



Kimulu (Suing as guardian ad litem of the Children at Kisii Children Home Child Welfare Society of Kenya) & 3 others v Abuga & 5 others (Environment & Land Case 220 of 2017) [2023] KEELC 21816 (KLR) (28 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21816 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 220 OF 2017
M SILA, J
NOVEMBER 28, 2023**

BETWEEN

**KELVIN KIMULU (SUING AS GUARDIAN AD LITEM OF THE CHILDREN AT KISII CHILDREN HOME CHILD WELFARE SOCIETY OF KENYA) 1ST PLAINTIFF
CHILD WELFARE SOCIETY OF KENYA, KISII BRANCH 2ND PLAINTIFF
CHILD WELFARE SOCIETY OF KENYA 3RD PLAINTIFF
THE HON. ATTORNEY GENERAL 4TH PLAINTIFF**

AND

**JOSHUA ABUGA 1ST DEFENDANT
PAMELA ISENSI 2ND DEFENDANT
REBECCA MBOYA 3RD DEFENDANT
PETERSDON ONDICHO 4TH DEFENDANT
FRED NYAKUNDI 5TH DEFENDANT
PETER OYARO 6TH DEFENDANT**

RULING

(Application for stay/injunction pending appeal; principles to be considered; applicants using part of the suit premises as a place of worship and suit land also housing a children’s home; applicants having been ordered to vacate the suit premises; applicants filing an application to review the order of eviction which application was declined; applicants preferring an appeal to the Court of Appeal and now seeking stay; need to balance interests of the applicant and respondent in an application



for stay; in our case, the rights of the children must be given preeminence; applicants can look for an alternative place of worship for the duration of the appeal; application dismissed)

1. The application before me is that dated 29 September 2023 seeking orders of stay pending appeal against the ruling of 21 September 2023. The application is opposed.
2. By way of background, the suit herein was commenced through a plaint filed on 21 November 2017 with the applicants as defendants. The plaintiffs/respondents contended that the applicants are in illegal occupation of the land parcel Kisii Municipality/Block [particulars withheld], which land was said to belong to the Children's Welfare Society of Kenya, and is where the Kisii Children's Home is established. The respondents claimed that they had allowed the Millenium SDA Church, which is represented by the applicants, to have a temporary licence to use part of the suit land for prayer and related activities. They averred that subsequently the Church started claiming ownership over the suit property which is what culminated in this suit. Together with the plaint, the respondents filed an application for injunction against the applicants. The applicants filed a reply asserting that they lay no claim over the suit land (as parcel No [particulars withheld]) and that they were not even operating within it but on adjacent land. The court (Mutungi J) referred the matter to the District Land Registrar and Surveyor to fix the boundaries of the suit land and file a report which was done. The judge found that the report demonstrated that the applicants were having a temporary shelter within the suit land and proceeded to enter judgment in accordance with the said report. Inter alia the court ordered the applicants to give vacant possession within 90 days and a decree was issued to that effect. The applicants were aggrieved by the decree and filed an appeal to the Court of Appeal, being Kisumu Civil Appeal No 152 of 2019. This appeal was dismissed in a judgment delivered on 18 December 2020.
3. Vide an application dated 14 May 2022, the respondents (as plaintiffs/decreed holders) filed an application for eviction of the applicants from the suit land. They did aver that the description of the suit land had changed from Kisii Municipality/Block [particulars withheld] to Kisii Municipality/Block [particulars withheld]. A replying affidavit opposing this motion was filed, inter alia urging that the plaintiff had filed suit over the land parcel No [particulars withheld] but was now seeking eviction over the land parcel No [particulars withheld], which they contended was a different plot. The application was heard by Onyango J, who delivered ruling on 3 November 2022, allowing the application for eviction. Aggrieved by the ruling, the applicants, through an application dated 20 April 2023, applied for a review of that ruling, still protesting that the order of eviction was given for a different parcel of land. I heard the application and dismissed it in my ruling of 21 September 2023. I held that the court (Onyango J) had exhaustively analysed the argument regarding eviction from the parcel No [particulars withheld] and/or parcel No [particulars withheld], and it was not in my place to sit on appeal against that ruling. I held the view that if the applicants were aggrieved by the reasoning of the court, the avenue was to appeal, and not file review, for there was no new material being introduced.
4. Aggrieved by my ruling, the applicants filed a Notice of Appeal and have followed that up with this application for stay pending appeal. The supporting affidavit is sworn by Peterson Ondicho, the 4th applicant. He contends that eviction was ordered against them in respect of the Plot No. [particulars withheld] which measures 1.429 Ha whereas the Plot No [particulars withheld] measures 0.6309 Ha. He believes that they have a good appeal to the Court of Appeal and the substratum of the appeal should be preserved. He avers that they stand to suffer irreparable harm and substantial loss that cannot be compensated by way of damages, as they will have been evicted from the suit property which has been their place of worship for over 10 years, and they have much religious and sentimental value attached to it.



5. The application is opposed by the Replying Affidavit of Irene Mureithi, the Executive Director of the Child Welfare Society of Kenya and the custodian of Kisii Children's Home. She has more or less given the history of the case which culminated in the issuance of the order of eviction. She has pointed out the court was not persuaded to review the order of eviction issued on the plot No 649 and that this was considered by the court when dealing with the application for eviction. She believes that this application is another attempt to circumvent the decree of the court and the judgment of the Court of Appeal. She is of opinion that the issues raised in the application have been articulated and litigated to the pulp and the application is thus res judicata. She avers that litigation must come to an end and the applicants cannot keep coming to court over the same issues forever. She contends that the applicants are a threat and danger to the well being and safety of the children in the Children's Home and it cannot be ruled out that they may inflict physical or actual harm to the children. She does not think that there is any loss that the applicants stand to suffer as they have never had an interest in the suit land.
6. I invited counsel to file submissions and I have seen the submissions of Mr. Nyangacha, learned counsel for the applicants, and of Mr. O.M Otieno, learned counsel for the respondents.
7. This is an application for stay pending appeal brought inter alia under Order 42 Rule 6 (1) of the [Civil Procedure Rules](#). Under the said rule, this court does have jurisdiction to consider an application for stay pending appeal to the Court of Appeal.
8. According to Order 42 Rule 6 (4), for purposes of considering such an application, an appeal will be considered filed, once a notice of appeal is filed under the [Court of Appeal Rules](#). I have seen that the applicants did file a notice of appeal against the ruling of 21 September 2023 on the same day, and thus, they have lodged a valid notice of appeal.
9. An order for review is appealable as of right as provided under Order 43 Rule 1 (1) (x). I acknowledge the protest of the respondents, that the applicants appear to file one application over another, but the law does allow them to lodge an appeal against an order for review. The law also permits the filing of an application for stay pending appeal.
10. I have also seen that in his submissions, Mr. Otieno, learned counsel for the respondents, urged that this application is res judicata. I am not persuaded. It would only be res judicata if there had been a previous application for stay pending appeal against the same ruling which is not the case. There certainly has not been a previous application for stay pending appeal against the impugned ruling and thus the doctrine of res judicata cannot apply.
11. On my part, I see no problem with the applicants applying to appeal the order for review, and it is indeed within their rights to do so, and they have every right to come to court to seek a stay pending appeal. If they are inclined to pursue the appeal to the end, the Court of Appeal will determine whether this court erred in refusing to order a review of the order of eviction. I cannot go to the merits or otherwise of the appeal and I will leave it at that. Indeed, the merits or demerits of such an appeal is not among the considerations this court will look at while considering whether or not to grant stay.
12. Mr. Otieno also urged that the applicants have not met the test in *Giella v Cassman Brown* (1973) EA on the grant of an order for injunction. That was certainly in response to Mr. Nyangacha's submissions where he urged that the applicants have met the test in the case of *Giella v Cassman Brown* and that they deserve an order of injunction pending appeal. I am at a loss as to why *Giella v Cassman Brown* was being cited by Mr. Nyangacha in the first place for it cannot apply in a case such as this. *Giella v Cassman Brown* is a decision over interlocutory injunctions, i.e, injunctions pending hearing of a suit. It is not an authority that lays any principles on the grant of an order of stay of execution pending appeal or an order of injunction pending appeal.



13. The principles regarding stay or injunction pending appeal are outlined in Order 42 Rule 6 (2) which provides as follows :-
 - (2) 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.
14. From the above, it will be noted that the court ought to consider three issues when addressing an application for stay of execution pending appeal. These are :-
 - (i) That the application has been made without unreasonable delay;
 - (ii) That the applicant satisfies the court that she stands to suffer substantial loss if the order for stay is not made;
 - (iii) That there is provision of security as the court may order for the due performance of the decree.
15. I will be guided by the above principles in my assessment of this application.
16. The first issue is delay and it cannot be argued that there has been any delay in lodging this application. It was filed less than 10 days to the impugned ruling. I find no delay.
17. The second principle is substantial loss. This has been held to be the cornerstone of an application for stay pending appeal. It is my considered view that any substantial loss to the applicant also needs to be weighed and balanced against the right of the successful party to the fruits of the judgment. It could also happen that if the execution of the decree is stalled, the successful party is the one that will suffer substantial loss, which loss may not be mitigated if the applicant loses the appeal. Thus any loss that an application claims he/she will suffer also needs to be weighed against any loss that the successful party demonstrates he may suffer by the decree not being executed. It cannot be the law, nor is it just, that the successful party should be sacrificed for the comfort of the applicant.
18. In our case, as far as I can see, the loss that the applicants aver they will suffer relates to an inability to use the premises for worship, for the duration of the appeal. On the other hand, the respondents assert that the continued presence of the applicants in the premises may expose the children residing in the Children’s Home to various risks. Children are a vulnerable group in our society and we must go to all lengths to ensure their safety. When it comes to weighing whether to expose children to any risks, or to have the applicants continue worshipping on the disputed land, I think the balance tilts towards issuing an umbrella of protection to the children. The adults can certainly look for, and find, an alternative place to worship for the duration of the appeal. If they succeed on appeal, they can come back to the land, for the land is not going anywhere. I think for the sake of the children, the applicants need to keep away from the suit property pending hearing and determination of their appeal. I am thus not persuaded to issue any orders of stay of execution pending appeal. I give the applicants seven (7) days to make sure that they have quietly moved out of the suit premises, and if they do not do so, the respondents are at liberty to proceed to execute the order of eviction.
19. It will be seen from the foregoing that I do not find merit in this application and it is hereby dismissed with costs.
20. Orders accordingly.



DATED AND DELIVERED AT KISII THIS 28th DAY OF NOVEMBER 2023

JUSTICE MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT AT KISII

