



REPUBLIC OF KENYA



Handa Ukagetha Self Help Group (Suing Through Peter Ndungu Mwangi & 2 others) v Karani & 2 others (Environment & Land Case 123 of 2016) [2023] KEELC 20927 (KLR) (25 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20927 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 123 OF 2016**

**BN OLAO, J
OCTOBER 25, 2023**

BETWEEN

HANDA UKAGETHA SELF HELP GROUP (SUING THROUGH PETER NDUNGU MWANGI, STEPHEN TUMAINI KAMAU & JOSEPH MATHENGE) PLAINTIFF

AND

**GETRUDA TATA KARANI 1ST DEFENDANT
ERINEO PAMBA 2ND DEFENDANT
CALEB KARANI 3RD DEFENDANT**

RULING

1. The dispute between Chanda Ukagetha Self Help Group (suing through Peter Ndungu Mwangi, Stephen Tumaini Kamau and Joseph Mathenge hereafter the plaintiff) and Getruda Tata Karani, Erineo Pamba and Caleb Karani (the 1st, 2nd and 3rd defendants respectively) over the ownership of the land parcels No Bukhayo/mundika/9149, 9150 and 9151 (the suit land) was heard and determined by Omollo J.
2. Vide a judgment delivered on February 20, 2023, the Judge made the following disposal orders:
 - a. That the defendants do and are hereby ordered to surrender vacant possession of the entire parcels of land known as Bukhayo/mundika/9149, 9150 and 9150 within 90 days hereof including demolition of the structures if any on the parcels of LR Bukhayo/Mundika/9150 and 9151.
 - b. That in default of (a) above an eviction order to issue.
 - c. Each party to meet their own costs of this suit.



3. The judgment was delivered to counsel for the parties on the same day via email. The record shows that the defendants were aggrieved by the judgment and promptly filed a Notice of Appeal on February 21, 2023.
4. I now have for my determination the defendant's notice of motion dated May 3, 2023 in which they seek the following orders:
 1. Spent
 2. That leave be granted to the firm of Fwaya Masakhwe Were & Company Advocates to come on record for the defendants.
 3. Spent.
 4. That there be a stay of execution of the judgment and decree issued herein on February 20, 2023 and execution proceedings pending the hearing and final determination of the appeal lodged on February 23, 2023 against the said judgment.
 5. That costs of the application be provided for.
5. The application is premised under the provisions of sections 1A, 1B, 34 and 63(e) of the *Civil Procedure Act*, Order 51 Rule 1, Order 9 Rule 9 and 10 and Order 42 Rule 6 of the *Civil Procedure Rules*. It is based on the grounds set out therein and supported by the affidavit of Erineo Pamba Karani the 2nd defendant herein.
6. The crux of the application is that the defendants being dissatisfied with the judgment herein have lodged an appeal whose chances of success are high. The plaintiffs have however threatened to commence execution proceedings and the 90 days grace period within which the defendants were to give vacant possession of the suit land to the plaintiff are almost due and the defendants stand to suffer irreparable loss in tracing, recovering and restituting the suit land which shall be in danger of being transferred and alienated to third parties as a consequence of the imminent execution process. The defendants have therefore appointed the firm of Fwaya Masakhwe Were & Company Advocates to come on record on their behalf in place of the firm of Ouma Okutta & Associates Advocates and no prejudice will be caused to the plaintiffs if the execution proceedings are stayed pending the appeal.
7. Annexed to the application is a copy of the Notice of Appeal.
8. The appeal is opposed and Peter Ndung'u Mwangi one of the Trustees of the plaintiff and with the authority of the others has filed a replying affidavit dated July 3, 2023 in which he has deposed, inter alia, that the judgment herein was delivered on February 20, 2023 by which the defendants were ordered to give vacant possession of the suit land to the plaintiff within 90 days. However, the defendants failed to do so. That this application does not meet the requirements for orders of stay of execution as it has not been made timeously and neither have the defendants furnished the court with any security to warrant the orders sought. Further, the defendants have not demonstrated to this court the loss that they are likely to suffer if the order for stay of execution is not granted. This application is therefore a waste of the court's time and aimed at delaying the course of justice. It should be dismissed with costs.
9. When the application was placed before Koross J on May 30, 2023, the judge did not certify it as urgent. She directed that it be canvassed by way of written submissions.
10. Submissions were subsequently filed by Mr Fwaya instructed by the firm of Fwaya Masakhwe Were Advocates for the defendants and by Mr Otanga instructed by the firm of Bogonko Otanga & Company Advocates for the plaintiff.



11. I have considered the application, the rival affidavits and the submissions by Counsel.

12. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules reads:

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- (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.”
Emphasis mine.

It is clear from the above that to be entitled to the orders sought, the defendants are required to meet the following conditions:

1. Show sufficient cause.
2. Demonstrate that they will suffer substantial loss unless the order of stay is granted.
3. File the application without unreasonable delay.
4. Offer security.

The above was re-stated by the court of Appeal in the case of *Vishram Ravji Halai v Thornton & Turpin (1963) Ltd* 1990 KLR 365 in the following terms:

“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.”

The centrality of proving substantial loss in such an application was emphasized by Platt Ag. J. A (as he then was) in the case of *Kenya Shell Ltd v Kibiru & another* 1986 KLR 410 where he said:

“It is usually a good rule to see if order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in it’s various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it



is difficult to see why the respondents should be kept out of their money”. Emphasis mine.

13. Guided by the above, it is not in dispute that the defendants lodged their Notice of Appeal a day after the delivery of the judgment sought to be appealed. That is sufficient cause.
14. On the issue of substantial loss, the 2nd defendant has deposed in paragraph 6 of this supporting affidavit as follows:
 - 6: “That we stand to suffer irreparable loss in tracing, recovering and restituting the suit parcels of land which shall be in danger of being transferred and alienated to third parties as a consequence of the imminent execution process.”

15. Kuloba J said the following on the issue of substantial loss in *Machira v/a Machira & Company Advocates v East African Standard (no 2)* 2002 2 KLR 63:

“If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant’s business (eg appeal or intended appeal).”

Other than a mere un-substantiated allegation by the defendants that they stand to suffer irreparable loss in tracing the suit land if it is transferred to third parties, they have not placed before this court any evidence to suggest that the plaintiffs intend to do so. Mere unsubstantiated allegations will not do.

16. It is also not lost to this court that in their respective defences, the defendant has pleaded that the suit land did not in fact exist. In paragraph 3 of their joint defence dated March 2, 2017 the 1st and 2nd defendants pleaded as follows on that issue:
 - 3: “The defendant denies (sic) that there is land parcel known as Bukhayo/Mundika/9149, 9150 and 9151 and specifically that it is owned by the plaintiffs. Strict proof to the contrary shall be on the plaintiffs. The averments in paragraph 3 are denied in total.”

The 3rd defendant made a similar claim in paragraph 3 of his defence dated November 2, 2016. Those pleadings were in response to the plaintiffs’ claim in paragraphs 3 and 4 of their amended plaint dated April 4, 2018 in which they had not only pleaded that they are the registered proprietors of the suit land but further, that the defendants had without any colour of right or justifiable cause trespassed thereon and erected semi-permanent structures. It is difficult to comprehend how the defendants can now allege that the suit land, whose existence they had previously denied, is now under threat of being alienated if the order of stay of execution pending appeal is not granted. What substantial loss is there for them to suffer if what they believe does not exist is alienated to third parties? The defendants cannot approbate and reprobate at the same time. Clearly, the defendants are simply groping in the dark in trying to delay the inevitable.

17. The defendants have not demonstrated substantial loss.
18. On issue of unreasonable delay, it is common ground that the judgment sought to be stayed was delivered by way of electronic mail on February 20, 2023. I did not hear the defendants claim that they did not become aware of the delivery of the judgment on that day. What is or is not unreasonable delay is of course not a matter for determination by any mathematical formula. Each case must be determined



on the basis of its own peculiar circumstance. This court notes, however, that by the said judgment, the defendant were given 90 days “to surrender vacant possession of the entire parcels of land known as Bukhayo/Mundika/9149, 9150 AND 9151.” There is no explanation, reasonable or otherwise, as to why they did not file this application as soon as the judgment was delivered but decided to wait until the expiry of the 90 days grace period allowed in the judgment. This can only be explained on the fact that this application has not been made in good faith. Rather, it is a belated attempt to delay the plaintiffs’ of their right to enjoy the fruits of their judgment.

19. On the issue of security, the defendants have not made any offer. In *Wycliffe Sikuku Walusaka v Philip Kaita Wekesa* 2020 eKLR, it was stated that:

“The offer for security must of course come from the applicant himself as a sign of good faith to demonstrate that the application for stay of execution pending appeal is being pursued in the interest of justice and not merely as a decoy to obstruct and delay the Respondent’s right to enjoy the fruits of his judgment.”

20. As I have already stated above, the defendants decided to wait until the 90 days grace period had expired before filing this explanation. This is not a demonstration or conduct of litigants who are really intent on pursuing justice. The defendants have also pleaded in paragraph 5 of the supporting affidavit of the 2nd defendant.

5: “That the intended appeal shall raise arguable points of law and has high chances of success.”
That cannot be a consideration when this court is determining an application for stay of execution pending an appeal from its own decision.

21. It is clear from all the above that the defendants have been unable to meet the threshold of the law to justify the grant of the orders sought.

22. The Notice of Motion dated May 3, 2023 is devoid of merit. It is accordingly dismissed with costs.

BOAZ N. OLAO

JUDGE

25TH OCTOBER 2023

RULING DATED, SIGNED AND DELIVERED ON THIS 25TH DAY OF OCTOBER 2023 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO

JUDGE

25TH OCTOBER 2023

