



REPUBLIC OF KENYA



KENYA LAW
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**Chemitei v Yano & 2 others (Environment & Land Case 12 of 2020)
[2023] KEELC 20231 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20231 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 12 OF 2020
EO OBAGA, J
SEPTEMBER 28, 2023**

BETWEEN

TRUPHENA J. CHEMITEI PLAINTIFF

AND

PIUS KIPTUM YANO 1ST DEFENDANT

REUBEN KIPKEMOI KOGO 2ND DEFENDANT

JOSPHAT KIPROTICH KIKONO 3RD DEFENDANT

RULING

1. This is a ruling in respect of a notice of motion dated 16/5/2023 in which the Applicant seeks the following orders:-
 1. Spent
 2. Spent
 3. That this honorable court be pleased to grant a stay of execution of the judgement and decree delivered on 20/4/2023 and all consequential orders arising therefrom pending the hearing and final determination of the intended appeal.
 4. That the costs of this application be provided for.
2. The Applicant contends that she has preferred an appeal against this court's judgement delivered on 20/4/2023. The Applicant contends that she is a Senior citizen who has been residing on the suit property since 1987. She has put up a permanent house on it and that if she was evicted from the same, she has nowhere to call home. She states that her appeal has overwhelming chances of success.



3. The Applicant further states that if execution is carried out, the suit property will be available to the Respondents who may sell the same, lease it out or do any other action which will interfere with the subject matter of the appeal.
4. The Respondents opposed the Applicant's application through a replying affidavit sworn on 25/5/2023. The Respondents contend that the Applicant is not being truthful. They state that they have resided on the suit property, particularly the portion known as Cherangany/Kapkanyor/59 and that the Applicant cannot claim that she is the only one residing on the land.
5. The Respondents state that they have been tormented by the Applicant who caused them to be chased away from the portion they were occupying using goons. The Respondents were charged in Kitale court but have since been acquitted/discharged.
6. The Respondents state that should the court be inclined to allow the application, it should be on condition that the Applicant deposits a sum of Kshs 1,000,000/= as security for costs in a joint interest earning account in the name of the Advocates, restore the fence separating LR. No Cherangany/Kapkanyor 58 and 59 and that she should not interfere with their activities on LR. No. Cherangany/Kapkanyor/59.
7. I have carefully considered the Applicant's application as well as the opposition to the same. I have also considered the submissions by the parties. The conditions upon which the court can give stay are that the application has to be brought without unreasonable delay. The Applicant must demonstrate that he/she will suffer substantial loss absent stay and that there has been security given for the due performance of the decree as may ultimately be binding upon the Applicant.
8. In the instant case, judgement was delivered on 20/4/2023. This application was filed on 16/5/2023. The application was filed 26 days after the judgement. The court had granted stay of 30 days soon after delivery of judgement. The application was therefore brought timeously.
9. On whether the Applicant has demonstrated substantial loss, I notice that the Applicant's family have been on the suit property since the mid 70's. the Applicant came to the suit property in 1987. She has permanent houses on the land. If execution was to be carried out her permanent structures will be affected and this will cause her substantial loss.
10. As the Applicant has demonstrated substantial loss, this court has to consider the appropriate conditions to attach to the stay. In determining this, I will have to consider the circumstances of this case. There is no doubt that a losing party has a right to appeal. There is also no doubt that a successful party ought to enjoy the fruits of his judgment.
11. In this case, I must point out that this is one of the cases where parties who are strong use their position to harass the weaker ones. This is clearly shown in this case where the Respondents have even been hauled to court where they face criminal charges. Their houses have been razed down and goons have been let loose upon them.
12. In the circumstances of this case, I have to balance the rights of both parties as was clearly stated by Justice Warsame (as he then was) in the case of *Samvir Trustee Limited v Guardian Bank Ltd* Nairobi (Milimani) HCCC No. 795 of 1997 where the judge stated as follows:-

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The



Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the Applicant/ Defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation... At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court.

Justice requires the court to give an order of stay with certain conditions.”

13. Considering the circumstances of this case, I allow the Applicant’s application for stay pending appeal on the following conditions: -
- a. The Applicant to deposit a sum of Kshs 1,000,000/= (One million shillings) in a joint interest earning account in the names of the Advocates for the parties within 21 days.
 - b. The Applicant to let the Respondents utilize LR. No Cherangany/Kapkanyor/59 pending the hearing and determination of the appeal without any interference from her or her agents whatsoever.
 - c. The Applicant to restore the existing boundary between LR. No. Cherangany/Kapkanyor/58 and 59 as it existed before the same was destroyed by her within 21 days.
 - d. Failure to comply with any of the conditions in (a) (b) and (c) above within the stipulated period, the stay shall automatically lapse and the Respondents be at liberty to execute the decree.
 - e. The costs of this application shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 28TH DAY OF SEPTEMBER, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;



Ms. Kiptum for Plaintiff.

Ms. Kinyua for Defendants.

Court Assistant –Laban

E. O. OBAGA

JUDGE

28th SEPTEMBER, 2023

