



REPUBLIC OF KENYA



KENYA LAW
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**Tireito v Lagat & 2 others (Environment & Land Case 441 of 2012)
[2023] KEELC 21114 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21114 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 441 OF 2012
JM ONYANGO, J
OCTOBER 31, 2023**

BETWEEN

JOSEPH TIREITO PLAINTIFF

AND

JOSEPH KIPSUGUT ARAP LAGAT 1ST DEFENDANT

ANNE NGENY 2ND DEFENDANT

STEPHEN KIPYEGO LEL 3RD DEFENDANT

RULING

1. This is one of those rare scenarios where a successful litigant has come to court under Certificate of Urgency seeking a stay of execution of a judgment rendered in his favour, ostensibly because his application for recusal of the judge was disallowed vide a ruling delivered on June 13, 2023 and he has filed an appeal in the Court of Appeal.
2. The grounds upon which the application dated June 19, 2023 is predicated confirm that the applicant is indeed the successful party and Decree Holder as the 2nd respondent's appeal in the Court of Appeal was dismissed on July 9, 2021 paving the way for execution of the judgment of Justice Sila Munyao which was delivered on February 26, 2014.
3. The application is based on the applicant's supporting affidavit sworn on June 19, 2023 in which he traces the journey that this 24 year old case has gone through from 2002 when Justice Omondi Tunya delivered a ruling on an application for injunction in his favour, upto October 2022 when he objected to the surveyors attempt to implement the judgment by excising 2.5 acres from the 2nd defendant's land so that the same could be included in his title as ordered by Justice Sila Munyao.
4. The application is opposed by the 2nd and 3rd defendants/respondents. The 1st respondent passed away while the appeal was pending for hearing.



5. In herreplying affidavit sworn on July 6, 2023the 2nd respondent deposes that the applicant has not satisfied the mandatory provisions for the grant of a stay of execution as the bulk of his depositions have nothing to do with the application for stay. In particular the applicant has not demonstrated what loss or prejudice he will suffer if the orders sought are not granted.
6. On his part, the 3rd respondent filed a replying affidavit sworn on the July 7, 2023 in which he deposes that the application is incurably defective and has been made in bad faith. He further deposes that the Applicant has not satisfied the conditions for stay pending appeal as provided under Order 42 rule 6 of the *Civil Procedure Rules*. Notably, he points out that an applicant for stay pending appeal must satisfy three conditions first; he must establish substantial loss, secondly he must file the application without undue delay and thirdly he must furnish security for costs.
7. The 3rd Respondent further deposes that the order against which the Applicant has appealed is a dismissal which is a negative order that is not capable of being executed.
8. The court directed that the application be disposed of by way of written submissions and all the parties filed their respective submissions which I have carefully considered.

Parties' Submissions

9. In his submissions, learned counsel for the applicant dwelt on why the 3rd respondent should not participate in the proceedings as the land he had started constructing on was held to belong to the applicant. He then submitted that since Justice Munyao had granted a stay pending appeal on September 30, 2014 and restrained the defendants from dealing with the suit property, and further ordered that possession of the 26.5 acres be with the plaintiff, it was only fair that the same order of stay be maintained pending appeal.
10. Learned counsel for the 2nd respondent submitted that application lacks merit as the conditions stipulated in Order 42 rule 6 of the *Civil Procedure Rules* had not been met. She relied on the case of *Catherine Njeri Maranga*(2017) eKLR for the proposition that sufficient cause had not been established. She further relied on *James Wangalwa v Agnes Naliaka Cheseto* (2012) eKLR for the proposition that an applicant for stay pending appeal must demonstrate that he will suffer substantial loss if the order for stay is not granted.
11. Arguing that the ruling delivered by the court on June 13, 2023was a negative order, she relied on the case of *Cooperative Bank of Kenya Limited v Banking Insurance and Finance Union* (2015) eKLR where the court held that an order for stay must be intended to serve a purpose.
12. She further relied on the case of *Kenya Commercial Bank Ltd v Tamarind Meadows Ltd & 7 others* (2016) eKLR for the proposition that a negative order is incapable of execution.
13. It was her contention that since the ruling delivered on 13.6.23 merely dismissed the applicant's application for recusal of the judge and dealt with the issue of the 3rd respondent's participation in the suit, the court could not grant an order of stay as there was nothing to stay.

Analysis And Determination

14. The only issue for determination is whether the applicant has met the conditions for stay pending appeal. In arriving at its decision, the court shall be guided by Order 42 Rule 6(2) which provides as follows:

“ Rule 6(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
- b. that the application has been made without undue delay; and
- c. such security as the court orders for due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

15. The principles for stay pending appeal were laid down in the case of *Elena D Korir v Kenyatta University* (2014) eKLR where Justice Nzioki wa Makau stated as follows;

“the application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & another v Thornton & Turpin Ltd* where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause; Substantial loss would ensue from a refusal to grant stay; The applicant must furnish security; the application must be made without unreasonable delay.

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo v Straman EA Ltd*[11] (2013)”

16. I will now proceed to determine if the applicant has met the above-mentioned conditions.
17. On the question of substantial loss, the Applicant has not demonstrated what loss he will suffer if the order for stay is not granted. Indeed, being the successful party, it is difficult to envision what loss he would suffer if the judgment is implemented in his favour. His fears about the 3rd Respondent’s participation in the suit at this late stage are totally unfounded and blown out of proportion as he has a judgment in his favour while the 3rd Respondent has none. The Applicant’s apprehension and the false narrative that the court has been misled with a view to depriving him of his prime land is highly misplaced, ill-advised, diversionary and made in bad faith as the court has no intention whatsoever of dispossessing the Applicant of what is rightfully his.
18. On the question of delay, I am of the view that the application was filed without unreasonable delay.
19. With regard to security for costs, the applicant has made no attempt to furnish security for costs as required by order 42 rule 6(2).
20. Additionally, the applicant has not demonstrated that if a stay is not granted, his appeal shall be rendered nugatory.
21. In the final result, I am constrained to find that that the applicant has failed to meet the threshold for stay pending appeal.
22. Consequently, the application lacks merit and it is hereby dismissed.
23. I make no order as to costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 31ST DAY OF OCTOBER 2023

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J.M ONYANGO

JUDGE



In the presence of :

Miss Tum for Dr. Chebii for the Plaintiff/Applicant

Miss Kemboi for Miss Odwa for the 2nd Respondent

Miss Wanjala for Miss Chesoo for the 3rd Respondent

Court Assistant: A. Oniala

