



**Laton & 2 others v Konchellah & 3 others (Environment & Land Case 26 of 2021) [2023] KEELC 20747 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20747 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
ENVIRONMENT & LAND CASE 26 OF 2021**

**EM WASHE, J**

**OCTOBER 17, 2023**

**BETWEEN**

**ERICK SAITOTI LATON ..... 1<sup>ST</sup> PLAINTIFF**

**VALENTINE NAMOO LATON ..... 2<sup>ND</sup> PLAINTIFF**

**SAMPAYIAN LATON ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**JAMES LATON KONCHELLAH ..... 1<sup>ST</sup> DEFENDANT**

**ABDIHAKIM MOHAMUD JUBAT ..... 2<sup>ND</sup> DEFENDANT**

**JUMBA & COMPANY, ADVOCATES ..... 3<sup>RD</sup> DEFENDANT**

**LAND REGISTRAR, TRANSMARA ..... 4<sup>TH</sup> DEFENDANT**

***(FORMERLY NAROK ELC CASE NO. 368 OF 2017 & KISII ELC CASE NO. 1276 OF 2016)***

**RULING**

1. The 2<sup>nd</sup> Defendant (hereinafter referred to as “the Applicant”) herein being aggrieved by the Judgement of this Honourable Court pronounced on the March 23, 2023 (hereinafter referred to as “the Trial Court Judgement”) filed a Notice of Motion application dated April 12, 2023 (hereinafter referred to as “the present Application”) seeking for the following Orders:-
  - a. This Application be certified as urgent. (SPENT)
  - b. Service be dispensed with in the first instance. (SPENT)
  - c. That a stay of execution of the judgement, decree and/or order of this Court given on 23<sup>rd</sup> of March 2023 be granted pending the hearing and determination of this Application. (SPENT)



- d. The Court be pleased to grant a stay of execution of the judgement, decree and/or order given on 23<sup>rd</sup> of March 2023 pending hearing and determination of the Appeal against the judgement made by this Honourable Court to the Court of Appeal.
  - e. The costs of this Application be provided for.
  - f. Any other orders that meet the ends of justice.
2. The Applicant in the body of the present application as well as the supporting affidavit sworn on the 12<sup>th</sup> of April 2023 has outlined various grounds in support of the prayers hereinabove which can be summarised as follows;-
- a. The Applicant is aggrieved by the Trial Court Judgement pronounced on the 23<sup>rd</sup> of March 2023.
  - b. The Applicant has indeed in the exercise of his right to an appeal filed a Notice of Appeal dated 24<sup>th</sup> of March 2023 together with a Memorandum of Appeal.
  - c. The Applicant believes that the draft Memorandum of Appeal attached to the Notice of Appeal dated 24<sup>th</sup> of March 2023 raises serious issues and is not frivolous.
  - d. If the stay of execution order is not issued against the judgement of 23<sup>rd</sup> of March 2023, then there is a likelihood that the Plaintiffs/Respondents will proceed and dispose of the suit properties thereby rendering the intended Appeal nugatory.
  - e. Further to that, the Applicant states that he is the one in possession and undertaking various farming activities and therefore if this Honourable Court does not grant the stay of execution being sought, the Applicant stands to suffer substantial loss arising from destruction of the crops and/or trees on the ground.
3. The Plaintiffs/Respondents have opposed the present Application through a Replying Affidavit sworn by the 1<sup>st</sup> Plaintiff/Respondent on the 25<sup>th</sup> of April 2023.
4. The main grounds relied upon by the Applicants in their Replying Affidavit dated 25<sup>th</sup> of April 2023 is that this Honourable Court is now *functus officio*, incapable of issuing any stay against a negative order and finally, the present application is an abuse of the Court process.
5. The Applicant then filed his submissions dated June 20, 2023 while the Plaintiffs/Respondents filed their submissions on the June 7, 2023.
6. The present Application has been brought before the Honourable Court through the provisions of Order 42 Rule 6 of the [Civil Procedure Rules](#), 2010 which expressly provides as follows;-
- “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.



7. The case of *RWW v EKW* [2019] eKLR, the Honourable Court made the following observations,

"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.

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."

8. The general legal principle in considering an application for stay pending appeal is whether or not the Applicant will suffer substantial loss if the said order of stay is not granted.
9. The Kenyan *Constitution*, 2010 grants every person the opportunity of appeal as a right to fair hearing.
10. This Honourable Court will therefore not be a hinderance to the right of appeal to any aggrieved party in any legal proceedings.
11. The only issue that it will consider in determining if an order of stay of execution should be issued or not is the scale of loss that will be suffered by the Applicant is the order of stay of execution is not granted.
12. In the present Application, the Applicant states that he is on the ground and has undertaken extensive agricultural activities including farming and planting trees.
13. The Applicant submits before this Honourable Court that the judgement pronounced by this Honourable Court on the 23<sup>rd</sup> of March 2023 cancels and/or nullifies the title documents of the suit properties he owns and therefore the Applicants/Respondents can evict him and/or dispose of the suit properties to third parties.
14. The Applicant's fear is that such actions will result in substantive loss on the ground as well as render the intended Appeal nugatory as the suit properties will be in the hands of third parties.
15. To be able to make a proper determination of whether the Applicant stands to suffer substantial loss or not, this Honourable Court reminds itself of the issues that were discussed in the Trial Court Judgement.
16. In the said Trial Court Judgement, the Applicant owned a number of properties which were a sub-division of the original property known as LR No Transmara/Enanyieny/200.
17. The sub-divisions in the names of the Applicant were LR No Transmara/Enanyieny/662,654,665,666,647 and 648 and the remainder of the original property known as LR No Transmara/Enanyieny/200 is owned by other parties.
18. It essence therefore, the Applicant can only be in possession of various sub-divisions which have been outlined in the paragraph hereinabove and not the entire property known as LR NO Transmara/Enanyieny/200.
19. In the sub-divisions registered in the name of the Applicants, it was clear during trial that he had taken possession and undertaken various agricultural activities including planting trees.



20. Possession in the eyes of this Honourable Court does not necessarily have to be the act of residing on the suit properties.
21. In other words, if the Plaintiffs/Respondents succeed to implement the Trial Court Judgement, then the ownership rights and possession of the said sub-divisions will be alienated and cause substantial loss to the Applicant.
22. The Plaintiff/Respondent have submitted that this Honourable Court has no jurisdiction to entertain the present Application as there already exists a substantive Appeal known as Nakuru Court of Appeal No E063 of 2023.
23. According to the Plaintiffs/Respondents, once the Applicant filed the substantive Appeal known as Nakuru Court of Appeal No E063 OF 2023, this Honourable Court should not deal with the present application and instead the Applicants should file the same in the Court of Appeal which is now seized of the matter.
24. Unfortunately, the Plaintiffs/Respondents did not present any document before this Honourable Court save for the allegation that they are reliably informed of such an appeal.
25. It was incumbent upon the Plaintiffs/Respondents to provide the necessary documents and/or pleadings in the said Nakuru Court of Appeal No E063 of 2023 to enable this Honourable Court understand what was pending before the Court of Appeal and/or its legal effects on the present Application.
26. The failure by the Plaintiffs/Respondents to do so leaves this Honourable Court with the view that it has jurisdiction to hear and determine the present Application in line with Order 42 Rule 6 of the [Civil Procedure Rules](#), 2010.
27. In essence therefore, this Honourable Court is satisfied that indeed, the Applicant will suffer substantial loss if an order of stay of execution is not issued in relation to the sub-divisions known as LR No Transmara/Enanyieny/662,654,665,666,647 and 648.
28. The second issue in considering an application for stay of execution is whether the said application was filed without delay.
29. In this suit, the judgement was pronounced on the 23<sup>rd</sup> of March 2023.
30. The Notice of Appeal by the applicant was promptly filed on the 24<sup>th</sup> of March 2023 and the present Application filed on the 12<sup>th</sup> of April 2023.
31. Clearly therefore, the Applicant acted with speed to file the present Application and it cannot be said that there was any delay of any nature whatsoever.
32. The last issue for consideration is security for costs for the due performance of such decree or order as may ultimately be binding on him.
33. The Trial Court judgement being appealed against did not have any monetary prayer save as to costs.
34. In the circumstances, the only security that the Applicant should deposit pending the hearing and determination of the intended Appeal is the costs before the Trial Court which in the Honourable Court's view a figure of Kenya Shillings Two Hundred Thousand should suffice.
35. In conclusion therefore, this Honourable Court hereby makes the following Orders as appertains the present Application; -



- a. An order of stay of execution of the judgement pronounced on March 23, 2023 be and is hereby issued relating to the properties known as LR No Transmara/ Enanyieny/662,654,665,666,647 and 648 pending the hearing & determination of the intended appeal.
- b. The applicant is hereby directed to deposit a sum of Kshs 200,000/- as security for the costs within 30 days from today's date failure to which the order of stay of execution will automatically lapse and/or be discharged.
- c. The costs of the notice of motion dated April 12, 2023 will abide the outcome of the substantive appeal.

**DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON THE 17<sup>TH</sup> OCTOBER 2023.**

**EMMANUEL.M.WASHE**

**JUDGE**

**In the Presence of:**

Court Assistant: Mr. Ngeno

Advocates for the Applicants: Mr. Kerongo

Advocates for the Defendant: Mr. Okemwa h/b Mr. Nyambati

