



REPUBLIC OF KENYA



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Springs Property Management Limited v Mwatsuma & 3 others; Ain Diab Investment Limited (Interested Party) (Land Case 237 of 2014) [2023] KEELC 21689 (KLR) (22 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21689 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE 237 OF 2014
FM NJOROGE, J
NOVEMBER 22, 2023**

BETWEEN

SPRINGS PROPERTY MANAGEMENT LIMITED PLAINTIFF

AND

LUKE BRUNO MWATSUMA 1ST DEFENDANT

THE ESTATE OF GRACE NAZI MWATSUMA (DCD) 2ND DEFENDANT

PETER WOODS 3RD DEFENDANT

LAND REGISTRAR, KILIFI 4TH DEFENDANT

AND

AIN DIAB INVESTMENT LIMITED INTERESTED PARTY

RULING

1. For determination is the application by the interested Party dated 27th March, 2023 seeking the following orders:
 1. Spent
 2. A temporary stay of execution of judgment and decree of the Honourable Court rendered on 7th March, 2023 be granted pending the hearing and determination of this application inter parties.
 3. Spent



4. That after the said inter parties hearing of the application this Honourable Court be pleased to grant a stay of execution of the judgment rendered on 7th March, 2023 pending the hearing and determination of the Interested Party's Appeal.
5. An appropriate order be made for costs of this application.
2. The application is supported by the grounds on the face of the application and the supporting affidavit sworn by George Gohu Mwakule the Company's director. He deponed that there was a disagreement after the construction of a wall to serve as a fence was brought down due to its encroachment on the boundary between plot No. 331 and 332 herein. That on 7th March, 2023, the honourable Court delivered a judgment in which it found that the boundary between the Plaintiff and the Defendants together with the Interested Party had been encroached on and that the location where the wall was brought down was declared to be the proper boundary between the two plots.
3. He asserted that he intended to contest the whole decision in the Court of Appeal having filed a Notice of Appeal dated 20th March, 2023 which appeal raises manifestly arguable grounds for determination and that granting the orders of stay sought will advance his alienable right to prosecute an effective appeal. He also asserted that he is apprehensive that there being no orders of stay of execution the Plaintiff may commence execution proceedings for construction of the boundary as recommended by the court in the Judgment of 7th March, 2023.

Response.

4. I perused the file record at the time of writing this opinion and found no replying affidavit filed on behalf of the Plaintiff/Respondent.

Submissions.

5. The applicant/ Interested Party filed its submissions on the 7th day of June, 2023.
6. In its submissions, the Interested Party submitted that the orders made by the Court with regard to rectification of the boundary will be severely detrimental to the applicant. He relied on the case of *RWW v EKW* (2019) eKLR where the court considered the purpose of a stay of execution order pending appeal. Counsel submitted that it is essential that a stay be granted to avoid rendering the appeal nugatory and an academic exercise if it is heard and determined in favour of the Applicant.
7. Counsel also relied on the case principles set out on the case of *Butt v Rent Restriction Tribunal* (1979) urging the court to consider the grounds set out in respect of granting stay of execution therein. Counsel submitted that stay of execution is discretionary and sought to have the stay granted notwithstanding the defendant's objection. He stated that the objection in itself has failed to raise a point as to why stay should not be granted.
8. On whether the applicant will suffer substantial loss, counsel persuaded the court to be guided by the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR. Further, counsel submitted that the appeal is arguable and, on this heading, they relied on the case of *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* (2013) eKLR.
9. The Respondent/ Plaintiff on the other hand filed submissions on the 12th day of July, 2023. Counsel identified two issues which in his perception for determination:
 - a. Whether the court should allow the applicant's application seeking to stay negative orders issued in form of a determination by this court and



- b. Whether there is sufficient cause for the application to be granted.
10. On the 1st issue for determination, counsel submitted that the applicant has not attached evidence to prove that there is a positive requirement herein capable of execution. That judgments in form of declarations are not capable of execution and from the application there is nothing to prove execution of the orders issued.
11. According to him, the order of the Honourable court is negative order and such an order cannot be executed. He also submitted that the applicant has failed to show any steps taken by the respondent towards execution. That no decree or order has been extracted and annexed to prove the applicant's allegations.
12. On the 2nd issue for determination, counsel submitted that the principles guiding the grant of a stay of execution are provided for under order 42 rule 6(2) of the *Civil Procedure Rules*. He also submitted that the applicant has failed to demonstrate how he is likely to suffer substantial loss unless the order is granted. He relied on the authorities of *James Wangalwa & Ano. v Agnes Naliaka Cheseto* (2012) eKLR, *Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 others* High Court Election Petition No. 8 of 2013 and that of *Mohamed Ali Osman T/A Hanan Petroleum v Juanco Group Ltd* C.A No. 044 of 2021.

Analysis and Determination.

13. I have considered the application before me and in my view, what is for determination is whether this court ought to grant stay of execution as has been sought by the applicant.
14. The principles to be considered in determining an application for stay of execution pending appeal are found in Order 42 Rule 6(2) which provides that: -
- “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 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 the Applicant.”
15. The applicant contends that on 7th March, 2023, the Honourable Court delivered a judgment in which it pronounced that the boundary between the Plaintiff and the Defendants together with the Interested Party had been encroached and that where the wall was brought down was declared to be the boundary between the two plots. His further contention is that that he intends to contest the whole decision in the Court of Appeal having filed a Notice of Appeal dated 20th March, 2023 which appeal raises manifestly arguable grounds for determination and that granting the orders of stay sought will advance his inalienable right to prosecute an effective appeal.
16. The Plaintiff/ Respondent on the other hand argues that the order of the Honourable court is a negative order and such an order cannot be executed, that the applicant has failed to show any steps taken by the respondent towards execution. That no decree or order has been extracted and annexed to prove the applicant's allegations.
17. The Applicant has therefore to satisfy this Court that she has met the threshold for grant of the orders sought. Even as the Court considers the principles set out in Order 42 Rule 6(2), it will also take into account that the power to grant or not to grant stay of execution pending appeal is discretionary, which



discretion must be exercised judicially based on facts and sound legal principles as was held in the case of *Fina Bank Ltd v Spares & Industries Ltd*, Civil App.No.25 of 2000 LLR 5845 (CAK).

18. On whether the application was filed without unreasonable delay, the applicant filed the present application on March 27, 2023 while judgement in this matter was delivered on March 7, 2023. The application was therefore filed timeously.
19. There is a Notice of Appeal on the court record dated March 14, 2023 and lodged on January 20, 2023 and it is therefore my view that for the purposes of this application, there is an appeal in place and the application has been filed without unreasonable delay.
20. On whether the applicant will suffer loss, I am guided by the case of *Masisi Mwita v Damaris Wanjiku Njeri* (2016) eKLR where the court held as follows on what constitutes substantial loss:

“The corner stone of the jurisdiction of the court under order 42 of the *Civil Procedure Rules* is that substantial loss would result to the applicant unless a stay of execution is granted. What constitutes substantial loss was broadly discussed by Gikonyo J in the case of *James Wangalwa & another v Agnes Naliaka Cheseto* where it was held inter alia that: -

“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 order 42 rule 6 of the *CPR*. This is so 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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein v Chesoni ...* 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.”

21. I have considered the sentiments of both parties and the Judgment, intended to be appealed. The court stated that the only way it could come to a resolution of the boundary dispute is the implementation of the survey report dated 25th September, 2014 which is what the court ordered the Land Registrar to do. In my view, the court did not ask any of the other parties to perform any duties. It merely declared the proper position of the boundary. That declaration concurred with a prior report of the Land Registrar. As such, I am of the opinion that there is nothing to be stayed by this court. In the end, the application dated 27/3/2023 cannot succeed and I hereby dismiss it with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 22ND DAY OF NOVEMBER 2023.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

