



**Opot v Osoma & another (Environment & Land Case 26 of 2021)  
[2023] KEELC 19888 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19888 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE 26 OF 2021  
AY KOROSS, J  
SEPTEMBER 21, 2023  
[ORIGINALLY KISUMU ELC APP.NO.55 OF 2018 (O.S.)]**

**BETWEEN**

**GEORGE OHALA OPOT ..... PLAINTIFF**

**AND**

**JAMES AWIMBO OSOMA ..... 1<sup>ST</sup> DEFENDANT**

**DANIEL OTIENO ATIENO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Applicant's case**

1. Pursuant to Sections 1A, 1B, 3A and 66 of the [Civil Procedure Act](#) and Order 42 Rule 6 (1) and (2) and Order 51 Rule 1 of the [Civil Procedure Rules](#), the defendants filed the instant notice of motion that is the subject for determination which was dated 06/04/2023 and sought the following reliefs:
  - a) Spent.
  - b) Spent.
  - c) That the honourable court be pleased to grant an order for stay of execution of the whole judgment delivered by Hon. Lady Justice A. Y. Koross dated 23/03/2023 and all consequential orders pending the hearing and determination of the intended appeal.
2. The application was premised on the grounds outlined on the face of the motion and on the annexed affidavit of the 2<sup>nd</sup> defendant Daniel Otieno Atieno sworn on 06/04/2023.



3. The defendants asserted that the order for stay of execution would preserve the subject matter in dispute so that their rights their appellate rights would be safeguarded and if the appeal was successful, it would not be rendered nugatory.
4. According to the 1<sup>st</sup> defendant, the motion was made in good time, the appeal had high chances of success, they would suffer substantial loss if the orders sought were not granted and they were willing to furnish security.

#### **Plaintiff's case**

5. The motion was opposed by the plaintiff's replying affidavit deposed on 17/04/2023. He averred, the motion was a misnomer, an afterthought and an abuse of court process. The defendants had not demonstrated they were deserving of the orders sought since they had not tendered a memorandum of appeal to show their appeal was arguable or if a grant of stay was not granted, the appeal would be rendered nugatory.

#### **Defendant's submissions**

6. Their counsel, Mr. Madowo, who filed written submissions dated 04/05/2023 identified two issues for determination: (a) whether the order for stay of execution should be issued pending appeal; and (b) who should bear the costs of the motion.
7. On the 1<sup>st</sup> issue, counsel submitted stay pending appeal was anchored in Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules* and the court's discretion had to be exercised judiciously and within the confines of law and the court had to balance the interests of the plaintiff who was successful in his claim vis a vis the unsuccessful defendants.
8. Counsel submitted the motion was filed without unreasonable delay and the defendants would suffer substantial loss for the reason that if the transfer of the disputed portion was to take place as ordered by the court, and, the appeal rendered successful, the subject property would be reverted back to the defendants which would amount to a waste of court's time and resources.
9. Counsel submitted if stay was not granted, the appeal would be rendered an academic exercise. To buttress his position, counsel relied on the case of *Halai and Another vs. Thornton & Turpin [1963] Limited* [1990] eKLR where the Court of Appeal expounded: -

“Thus, the Superior Court's discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay.”
10. Counsel also cited the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, where Gikonyo J stated that:

“...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.”
11. On the 2<sup>nd</sup> issue counsel submitted that as stated in *Morgan Air Cargo Limited vs. Everest Enterprises Limited* [2014], costs should follow the event. The court had the discretion of awarding costs.



## Plaintiff's submissions

12. His counsel, Miss Omondi, filed written submissions dated 19/05/2023. Counsel identified one issue for determination; whether the defendants had established a reasonable case for stay of execution pending appeal.
13. Counsel submitted in stay pending appeal, courts exercise their discretion judiciously and the defendants had failed to establish they would suffer substantial loss, they were not in occupation of the disputed portion of land and had not shown the loss they would incur if the portion was registered in the plaintiff's name or proved the plaintiff was likely to dispose off the disputed portion.
14. Counsel admitted the motion was not filed with unreasonable delay and the nature of security had not been disclosed. Counsel relied on *Samvir Trustee Limited vs. Guardian Bank Limited* Nairobi HCCC Number 795 of 1997 which stated: -

“It is my humble view that for the applicant to obtain a stay of execution, it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention.”

## Analysis and determination

15. Having considered the motion and its grounds, affidavits, parties' rival submissions and well cited provisions of law and authorities which shall guide this court, the single issue falling for determination is whether the defendants have met the threshold for stay pending appeal.
16. If one is seeking stay from the court from whose decision an appeal is preferred, an applicant has to satisfy that he will suffer substantial loss, has moved the court without unreasonable delay and has furnished security. As submitted, these principles are laid out in Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules. See also *Halai and Another vs. Thornton & Turpin* (Supra). This Order 42 Rule 6 (1) and (2) provides as follows: -

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (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.

17. The defendants have appealed against the decision of this court to the Court of Appeal. Since it is the court to which the decision of this court an appeal has been preferred to, it has a wider discretion than this court and some of the principles that guide such an appellate court include whether the appeal is arguable or will be rendered nugatory. The defendants' contestation before this court that the appeal will be rendered nugatory is misplaced; that is the preserve of an appellate court.
18. Being a court against whose decision an appeal had been preferred, its discretion is essentially limited to such conditions as substantial loss, security and unreasonable delay and such discretion has to be exercised judiciously. However, at times the court is called upon to give effect to the overriding objective of the *Civil Procedure Act* as set out in its Sections 1A and 1B.
19. It was common ground amongst the parties the motion had been filed in a timely manner and although the defendants were willing to furnish security, they had not disclosed the nature of security but had left it to the court's discretion. Having dealt with that, the outstanding condition is for this court to establish whether the defendants would suffer substantial loss and if the answer is in the affirmative, what would be the nature of the security and how will it be settled.
20. Both counsels submitted substantial loss was the cornerstone in an application for stay of execution. See *James Wangalwa & Another v Agnes Naliaka Cheseto (Supra)* and *Samvir Trustee Limited vs. Guardian Bank Limited (Supra)*. This position of law was well expounded in the Court of Appeal decision of *Charles Wabome Getbi vs. Angela Wairimu Getbi* [2008] eKLR where the court stated:-
- “... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”
21. In his affidavit, the 1<sup>st</sup> defendant merely averred that he would suffer substantial loss. He did not expound on the nature of the loss or injury he would suffer. This has been left to the court's speculation.
22. The defendants submitted it was the court that would suffer loss if the appeal succeeds and the disputed portion is reverted back to them. Notwithstanding submissions are not evidence, the onus was on the defendants to prove their loss. I agree with the plaintiff's counsel and find the defendants did not prove they would suffer substantial loss.
23. Not one but all the conditions for stay of execution had to be met, in the absence of meeting the condition for loss, I find the defendants have not met the threshold for stay of execution.
24. For the foregoing reasons and findings, the upshot is that the notice of motion dated 06/04/2023 is devoid of merit. It is accordingly dismissed with costs to the plaintiff.
25. It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:



Miss Omondi for the plaintiff

N/A for the defendants

Court assistant: Ishmael Orwa

