



**Mochama v Machogu (Environment & Land Case 72 of 2013)
[2023] KEELC 21684 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21684 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 72 OF 2013**

M SILA, J

NOVEMBER 23, 2023

BETWEEN

RACHEL MORAA MOCHAMA PLAINTIFF

AND

PAUL TIRIMBA MACHOGU DEFENDANT

RULING

(Application for stay of execution pending appeal; principles to be applied; plaintiff/applicant having filed suit seeking to have the defendant restrained from the suit land; turning out that the plaintiff does not own the suit land but owns neighbouring land; plaintiff not lodging any claim for the suit land and her suit thus dismissed; plaintiff now seeking stay pending appeal; court not persuaded to grant stay as the plaintiff does not stand to suffer any loss since she does not own the suit land and she made no claim for it; application dismissed)

1. The application before me is that dated 7 September 2023 filed by the unsuccessful plaintiff. She seeks orders of stay of execution of the judgment herein pending hearing and determination of an appeal to the Court of Appeal. The application is opposed.
2. To put matters into perspective, the applicant commenced this suit through a plaint filed on 20 February 2013. She averred to be the owner of the Plot No. B/13 Gekomu Market within Kisii Municipality. She complained that the defendant/respondent invaded the premises, which she alleged was developed, and evicted the occupants therein. In the suit, she inter alia asked for a declaration that she owns the Plot No. B/13 Gekomu Market and a permanent injunction to restrain the respondent from it. In defence the respondent contended that what he owns is the land parcel Nyaribari Chache/B/B/Boburia/6353 which is where the development in question was located. I heard the case and delivered judgment on 25 July 2023. The evidence demonstrated that the Plot No. B/13 Gekomu market and the land parcel Nyaribari Chache/B/B/Boburia/6353 were two different and distinct plots. Whereas the applicant owned the Plot No. B/13 Gekomu Market, the respondent owned the



land parcel Nyaribari Chache/B/B/Boburia/6353. I also found that the development in dispute was on the respondent's plot No. Nyaribari Chache/B/B/Boburia/6353 (parcel No. 6353) and not the applicant's plot. I did not find any pleadings whereby the applicant asserted ownership of the parcel No. 6353 as her pleadings were to restrain the respondent from the Plot No. B/13 Gekomu market, which the respondent was not laying claim over. I proceeded to dismiss her case.

3. Aggrieved, she filed a Notice of Appeal and followed it up with this application for stay pending appeal.
4. . In support of her application, the applicant has deposed that the respondent has started verbally instructing the tenants on the premises to vacate and/or pay rent to him, which she states is likely to cause a breach of peace between him and herself. She prays that the status quo on occupation and use of the premises be maintained pending hearing of the appeal. She is apprehensive that if stay is not granted, the intended appeal will be rendered nugatory and a mere academic exercise and she is likely to suffer irreparable loss and damages.
5. In response, the respondent deposed that it would be unethical for him to claim rent as the building on the premises is dilapidated and a health hazard and is borderline inhabitable, and it is best for the occupants to vacate the building and not pay anyone rent. He averred that what this court did was to dismiss the suit of the applicant and no positive orders were issued which are capable of being stayed. He has also raised issue that the Notice of Appeal is invalid as it was filed more than 25 days late. He believes that the applicant is unjustly enriching herself using his property and that the application is a delaying tactic.
6. I invited counsel to file written submissions towards the application, and I have seen the submissions of Mr. Soire, learned counsel for the applicant, and Ms. Hashi, learned counsel for the respondent. I have taken these into account before arriving at my decision.
7. This is an application for stay pending appeal and I stand guided by the principles laid down 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.
8. . But before I embark on the above principles, it has been raised that this application is incompetent since there is no valid notice of appeal. Being an application for stay pending appeal, the court needs to be satisfied that an appeal has been lodged, for I do not see how one can claim to seek a stay pending appeal, when they have no appeal in the first place. You need to first demonstrate that you have an appeal, then seek a stay pending that appeal. Order 6 rule 4 provides that for purposes of the rule (relating to stay pending appeal) an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given. Thus, this court is entitled to entertain an application for stay pending appeal on the basis of a Notice of Appeal. It is my view that if there is no valid notice of appeal, then one cannot purport to seek stay pending appeal before this court, for there will technically be no appeal pending before the Court of Appeal.
9. The respondent contends that there is no valid notice of appeal, and in her submissions, Ms. Hashi, learned counsel for the respondent, urged that the notice of appeal was filed on 8 September 2023 yet the judgment was delivered on 25 July 2023. That position is misplaced. I can see that the Notice of Appeal was lodged on 3 August 2023. That date of 8 September 2023 is the date of filing this



application, and annexed to the supporting affidavit was a copy of the notice of appeal, thus the copy of notice of appeal annexed to the supporting affidavit is stamped with the receiving date of 8 September 2023. It is mistaken to claim that the notice of appeal was filed on 8 September 2023. There is indeed a valid notice of appeal which can form a basis for an application for stay pending appeal before this court.

10. . I will now turn back to the principles laid down in order 42 rule 6 (2). It outlines three principles that the court ought to consider when assessing an application of this nature. These are :-
 - a. That the application has been filed without undue delay.
 - b. That the applicant demonstrates that she stands to suffer substantial loss if the application is not allowed.
 - c. That there is given due security for the performance of the decree in the event that the appeal is lost.
11. Starting with delay, I observe that judgment was delivered on 25 July 2023. The notice of appeal was filed on 3 August 2023. This application was filed more than a month later on 8 September 2023. There were no stay orders in between. I wonder why the applicant needed to wait for more than one month before filing this application. That time period is not explained. There is a reason why the rule provides that such application not be filed after undue delay. The applicant does not say that there was anything that prevented her from filing this application shortly after filing the notice of appeal since she had already signaled her intention to appeal. I think, in the circumstances of this case, there was unreasonable delay in filing this application, and I would outrightly dismiss it on that basis.
12. But let us assume that I am wrong on the above. Would the applicant suffer substantial loss ? I am not persuaded. The development in question is not on her Plot B/13 Gekomu Market but on the land parcel Nyaribari Chache/B/B/Boburia/6353 of which she lays no claim over. Her interest is in the Plot No B/13 Gekomu Market and not the parcel Nyaribari Chache/B/B/Boburia/6353. If you own Plot A, and there is a development in Plot B, how can you allege to suffer loss if you are kept out of the development in Plot B which you are not even making a claim over ? That is the scenario we have here. I do not see what loss the applicant can assert by being kept away from a plot that she does not own and she does not contend to own. Nowhere in her pleadings did the applicant ever make a claim of ownership over the land parcel Nyaribari Chache/B/B/Boburia/6353 upon which the development in issue is located.
13. Having not demonstrated any substantial loss, it is not necessary to consider the element of security for the due performance of the decree.
14. I am aware that the respondent contends that all that this court did was dismiss the suit and thus no positive order capable of being stayed was made. I do not see any need to engage in assessing that argument since it is apparent to me that the applicant has not met the test for grant of stay pending appeal.
15. For the above reasons, I see no merit in this application and it is hereby dismissed with costs to the respondent.
16. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 23 DAY OF NOVEMBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT



AT KISII

In presence of: -

Mr. Soire for the plaintiff/applicant

Ms. Moturi holding brief for Ms. A. Hashi for the defendant/respondent

Court Assistant – Lawrence Chomba

