



**Sikuku v Chemutai (Environment and Land Appeal E5 of 2023)
[2023] KEELC 21076 (KLR) (18 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21076 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E5 OF 2023
EC CHERONO, J
OCTOBER 18, 2023**

BETWEEN

JOHN SIKUKU APPELLANT

AND

BEATRICE CHEMUTAI RESPONDENT

RULING

1. The applicant/appellant herein, vide a Notice of Motion brought under certificate of urgency dated 7th July, 2023 seeks the following orders;
 - i. (Spent)
 - ii. That pending the hearing and determination of this application interparties, the respondent and all others, including those claiming through her, be and is/are hereby temporarily restrained from entering into the portion of the suit parcel of land Ndivisi/Ndivisi/1544 which was in the possession of the applicant being 4.5 acres, as at the institution of the suit in the lower court in 2019.
 - iii. That pending the hearing and determination of this appeal, which has already been admitted, the respondent and all others claiming through her, be and is/are hereby restrained from entering into the portion of the suit parcel of land Ndivisi/Ndivisi/1544 which was in the possession of the applicant being 4.5 acres at the institution of the suit in the lower court in 2019.
 - iv. There be and is hereby ordered stay of the Judgment of the lower court delivered on 11-1-2023 pending the hearing and determination of the appeal.
 - v. The Officer Commanding Police Station Webuye to enforce the orders of the court.
 - vi. The costs of this application be in the appeal.



2. The application is supported by the affidavit of the applicant and annexures thereto as well as grounds apparent on the face of the said application.
3. The said application is opposed with a replying affidavit sworn and filed by the respondent on 24th July, 2023. The said replying affidavit is also supported by numerous annexures thereto.

Applicant's Summary Of Facts

4. The applicant in his affidavit in support of the application deposed that within three days after the impugned judgment was delivered on 13/1/2023, one Walubengo Wasike, under instructions from the respondent led a group of 20 rowdy men into the suit property and fenced off the entire 4.5 acres which had been in his possession since 1999. He stated that the action of fencing off the suit property was done with the aim of blocking all entries and exits into and out of the suit property which is tantamount to evicting him and making life impossible for him and his family.
5. The applicant further deposed that the said walubengo Wasike is a brother to the deceased John Musumba who sold him the suit property and that his active participation in fencing the suit land is a clear indication that he together with the rest of the brothers are using the respondent to grab the suit property sold to him by the deceased. He stated that after the respondent acted in the manner stated hereinabove, he reported to the police but the police declined to assist in enforcing the law forcing him to file an application under certificate on 24/1/2023 and managed to obtain interim injunction orders. He said that before he could serve the said orders upon the respondent, they invaded and totally demolished his entire homestead and also put a tractor to plough the suit land. He said that on the day of demolition of his home, the respondent and her cohorts assaulted his son and broke his arm and also confiscated his phone and his son reported to the police wherefore he was issued with a P3 Forms.
6. The applicant further stated that after obtaining the temporary injunction orders, he served upon the respondent and some sanity returned and they managed to cultivate and plant crops which they harvested.

Respondent's Summary of Facts

7. The respondent filed a replying affidavit sworn on 24th July 2023 in which she deposed that the suit land being land parcel No Ndivisi/Ndivisi/1544 has already been overtaken by events as the same has been fenced and tilled by the beneficiaries of the late Wasike Namisi. She stated that the conditions for the grant of stay orders have not been met and that the application lacks merit and ought to be dismissed. The respondent also deposed that the applicant lacks locus standi to institute proceedings against anyone arising out of the subject matter herein since he is not a beneficiary of the estate of the late Wasike Namisi. She stated that the instant application is an abuse of the court process as there is a similar application pending before the lower court and that should the application herein be allowed, it would amount to intermeddling with the estate of a deceased person. She stated that the suit land is part of the estate of Wasike Namisi who died intestate in the year 1994. She said that prior to his demise, the deceased had not subdivided the suit land and that she has constructed a home where she has lived with her children since the year 1980 to date. She stated that she is wife to one John Murumba(deceased) and daughter-in-law to Wasike Namisi who is the registered proprietor of the suit land and that the suit land parcel No. Ndivisi/Ndivisi/1544 is subject to the provisions of *Law of Succession Act* and that the applicant is not a beneficiary thereof.
8. The respondent stated that John Murumba did not have capacity to dispose off any piece of land registered in the name of the late Wasike Namisi(deceased).



9. In conclusion, the respondent said that the application herein is misconceived and lacks merit and should be dismissed with costs.

Applicant's Submissions

10. The applicant/appellant through the firm of Omagwa Angima & Company Advocates submitted that from the supporting, the supplementary affidavit and the annexures thereto, the applicant has demonstrated/shown sufficient cause or prima facie case as the first condition for the grant of the injunction orders sought. On the second condition, the learned counsel submitted that the damage which may result if the relief sought is not granted could be such that it would be difficult to remedy with monetary compensation. He argued that the subject of this appeal is land which is emotive and must be handled with care to avoid the emotional turmoil that would accompany the consequential loss. He further submitted that the applicant has been on the suit property for close to 3 decades with his family and has extensively developed the same with 4 houses and planted trees. He cited the following cases in support;
 1. *National Bank of Kenya v Duncan Owour Shakali & another*, CA No 9 of 1997
 2. *Stanley Kangethe v Tony Keter & 5 others* (2013) KLR
 3. *Chatur Radio Service v Ponogram Limited* (1994) KLR
 4. *3rd Edition of Halsbury's Laws of England* Vol.21 at paragraph 739 page 352

Respondent's Submissions

11. The respondent through the firm of R.E Nyamu & Company Advocates submitted that the respondent cannot be held responsible for the actions of third parties whom she has no control over and that the applicant has not even enjoined the person alleged wants to evict him namely Walubengo Wasike. She submitted that the applicant has not met the conditions for the grant of stay pending appeal under order 42 Rule 6 *CPR*. She further submitted that allowing this application will only amount to indirectly granting the applicant reliefs that the trial court had declined to grant to the appellant in the former suit and which if allowed will be assisting the applicant/appellant to continue intermeddling with the assets of the estate of the deceased person.

Legal Analysis And Decision

12. I have considered the application dated 7th July 2023, the supporting affidavit, the supplementary affidavit, the replying affidavit and the annexures in support and in opposition to the application, the rival submissions as well as the relevant law. The said application is predicated under order 40 Rule 1 & 2, order 42 Rule 6(1) *CPR*, Article 50 and 159 of the *Constitution*, Section 1A, 1B, 3 & 3B Section 63(e) *CPA*, and section 19 of the *Environment and Land Court Act*.
13. An application for a temporary injunction is usually issued to restrain a party from acting or doing something that is detrimental or prejudicial to the opposite party pending the hearing of the main suit. The conditions for the grant of an injunction are as follows;
 - i. The applicant must establish a *prima facie* case.
 - ii. The applicant must show that he/she will suffer irreparable loss that cannot be compensated by an award of damages



- iii. Where the court is in doubt, it may decide the matter on a balance of convenience.
14. On the other hand, where a party seeks an order for stay pending appeal under order 42 Rule 6(2) CPR, the court must be satisfied that the applicant has met the following conditions;
- a. The application has been brought without undue delay.
 - b. The applicant has shown that he/she will suffer substantial loss unless the stay orders are granted
 - c. The applicant has given security for the due performance of the decree/order as may ultimately be binding on him/her.
15. Since the applicant is appealing against the judgment and decree by the trial court delivered on 11/1/2023, the applicable law is an order of stay pending appeal under order 42 Rule 6(2) CPR which provides as follows;
- “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 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.”
16. The court of Appeal in RWW v EKW [2019] eKLR held as follows;
- “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.
9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellant with those of the respondent.”
17. Again in James Wangalwa & another v Agness Naliaka Cheseto [2012] eKLR Gikonyo J held thus;
- “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under 42 Rule 6 of the CPR. This is because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...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.”
18. I agree with the above decisions by the superior courts. Applying the first condition for the grant of stay pending appeal, it is clear that the impugned judgment was delivered on 11/1/2023 and the present



application was filed on 10th July, 2023. It took the applicant seven months to bring this application. At paragraph 10 of the supporting affidavit, the applicant stated that he filed an application before the trial court under certificate of urgency on 24/1/2023 and on 25/1/2023, the court granted him interim orders. However, he stated that when the lower court file was being forwarded to this Honourable court for appeal, the interim orders were not extended and the ruling on the interlocutory application had not also be delivered. For those reasons, I find that the delay has been explained.

19. As regards the second condition, I find that the applicant has not demonstrated any substantial loss he stands to suffer unless the stay of execution orders are granted. He has not established any other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. The applicant has not demonstrated how the intended appeal would be rendered nugatory unless the application is allowed. This condition being the cornerstone of stay pending appeal and applicant having failed to show that he will suffer any substantial loss, I find the applicant has failed the litmus test as all the three conditions must be proved sequentially before an order for stay pending appeal is granted.
20. The upshot of my finding is that the Notice of motion application dated 7th July, 2023 is without merit and the same is hereby dismissed with costs.

**READ, DATED AND DELIVERED IN THE OPEN COURT/VIRTUALLY AT BUNGOMA THIS
18TH OCTOBER, 2023**

HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr Omagwa Angima for applicant/appellant-present
2. Respondent/advocate-absent
3. M/S Joy C/A-present

