



Obengo v Mugo & 4 others (Environment and Land Case Civil Suit 3 of 2019) [2023] KEELC 20916 (KLR) (19 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20916 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND CASE CIVIL SUIT 3 OF 2019
MC OUNDO, J
OCTOBER 19, 2023**

BETWEEN

PAMELA ADHIAMBO OBENGO PLAINTIFF

AND

STEPHEN N. MUGO 1ST DEFENDANT

LAND REGISTRAR, KERICHO LAND REGISTRY 2ND DEFENDANT

ADJUDICATION OFFICER, KERICHO 3RD DEFENDANT

**CHIEF EXECUTIVE COMMITTEE MEMBER, (CE) IN CHARGE OF
LANDS 4TH DEFENDANT**

COUNTY GOVERNMENT OF KERICHO 5TH DEFENDANT

RULING

1. Pursuant to delivery of judgment in this matter on the 2nd March 2023, the Applicant has now filed an Application by way of Notice of Motion dated 30th March 2023 brought under the provisions of Section 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Order 42 Rule 6 (1) and(2) and Order 51 Rule 1 of the Civil Procedure Rules, and all enabling provisions of the law whereby he has sought for orders of stay of execution of the said judgment pending the filing and hearing of his Appeal.
2. The Application is supported by the grounds set on its face as well as on his supporting affidavit sworn on the 30th March 2023 to the effect that he was aggrieved by the judgment and had lodged a Notice of Appeal dated 7th March, 2023 which had already been served upon the Plaintiff. That he had an arguable Appeal with high chances of success and should the Plaintiff/1st Respondent be allowed to execute the impugned judgment and the orders arising therefrom, his intended Appeal would not only be rendered nugatory but he would also suffer irreparable loss. That no prejudice would be suffered by



- the Plaintiff/1st Respondent if stay of execution was granted and further that the application had been brought timeously, in good faith and in the wider interest of substantive justice.
3. The said Application was opposed by the Plaintiff/1st Respondent vide her Replying Affidavit dated the 17th May 2023 in which she sought for the dismissal of the said Application for reasons that the Appeal was not arguable since the said grounds together with the available evidence and submissions of the parties in the suit had been carefully considered by the trial court. That the Applicant had not demonstrated the kind of irreparable loss he was likely to suffer should stay of execution not be granted.
 4. On the other hand should the stay orders be granted, the Plaintiff/1st Respondent stood to suffer prejudice that could not be compensated by damages. That the Applicant had not demonstrated on the face of the application, as legally required, that there was any just cause to warrant stay of execution and setting aside of court's final orders. That the Application was therefore frivolous, vexatious, abuse of court process and scarce judicial resources and non-meritorious. That the matter was already in advanced stages of execution. That if the court was inclined to allow the Application, then as a condition for stay of execution, there be an order directing the Applicant to give such security as the court may order within a given time line for the due performance of such decree or order as may ultimately be binding on the Applicant. That the Applicant also deposit in court the awarded general damages of Kshs. 1,000,000/= and costs of the suit, in default whereof the stay orders should automatically lapse.
 5. In response, the Applicant vide his Supplementary Affidavit dated 20th July, 2023 contended that the Plaintiff/1st Respondent's Replying Affidavit was baseless, bad in law, misplaced, inept, bereft of merit, frivolous, malicious, vexatious and a gross abuse of the court's process hence should be dismissed and/or struck out with costs to the Applicant. That the Plaintiff/1st Respondent had not demonstrated that she would be able to refund and/or adequately compensate the Applicant should his Appeal succeed after him being evicted and his property demolished. That contrary to the Plaintiff/1st Respondent's assertion, he had demonstrated to the satisfaction of the court that he was deserving of the court's discretion and the orders sought. That he had also shown his willingness to be bound by any direction and/or conditions imposed by the court as long as the said conditions were reasonable and in the best interest of justice.
 6. There was no response from the 2nd, 3rd, 4th and 5th Respondents.
 7. On 19th June 2023, parties took directions to have the application disposed of by way of written submissions wherein, I shall summarize their submissions as follows;

The Applicant's submissions.

8. The 1st Defendant/Applicant vide his Submissions dated 24th July, 2023 summarized the factual background of the matter before framing two issues for determination, to wit;
 - i. Whether the Applicant is entitled to the orders sought.
 - ii. Who should bear the costs of the application?
9. On the first issue for determination, the Applicant relied on the principles guiding the grant of stay of execution pending Appeal as provided for under Order 42 rule 6 (2) of the Civil Procedure Rules and the decision in the case of Masisi Mwita vs. Damaris Wanjiku Njeri [2016] eKLR where the court had held that for a stay of execution application to succeed, an Applicant must satisfy conditions that substantial loss would result unless the order was made, the application had been made without unreasonable delay and such security as to costs had been given.



10. With respect to the first condition as to whether he stood to suffer irreparable loss, the Applicant submitted in the affirmative. Reliance was placed on a combination of the decision in the cases of *RWW vs. EKW* [2019] eKLR, and *Andrew Nyando Othina vs. Edward Ouma Othina* [2020] eKLR, as well as the averments in Paragraph 11 of his Replying Affidavit to submit that the Plaintiff/1st Respondent did not dispute that he (Applicant) had extensively developed the suit property and that the same was his only source of livelihood, neither did she demonstrate that should the Appeal succeed upon the eviction of the Applicant and demolition of his rental units ensure, that she would be in a position to adequately compensate the him by way of damages. Consequently, the Applicant submitted that he had demonstrated that should the court disallow the instant application, he would suffer substantial loss hence he urged the court to so find and hold.
11. Regarding the condition as to whether the Application had been brought without unreasonable delay, the Applicant in submitting in the affirmative maintained that it was on record that the impugned judgment was delivered on 2nd March, 2023 and the Notice of Appeal dated 7th March, 2023 was timeously lodged before the court on the 9th March, 2023 while the instant Application was filed on 31st March, 2023. That it was therefore evident that the instant Application was brought in good faith and without unreasonable delay.
12. As to whether he had provided security, the Applicant placed reliance on the decision in the cases of *Charles Kariuki Njuri vs. Francis Kimaru Rwara (Suing as Administrator of the Estate of Rwara Kimaru Alias Benson Rwara Kimaru (Deceased)* [2020] eKLR and *Arun C Sharma vs. Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others* [2014] eKLR as well as the averments in Paragraph 16 of his Supporting Affidavit to reiterate that he was still ready and willing to abide by a reasonable condition on security as the court may order for the due performance of the impugned judgment and decree.
13. The Applicant thus submitted that he had satisfied all the conditions necessary for the grant of orders sought in the instant application hence he urged the court to so find and hold and proceed to grant the said orders.
14. On the second issue for determination as to who should bear the costs of the Application, the Applicant relied on the provisions of Section 27 of the *Civil Procedure Act* to submit that costs were discretionally and usually followed the event.

Plaintiff/1st Respondent's submissions.

15. In opposing the application, the Plaintiff/ 1st Respondent framed her issue for determination as follows;
 - i. Whether the court should grant the Applicant the orders sought in the Application
16. The Plaintiff/1st Respondent relied on the provisions of Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules to submit that one of the orders in the impugned judgment had declared her the absolute proprietor of the suit property. That the Applicant had not tendered any evidence to prove the kind of substantial loss that he was likely to suffer which could not be compensated by costs or at all if the orders sought in the Application were not granted. That the said Applicant had further not tendered any evidence of eminent threat to the effect that the she was likely expose the suit property to any dealings.
17. That all that the Applicant had insinuated had been mere assumptions and allegations without any proof or evidence tendered. That the Applicant laid his alleged claim on the fact that he had developed



- the suit land extensively with permanent rental units and that he lost employment thus depended on the said rental units for subsistence. There had been no authentication of the letter dated 23rd November 2020, photographs, and rent payment breakdown annexed. Reliance was placed on a combination of the decision in the cases of *New Stanley Hotel Ltd vs. Arcade Tobacconist* [1986] eKLR, *Mukuma vs. Abuoga* [1988] KLR 645 and *Charles Wahome Gethi vs. Angela Wairimu Gethi* [2008] eKLR, to submit that it was trite law that it was not sufficient to state that substantial loss may occasion on the Applicant. That the Applicant's basis that he had developed the suit land with permanent rental units could not stand based on the standard set by the law.
18. That it was also trite law that the court had to balance the interest of the Applicant who was seeking to preserve the status quo pending the hearing of the Appeal so that his Appeal was not rendered nugatory and the interest of the Respondent who was seeking to enjoy the fruits of her judgment. That in the instant case the Applicant had not provided the court with sufficient evidence to enable it to exercise its discretion in granting the orders of stay. Reliance was placed in a combination of the decision in the cases of *Attorney General vs. Halala Meat Products Ltd* [2016] eKLR, *Machira t/a Machira & Co. Advocates vs. East African Standard (No 2)* [2002] KLR 63 and *Kenya Shell Ltd vs. Kibiru & Another* [1986] KLR 410.
 19. The Plaintiff/1st Respondent further submitted that the Applicant had failed to demonstrate that he was ready, able and willing to deposit security for the due performance of such decree as may ultimately be binding on him as there was no clear indication that he was acting in good faith and with no intention to sabotage the process of justice. That Order 42 Rule (2) (b) of the Civil Procedure Rules stipulated in mandatory terms that the Applicant must furnish security as a condition for a grant of stay pending Appeal. To buttress the above assertion, reliance was placed on the decision in the case of *Arun C Sharma* case (supra).
 20. It was the Plaintiff/1st Respondents further submissions that the legal provision on security was never intended to fetter the right of Appeal but was put in place to ensure that courts do not assist litigants to delay execution of decree through filing vexatious and frivolous Appeals. That the issue of deposit of security for due performance of decree was not a matter of willingness by the Applicant but for the court to determine. Hence the Applicant had not furnished any security for due performance of the decree for him to be eligible for grant of the reliefs he sought, that the said Applicant could have at the very least, as a show of good faith, paid the awarded general damages of Kshs. 1,000,000/= which ought to have been paid within 30 days.
 21. That it was mandatory for all the three (3) conditions to be fulfilled before an order for stay pending Appeal was granted and that it was not enough that the Applicant fulfills one or two of them. That in the instant case, the 1st Defendant/Applicant had not fulfilled all the three conditions as was required by the law hence the instant Application ought to fail and be dismissed.
 22. Reliance was placed on a combination of the decisions in the cases of *Trust Bank Limited vs. Ajay Shah & 3 Others* [2012] eKLR, *Peter Ndungú Ngae & 3 Others vs. John Mugane Karomo* [2015] eKLR and *Samvir Trustee Limited vs. Guardian Bank Limited* [2007] eKLR to submit that the grant of stay of execution pending Appeal was an exercise of discretion by the court and such discretion was not unfettered but based on well-established principles of law and which the Applicant had not satisfied to warrant the court's exercise of its discretion in his favour. That the Applicant's Application was devoid of merits as he had not demonstrated that there was any just cause to warrant stay of execution of the judgment by meeting the threshold set out in law. That consequently, the instant Application should be dismissed with costs for being frivolous, vexatious, abuse of court's process and scarce judicial resources.



23. The Plaintiff/1st Respondent relied on the decision in the case of Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services & 4 Others [2015] eKLR, to submit since the issue of security was discretionary were the court inclined to grant the stay orders, then there should be an order directing the Applicant to furnish such security as the court orders within a given timeline for the due performance of such decree or order as may ultimately be binding on him. That he be directed to remit to the Plaintiff/1st Respondent the awarded general damages of Kshs. 1,000,000/= and costs of the suit, in default whereof the stay orders should automatically lapse.
24. From the foregoing, the Plaintiff/1st Respondent submitted that although there might not be unreasonable delay from the Applicant, the said Applicant had not satisfied the other grounds for grant of stay orders. She thus implored the court to consider the justice that she had waited for over 5 years since the filing of the instant suit and dismiss the Applicant's Application That she would be greatly prejudiced if the Application was allowed as the Applicant only sought to tactfully prolong the matter and deny her the right to enjoy the fruit of her judgment.

Analysis and Determination

25. The Court has considered the Applicant's application, the Plaintiff/Respondent's replying affidavit, the parties' authorities, as well as the written submissions. Both parties seem to agree that the Applicant is in current possession or occupation of the suit property. Basically, the Applicant is concerned with preserving the subject matter pending the hearing and determination of his Appeal. I find two issues for determination arising therein namely:
- i. Whether the Applicant has satisfied the court on conditions for grant of stay of execution of decree pending Appeal.
 - ii. What orders this court should make.
26. The issue of stay of execution pending Appeal is well stipulated in the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provides as follows :-
- 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.
- 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.
27. There are three conditions for granting of stay order pending Appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules to which :



- a. The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
 - b. The application is brought without undue delay and
 - c. 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.
28. On the first issue, the Court has to be satisfied that the Applicant stands to suffer substantial loss. The issue of substantial loss is one that has been debated and it is one that is discretionary depending on the facts of each case. In the case of Daniel Chebutul Rotich & 2 Others v. Emirates Airlines Civic Case No. 368 of 2001 the court had stated that”
- ‘Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an Applicant is likely to suffer if stay of execution is not granted and that Applicant is therefore forced to pay the decretal sum.’”
29. The Applicant has stated that he has extensively developed the suit properties herein from where he ekes a living from the rental income and will be at a loss should he be evicted from the suit land therein. That he has an arguable Appeal and wishes that the subject matter of the suit be protected from being disposed of by the Respondent so that his Appeal is not rendered nugatory.
30. I am alive to the inclination by courts to preserve the subject matter of litigation to avoid barren results in litigation, in this case being land. This is evident from the decided cases in Shivabhai Patel vs Manibhai Patel [1959] EA 907. and in Consolidated Marine vs Nampijja & Another, Civil App.No.93 of 1989 (Nairobi), where the Court held that:-
- “The purpose of the application for stay of execution pending Appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of Appeal are safeguarded and the Appeal if successful is not rendered nugatory”.
31. I have read, analysed and considered the written submissions by both parties and the Court is obliged to consider the Applicant’s application on merit. In the instant Application, I have observed that judgment was delivered on 2nd March 2023, the Applicant filed a Notice of Appeal dated 7th March, 2023 and served upon the Plaintiff/Respondent and this Application on 31st March 2023 about twenty nine days later accompanied, with a Memorandum of Appeal on dated 23rd March 2023. From the above, I find that there was no unreasonable delay in filing this Application.
32. On the last condition as to provision of security, I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. The Applicant has pledged his willingness to deposit security for due performance of any decree that may be binding on him. In the case of Arun C. Sharma(supra) the court had held that:
- “The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately



be binding on the Applicants. I presume the security must be one which can serve that purpose.”

33. The grant of stay remains a discretionary order that must also take into account the fact that the Court ought not to make a practice of denying a successful litigant the fruits of their judgment.
34. The Court of Appeal in *Butt vs. Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how discretion should be exercised as follows:
 1. “The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an Appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, stay must be granted so that an Appeal may not be rendered nugatory should that Appeal court reverse the judge's discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of Appeal.
 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
35. So as not to prevent an Appeal, I shall allow the said application on the following terms;
 - i. Stay of the execution of the judgment/decreed herein is granted pending hearing and determination of the Applicants' intended Appeal.
 - ii. The Applicant shall deposit security of Kshs.1,500,000/= (one million, five hundred thousand shillings) in court within 21 (twenty one) days from the date of delivery of this ruling. In default, the stay orders shall automatically lapse.
 - iii. The Appellant/Applicant shall lodge his Appeal against the decree of this Court within 30 days from this date.
 - iv. That upon filing of the Memorandum of Appeal in (iii) above, the Applicant shall prepare, file and serve his record of Appeal within 45 days.
 - v. Costs in the cause.

It is so ordered.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 19TH DAY OF OCTOBER 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

