



**Tarus v Kurgat (Environment & Land Case E001 of 2023)
[2023] KEELC 21630 (KLR) (16 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21630 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E001 OF 2023
MN MWANYALE, J
NOVEMBER 16, 2023**

BETWEEN

RHODA JEPKORIR TARUS APPLICANT

AND

MALAKWEN KOSGEI KURGAT RESPONDENT

RULING

1. The court has been tasked with determination of the Notice of Motion application dated September 25, 2023 which primarily seeks stay of execution orders against the Ruling dated May 16, 2023 pending hearing and determination of the Appeal.
2. The grounds in support of the application are *inter alia* that;
 - i) the trial magistrate delivered a ruling which the applicant is dissatisfied and has preferred an appeal.
 - ii) That the ruling of the trial court sets aside an order of Justice Ombwayo, a consent order by Hon. Alego and the adoption of the consent order by Hon. Orwa which has been a tedious laborious, meticulous, resolve of the dispute.
 - iii) The consent order was set aside without due regard to the tenets of settling aside a consent order.
 - iv) The appellant has an arguable appeal which will be rendered nugatory and an academic exercise should the ruling be executed.
 - v) That the appeal raises serious weighty and triable issues of both law and fact and has a high chance of success.



3. The application is supported but the Supporting Affidavit of Rhoda Jepkorir Tarus who has annexed a copy of the Ruling dated August 30, 2023 together with a Memorandum of Appeal, as well as previous orders in the matter.
4. The deponent, depones of having made the application timeously, and that the appeal would be rendered nugatory.
5. The application is opposed by the Replying of Malakwen Kipkosgei Kurgat, the defendant in the trial court now respondent herein, who deposes that the application is an abuse of court process and was made in bad faith as no ruling was delivered on May 16, 2023 as per prayer 2 of the application.
6. That the Ruling delivered on August 30, 2023 gives reasons as the same was made based on the circumstances and evidence on record.
7. That there was a discrepancy in the acreages in the mutation forms and earlier survey report; hence the order of a resurvey was to re-establish the boundaries.
8. That the applicant has not met the threshold of the grant of stay of execution. Applicant will not suffer any prejudice should a resurvey done.
9. Temporary orders of maintenance of *status quo* were issues at the *ex parte* stage.
10. The matter before the trial court is still a live matter and the resurvey was to be done to enable the defence hearing proceed but for the temporary orders issued.
11. The parties were directed to proceed by way of oral submissions

Applicants Submissions.

12. In his oral submissions, Mr Maritim Learned Counsel for the applicant submitted that previous surveys have been done on the boundaries of Nandi/Kipkaren/Salient/602 and Nandi/Kipkaren Salient/603, which were hived out of Nandi/Kipkaren Salient/216.
13. That there was no contention on the acreage in the survey report that was adopted by Court and implemented on the ground.
14. That both parties have testified and the impugned ruling was filed pursuant to an application to review the consent order that determined the boundary.
15. The respondent through Miss Nderitu learned counsel, opposes the application and places reliance on the Replying Affidavit of Malakwen Kipkosgei Kurgat, and she submitted that no prejudice will be occasioned to any party since no beacons will be removed, and a resurvey would make the Court reach a true decision on the actual measurements and not on errors, and she placed reliance on the decision in Francis K. Chabari and Another vs Mwarania Kairubi.
16. It is the ruling reviewing the consent order that is now subject of application before Court.

Respondents Submissions: -

17. The respondent submits that security has not been provided by the appellant hence the condition has not been met, urged the Court to dismiss the application and cited the decision in the case of *Estate of Richard Chuko Stephens* 2021 eKLR.



18. In a brief rejoinder, Mr Maritim for the applicant, submitted that his client was ready and willing to furnish security as may be ordered by the Court since there is no money decree. He further submitted that if the stay is not granted the Appeal will be rendered academic.

Issues For Determination: -

19. The Court frames the following as issues for determination;

- i) whether the application met the conditions for grant of stay of execution
- ii) whether the application is merited
- iii) What reliefs ought to issue?

20. On issue number 1, order 42 rule 6 sets out the conditions for grant of stay of execution. The same provides as follows;

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but the Court appeal from may for sufficient cause order stay of execution of such decree or order and whether.....”

21. Sub rule 2 provides thereof,

“No order of stay of execution.....

- 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.”

22. On substantial loss, the Court of Appeal in its decision in the case of *James Wangalwa and another vs Agnes Naliaka Cheseto* (2012) eKLR, emphasized the centrality of substantial loss, by holding interalia;

“The issue of substantial loss, is the corner stone of both jurisdictions. The substantial loss is what is to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

23. As noted elsewhere in this ruling this matter is still live before the trial court as this is a stay of execution application on an issue of an interlocutory issue of resurvey.

24. Once the trial court renders final judgment on the matter any aggrieved party would have a chance to appeal against the said decision, hence the Court finds at this stage no prejudice will be occasioned to any party, leave alone the applicant as after final judgment a right of appeal exists.

25. Whereas the application has been brought timely as required, the court having found in the proceeding paragraph that no prejudice will be occasioned to any party if the stay is not granted, as after final judgment a right of Appeal exists to any aggrieved party.

26. Consequently, as no prejudice and/or substantial loss has been demonstrated, that condition for stay has not been met, and the application is thus not merited, and it is dismissed.



27. For avoidance of doubt, the survey that had been ordered to proceed as may be scheduled by the trial court.
28. Costs of this application are awarded to the respondent.

DELIVERED AND DATED AT KAPSABET THIS 16TH DAY OF NOVEMBER, 2023.

HON. M. N. MWANYALE

JUDGE

