may be set by the court. The Respondent in his Replying Affidavit also stated that should the court allow the instant Application, then Applicant should be compelled to deposit Kshs 40,000,000/= as security for costs given the circumstances of the case.



28. In the case of *Aron C Sharma vs Ashana Raikundalia T/A Rairundalia & Co Advocates* the court held 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.

29. It is the Respondent's contention that the Applicant should be ordered to deposit Kshs 40,000,000/= as security for costs given the circumstances of the case. This figure in my view is exorbitantly high and will curtail the Applicant's right to justice. In the case of *Gianfranco Manentbi & Another vs Africa merchant Assurance Co Ltd [2019] eKLR* the court observed in part that: -

' ...Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals....'

30. However, as stated earlier in the ruling, the circumstances and competing rights and interests of both parties herein must be taken into consideration. An Order for stay of execution is aimed at preserving the substratum of the Appeal and ensuring that the Appeal is not rendered nugatory. Thus, in granting or refusing an Application for stay of execution, the court must ensure that no party is worse off by virtue of its order.

Conclusion

31. In view of the foregoing and in the interest of justice, I find that there is need to allow the Application for stay of execution subject to strict conditions that must strictly be adhered to. Accordingly, I do find that the Application dated May 18, 2023 is merited and I proceed to allow the same on the following terms: -

- a. An Order for Stay of Execution of the ruling and order of the lower court dated April 12, 2023 be and is hereby issued pending the hearing and determination of the Appeal.
- b. Further, the Appellant be and is hereby Ordered to deposit a Banker's Guarantee or Insurance Bond equivalent to Kshs 15,000,000/= within 45 days from the date of this Ruling.
- c. The Appellant be and is hereby Ordered to file his Record of Appeal and Submission within 45 days from the date of this Ruling. The Respondent is thereafter directed to file his submissions within 7 days upon service of the Appellant's submissions. Parties are directed to strictly adhere to the timelines herein.
- d. Failure to comply with order (b) and (c) hereinabove, Order (a) hereinabove shall automatically lapse. Consequently, the Appeal shall stand dismissed and the temporary injunction issued by trial court shall be deemed discharged forthwith.
- e. Further, I hereby direct that the rental income accruing from the suit premises No Suna East/ Wasweta I/ 8623 be deposited in a joint interest earning account in the names of both Advocates acting for the respective parties pending the hearing and determination of the Appeal herein.



- f. Costs of the Application to abide the Appeal.
- g. The matter herein be mentioned on the November 20, 2023 to confirm compliance with the above orders.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 29TH DAY OF SEPTEMBER, 2023.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Mr. Abisai for the Applicant

Mr. Kisera for the Respondent

Tom Maurice - Court Assistant

