



REPUBLIC OF KENYA



**Vision Afrika Housing Co-operative Society Limited v Mwangi & 3 others (Environment and Land Miscellaneous Application E17 of 2023) [2023] KEELC 21047 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21047 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E17 OF 2023  
A OMBWAYO, J  
OCTOBER 19, 2023**

**BETWEEN**  
**VISION AFRIKA HOUSING CO-OPERATIVE SOCIETY LIMITED . PLAINTIFF**  
**AND**  
**STEPHEN KAMAU MWANGI ..... 1<sup>ST</sup> DEFENDANT**  
**LAND REGISTRAR NAIVAHSA ..... 2<sup>ND</sup> DEFENDANT**  
**REGIONAL SURVEYOR RIFT VALLEY ..... 3<sup>RD</sup> DEFENDANT**  
**THE HON ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. Stephen Kamau Mwangi (hereinafter referred to as the applicant) has come to this court seeking a prayer that pending the hearing and determination of the intended appeal, there be Stay of Execution of the judgment of honorable I Orege given herein on 10<sup>th</sup> August 2023.
2. The application is made on grounds that on 10<sup>th</sup> August 2023, judgment herein was entered by Honorable I. Orege.
3. That the 1<sup>st</sup> defendant/applicant herein was aggrieved by the said judgment and consequently filed a memorandum of appeal. That in the instance of the judgment herein is not stayed execution shall commence and intended appeal shall be rendered futile. That no prejudice will be occasioned on the plaintiff/Respondent.
4. In the supporting affidavit the applicant states that the lower court found that he had trespassed on the respondents land and condemned him to pay damages. He has appealed against the said judgment. He now seeks stay of execution pending appeal. The respondent is now destroying the fence and is in the process of destroying his sons house.



5. In the replying affidavit the respondent states that the applicant has not satisfied the conditions for stay pending appeal. According to the respondent, the defendant has not demonstrated any substantial loss if stay of execution pending appeal is not granted. Moreover, that the applicant has not offered security for stay of the courts decree in the matter. The respondent further states that the applicant is guilty of forum shopping because there is an application pending in the lower court seeking similar orders.
6. I have considered the application and do find that the allegations that there is another application pending in the subordinate court is not controverted and therefore I do find the application to be premature and an abuse of court process. The act of filing an application seeking similar orders when another application in the subordinate court is pending is unprocedural and an abuse of court process.
7. The respondent submits that the boundary has already been aligned and the fence demolished and therefore the applicant is guilty of inordinate delay.
8. This Court observes that judgement was delivered on 10<sup>th</sup> August 2023 whereas the application herein was made on the 4<sup>th</sup> September 202, approximately 25 days thereafter.
9. This court has perused the application, replying affidavit and submissions on record filed by the parties and is of the view that the main issue for determination is whether the instant application meets the threshold to grant orders for stay of execution pending appeal. The law on stay of execution pending Appeal is provided for under Order 42 Rule 6 of the [Civil Procedure Rules](#) which 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 sub rule (1) unless—
    - (a) the Court is satisfied that substantial loss may result to the 1st 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 1st Applicant.”
10. The above three conditions ought to be met by the Applicants for this court to grant the said orders. The Court of Appeal in the case of [Mukuma vs Abuoga](#) (1988) KLR 645 stated that;
 

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”



11. In the case of *Kenya Shell Limited -vs- Benjamin Karuga Kigibu & Ruth Wairimu Karuga* (1982-1988)KAR 1018 the Court of Appeal pronounced itself to the effect that:

“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 rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

In the case of *RWW vs EKW* (2019) eKLR it was held that:-

“...the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.” [Emphasis mine]

12. In addition, Order 42 Rule 6 of the *Civil Procedure Rules* provides that all the three conditions are read conjunctively meaning that all the three conditions must be met in order for this court to grant the stay orders. This therefore means that in the event the Applicant does not meet one of the conditions, the stay orders should not be granted as in this case.
13. I do find that 25 days delay is not an unreasonable delay in the circumstances of this case, more so due to the fact that the Memorandum of Appeal that gives court jurisdiction was filed on 29<sup>th</sup> August 2023.
14. On substantial loss I do find that re-aligning the boundary between the applicant and respondent is not substantial loss. Moreover, the house alleged to belong to the applicant's son has not been shown to be valued and inhabited. It is not demonstrated that the respondent will be unable to refund the decretal sum if the applicant succeeds on appeal. The upshot of the above is that the application is dismissed with costs.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19<sup>TH</sup> DAY OF OCTOBER 2023.**

**A O OMBWAYO**

**JUDGE**

