



**Bor v Kirwa (Environment & Land Case 138 of 2016)
[2023] KEELC 19894 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19894 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 138 OF 2016
EO OBAGA, J
SEPTEMBER 21, 2023**

BETWEEN

GILBERT KIMUTAI ARAP BOR PLAINTIFF

AND

SAMUEL KIPSANGA KIRWA DEFENDANT

RULING

Introduction

1. This is a ruling in respect of a notice of motion dated 5/5/2023 in which the defendant/applicant seeks the following orders: -
 1. Spent
 2. Spent
 3. There be an order for the stay of execution of the Judgement delivered on 20th April, 2023 together with the decree emanating therefrom pending the hearing and determination of the main appeal at the Court of Appeal.
 4. The costs of this application be provided for.

Applicant's contention;

2. The applicant contends that this court delivered its judgement on 20/4/2023 in which the Plaintiff/ Respondent was found to have acquired the suit property by way of adverse possession. The Applicant states that he has since filed a notice of appeal against the judgement and has already applied for typed proceedings.
3. The Applicant further states that if stay of execution is not granted, the Respondent will move and have the suit property registered in his name which will render the appeal nugatory. He states that he



will suffer irreparable loss as he is in occupation of the suit property with his family and refusal to grant stay will put the suit property in the hands of the Respondent. He states that his appeal raises weighty issues of law and fact.

4. In a further replying affidavit, the Applicant states that though the Respondent has started the execution process, this court can grant stay of further execution.

Respondent's contention;

5. The Respondent opposed the Applicant's application based on a replying affidavit sworn on 19/5/2023. The Respondent contends that execution process has been carried out and that the Applicant's application has been overtaken by events. The Respondent further contends that the Applicant has lied on oath that he is in occupation of the suit property, when there is evidence that the Applicant has never taken possession of the suit property and will therefore not suffer any substantial loss as it is the Respondent who has been in possession.

Analysis and determination;

6. The parties were directed to file written submissions. The Applicant filed his submissions on 11/7/2023. The Respondent filed his submissions on 8/6/2023. I have gone through the Applicant's application, the opposition to the same by the Respondent as well as the submissions by the parties. The only issue for determination is whether the Applicant has met the threshold for grant of stay of execution pending appeal.
7. The conditions for grant of stay pending appeal are that the application for stay must be made without unreasonable delay. The Applicant has to demonstrate that if stay is not granted, he will suffer substantial loss. There must also be security for costs as may ultimately be binding upon the Applicant in the decree.
8. In the instant case, the judgement being appealed against was delivered on 20/4/2023. The present application was filed on 5/5/2023. The application was therefore filed 10 days after the judgements. I therefore find that application was brought without undue delay.
9. The next issue is whether the Applicant has demonstrated that he will suffer substantial loss should stay of execution be declined. This court found that the Respondent had acquired the suit property by way of adverse possession. Evidence tendered during the hearing shows that the Respondent had been in the suit property since the year 2000. This evidence was captured in the judgement which has been annexed to the Applicant's application. It is therefore not true that the Applicant has been on the suit property with his family as he claims in both the affidavit in support of his application and the supplementary affidavit.
10. The Applicant has not stated whether the Respondent intends to sell the suit property once it is registered in his name. should the appeal succeed, the suit property will simply revert to the Applicant's name. It is therefore not true that his appeal will be rendered nugatory should the stay not be granted.
11. There has been partial execution which was halted when the court ordered on 31/5/2023 that the status quo obtaining by them should be maintained. In the case of *Charles Wahome Gethi – Vs- Angela Wairimu Gethi* (2008) EKLK, the Court of Appeal dismissed the Applicant's application for stay pending appeal as the Applicant had not stated whether the Respondent was intent on selling a portion which the Applicant was occupying. The Applicant had temporary structures on the six acres he was occupying and claimed that the structures would be demolished before his appeal was heard and



determined. He had also not stated that the Respondent was incapable of compensating him should the appeal succeed after his structures had been demolished.

12. In the instant case, the Applicant has nothing on the suit property. His appeal will therefore not be rendered nugatory should stay be denied. The Applicant has not demonstrated any substantial loss he will suffer. Substantial loss is the cornerstone for grant of any stay of execution pending appeal. There is no need to consider the issue of security as the Applicant has failed to demonstrate that he will suffer substantial loss or that his appeal will be rendered nugatory.

Disposition;

13. From the above analysis, it is clear that the Applicant's application is devoid of merit. The same is dismissed with costs to the Respondent. The orders of status quo given on 31/5/2023 and subsequently extended are hereby discharged.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 21ST DAY OF SEPTEMBER, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Momanyi for Respondent.

Mr. Korir for Ms. Kipseii for Applicant.

Court Assistant –Laban

