



**Kanda & another v Kiprotich (Environment and Land Appeal  
008 of 2023) [2023] KEELC 21307 (KLR) (16 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21307 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT AND LAND APPEAL 008 OF 2023  
L WAITHAKA, J  
OCTOBER 16, 2023**

**BETWEEN**

**WILFRED KIBET KANDA ..... 1<sup>ST</sup> APPLICANT**

**NAHASHON KIPLIMO KANDA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**BENJAMIN KIPROTICH ..... RESPONDENT**

**RULING**

1. This ruling is in respect of the notice of motion dated 17<sup>th</sup> May, 2023 brought under Section 63E, 1A, 1B and 3A of the *Civil Procedure Act*, Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*. Through the motion/ application, the applicant seeks an order of stay of execution of the Judgement and decree of Honourable Charles Kutwa, SPM, delivered on the 3<sup>rd</sup> May, 2023 in Iten E&L Case No. 20 of 2018 pending the hearing and determination of the Appeal.
2. The application is premised on the grounds on its face and is supported by the affidavit of Winnie Jepchumba Kigen sworn on 17<sup>th</sup> May, 2023. The applicants point out that they were dissatisfied with the judgment of the lower court and have since appealed the decision; that unless stay of execution is granted, the respondent may execute the orders issued in his favour thereby occasioning them loss and prejudice.
3. In opposing the application, the respondent, Benjamin Kiprotich, filed the replying affidavit he swore on 7<sup>th</sup> June, 2022. He contends that the applicants had filed a similar application on 18<sup>th</sup> May 2020 in the lower court and a ruling was delivered on 2<sup>nd</sup> August 2020 where the application was dismissed; that the current application is not justified and is a delay tactic; that the power to grant stay of execution is discretionary under Order 12 Rule 7 of the Civil Procedure Rules and that the applicants have not demonstrated that they stand to suffer substantial loss if stay is denied.



## Submissions

4. Pursuant to directions given on 22<sup>nd</sup> June 2022, that the application be disposed by written submissions, both parties filed their submissions which I have read and considered. I find the issue for the court's determination to be whether the applicants have made up a case for being granted an order of stay pending the hearing and determination of the Appeal.

## The Applicant's Submissions

5. In their submissions filed on 6<sup>th</sup> July 2023, the applicants submit that they preferred an appeal to this court on 18<sup>th</sup> May, 2023 challenging the entire judgment; that they have met the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules. In brevity, the applicants submit that the dispute pertains to ownership of land and they risk being evicted if orders of stay are not granted rendering their families homeless; that there is further risk of the respondent wasting the suit property as the applicants have developments on the land; that the respondent may not be able to compensate them if the appeal succeeds or if execution is carried out as he is a man of straw; that their appeal raises triable issues with high chances of success; that if the orders sought are not granted, the appeal will be rendered nugatory; that the application has been made without delay; that whereas the decree appealed is not a monetary one, they are willing and ready to abide by such reasonable terms as the court may order in the interest of both parties.

They relied on the cases of *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* (2022) eKLR, *Equator Inn Limited v. National Oil Corporation of Kenya*, *RWW V EKW* (2019) and *Housing Finance Company of Kenya v. Sharon Kher Mohamed Ali Hirji*.

## The Respondents Submissions

6. In his submissions filed on 16<sup>th</sup> August 2023, the respondent submits that the application is not merited and is aimed at delaying the respondent from realizing the fruits of his judgment; that power to grant a stay of execution is a discretionary one thus the appellant's appeal is incompetent as there is a recourse under Order 12 Rule 7 of the *Civil Procedure Rules*. On the issue of substantial loss, he submits that the applicants must establish other factors that 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; that the respondents should be awarded costs with interests and the application dismissed for lack of merit. They relied on the cases *James Wangalwa & another v Agnes Naliaka Cheseto* (2020) EKLR, *Republic v Rosemary Wairimu Munene v Ibururu Dairy Farmers Co-operative Society* Judicial Review application 6 of 2014 and *DGM v EWG* (2021) eKLR.

## Analysis and Determination.

7. The legal basis for grant of stay pending appeal is found in Order 42 Rule 6 of the *Civil Procedure Rules* which provides;

“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
- b. n has been made without unreasonable 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.”
8. In the case of *RWW v EKW* [2019] eKLR, the court held;

“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.
9. In his plaint filed before the lower court, the respondent stated that the suit property is registered in the name of his late father; that the appellants had encroached into the suit property claiming they had joint ownership with the deceased. He sought an order of permanent injunction to restrain the appellants from among other orders occupying the suit property or in any way interfering with it. The suit was determined in his favour. This court is called upon to balance the competing interests of the respondent as a successful litigant and the appellants who are exercising their right of appeal and are in occupation of the suit property.
10. On whether the applicants will suffer substantial loss, if an order of stay is not granted; in the circumstances of this case where the subject matter of the suit is land registered in the name of the respondent’s late father, but occupied by the appellants, I am convinced that if an order of stay is denied and the respondent takes over the suit property, he may deal with it in a manner prejudicial to the outcome of the appeal, should the appellant succeed in his appeal. This court therefore finds it necessary to preserve the suit property that so that the appeal is not rendered nugatory.
11. On whether the application has been made without unreasonable delay, I find that there was no inordinate delay as the application was filed on 18<sup>th</sup> May, 2023 and judgment had been delivered only 15 days earlier, on 3<sup>rd</sup> May, 2023.
12. On security for costs; although the applicants have not offered any, the court notes that the appellant/ applicants have expressed willingness to abide with any conditions that the court may order.
13. Regarding the application filed in the lower court on 18<sup>th</sup> May 2020 said to be similar to the instant motion that was dismissed; a review of the court record shows that the application referred to above was challenging a ruling by the trial court where the court had granted orders of injunction. Under the circumstances, I find the allegation that the instant application is unjustified and an abuse of the court process to be untrue and misleading.
14. All in all, my considered view of this matter is that the prejudice to be suffered by the respondent can be addressed or lessened by fast tracking the hearing and determination of the appeal. Consequently, I allow the application dated 17<sup>th</sup> May, 2023 and grant prayer 3 in the application on condition that the applicants shall, within 21 days from the date of delivery of this ruling, deposit in a joint interest account to be opened in the joint names of the advocates for the parties Kshs. 100,000/-being security for costs and file and serve a record of appeal, failure to which the appeal shall automatically stand dismissed with costs to the respondent.



15. The appellant is directed to, with the help of the deputy registrar of this court, ensure that the appeal is processed for hearing and heard within 120 days from the date of this ruling failing which it shall stand automatically dismissed with costs to the respondent.
16. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ITEN THIS 16<sup>TH</sup> DAY OF OCTOBER, 2023.**

**L. N. WAITHAKA**

**JUDGE**

**Ruling read virtually in the presence of**

Ms Kigen for the appellant

Mr Barmao for the respondent

Christine – Court Assistant

