



**Kirui v Kipkurgat (Environment and Land Appeal 40 of 2022)
[2023] KEELC 20001 (KLR) (26 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20001 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL 40 OF 2022
JM ONYANGO, J
SEPTEMBER 26, 2023**

BETWEEN

EZEKIEL KIMWENO KIRUI APPELLANT

AND

KIBET KIBENEI KIPKURGAT RESPONDENT

RULING

1. What is before me is the Appellant/ Applicant’s application dated March 13, 2023 seeking a stay of execution pending appeal against the judgment in Eldoret CM ELC Case No E181 of 2019.
2. The application is premised on the grounds set out on the face of the Notice of Motion and the Applicant’s supporting affidavit sworn on the March 13, 2023 in which he has annexed a copy of the Memorandum of Appeal. He deposes that execution is imminent and if a stay of execution is not granted, the appeal shall be rendered nugatory.
3. The application is resisted by the Respondent through his Replying Affidavit sworn on the May 2, 2023 in which he deposes that the Applicant has not met the conditions for stay of execution provided under Order 42 Rule 6 of the *Civil Procedure Rules* as he has not demonstrated that he stands to suffer substantial loss. Secondly he has filed the application after a period of 5 months following the delivery of the judgment and he has not provided any security for costs.
4. The application was prosecuted by way of written submissions and both parties filed their submissions which I have carefully considered.
5. The only issue for determination is whether a stay of execution ought to be granted.
6. Order 42 Rule 6 of the Civil Procedure Rules sets out the conditions that one should meet in order to qualify for an order of stay pending appeal. In particular Order 42 Rule 6(2) 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.
7. In order to grant the order for stay of execution the court must be satisfied that the above three conditions have been met.
8. The first condition is that the Applicant must demonstrate that if the stay is not granted, he shall suffer substantial loss. As to what amounts to substantial loss the court in *James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR* observed as follows:

' 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.'
9. In the instant case the Applicant has not demonstrated what loss he stands to suffer if the order for stay is not granted. All that is stated in his Supporting affidavit is that he has an arguable appeal with high chances of success. I must point out that at this stage I am not required to examine the merits of the appeal. The applicant has therefore not satisfied the first condition in Order 46 rule 6 of the Civil Procedure Rules.
10. Regarding delay, the Applicant filed this application 5 months after judgment was delivered. The delay has not been explained. In my view the application was not filed without unreasonable delay.
11. Lastly with regard to security for costs. The Applicant has not offered any security for costs.
12. Although the Applicant has argued that the appeal will be rendered nugatory if a stay is not granted, I note that in the judgment, the court ordered the Respondent to transfer 4 acres to the appellant. It is not clear to me how such transfer would prejudice the appellant. In any event if the Appellant succeeds on appeal, the transfer can be reserved.
13. All in all, the Applicant has not satisfied the conditions for stay and the application therefore lacks merit. The same is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED THIS 26TH DAY OF SEPTEMBER 2023

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J.M ONYANGO

JUDGE

In the presence of;

1. Mr. Kemboi for the Appellant/Applicant
2. Miss Muiruri for the Respondent



Court Assistant: A. Oniala

