



REPUBLIC OF KENYA



**Kamau v Metto & another (Suing as administrators of the Estate  
of Elizabeth Jepchoge Sirma) (Environment and Land Appeal  
E045 of 2022) [2023] KEELC 22468 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22468 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT AND LAND APPEAL E045 OF 2022  
JM ONYANGO, J  
DECEMBER 19, 2023**

**BETWEEN**

**ALLAN GEORGE NJOGU KAMAU ..... APPELLANT**

**AND**

**JOSHUA KIPKEMBOI METTO ..... 1<sup>ST</sup> RESPONDENT**

**MOSES KIBET METTO ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS ADMINISTRATORS OF THE ESTATE OF ELIZABETH JEPCHOGE  
SIRMA**

**RULING**

1. This ruling determines the Appellants application dated 31<sup>st</sup> March, 2023 for stay of execution pending appeal. The application is based on the grounds set out on the face of the Notice of Motion and the Applicant's supporting affidavit sworn on 31<sup>st</sup> March, 2023.
2. In the said affidavit, the Applicant deposes that he was dissatisfied with the judgment delivered by Hon. Naomi Wairimu and he has thus filed an appeal. That after delivery of the said judgment, she filed an application for stay of execution but the same was dismissed prompting him to file the instant application. He deposes that he is apprehensive that the Respondent may proceed to execute the judgment by having the Applicant's name cancelled from the title and substituting it with the name of the Respondent. If this happens, the Respondent may go ahead and dispose of the suit property thereby occasioning him substantial loss and rendering the appeal nugatory. He is of the view that his appeal has high chances of success.
3. The application is opposed by the Respondents through the Replying affidavit of Moses Kibet Metto sworn on 6<sup>th</sup> may 2023 in which he deposes that the application is incompetent, misconceived and bad in law and tainted with dishonesty and does not entitle the Applicant to the reliefs sought. He further



deposes that the Applicant has not met the conditions in Order 42 Rule 6 of the Civil Procedure Rules. It is his further deposition that the Respondents are not men of straw and that they are capable of compensating the Applicant by way of costs should his appeal succeed. That the right of appeal must be balanced against the right of the successful litigant to enjoy the fruits of his judgment. He deposes that the application has been overtaken by events as the judgment of the lower court has already been executed and it is in the interest of justice and the overriding objective that the application be dismissed.

4. The application was disposed of by way of written submissions and both parties filed their respective submissions which I have carefully considered.

### **Analysis and Determination**

5. The principles that guide the court in the exercise of its discretion to grant a stay of execution are now well settled. The substantive provision for grant of stay pending appeal is to be found under Order 42 Rule 6 of the Civil Procedure Rules.

Order 42 Rule 6 provides in part as follows: -

6.

- (1) 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 appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) No order for stay of execution shall be made under sub-rule (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.

6. In the case of M.O.M Amin Transporters Limited & Another v Alexander Ndung'u Mbugua & 2 Others [2017] eKLR the court held that all the three conditions had to be met and satisfied simultaneously in order for the court to exercise its discretion and grant a stay of execution. The court stated as follows:

“ 13. In the cases of Kiplagat Kotut vs Rose Jebor Kipngok [2015] eKLR, Kenya Commercial Bank Limited Vs Sun City Properties Limited & 5 Others [2012]



eKLR and Kenya Shell Limited Vs Kibiru (Supra), the common thread was that a stay of execution will not be granted unless the conditions in Order 42 Rule 6 of the Civil Procedure Rules are satisfied.

7. Furthermore, in the case of *Equity Bank Limited v Taiga Adams Company Limited [2006]* eKLR Mutungi J stated as follows:

“It is not enough to satisfy 1 or 2 of the requirements under 42 Rule 6. All of the requirements must be met for the court to grant orders of stay pending appeal”.

8. In the instant suit the Applicant has stated that if a stay is not granted the Respondents may proceed to execute the judgment and decree thus occasioning him substantial loss and rendering his appeal nugatory.

9. On the other hand, the Respondents maintain that they have already executed the decree as the Applicant’s name has been cancelled and there is therefore nothing to stay. They have annexed a copy of the title as annexure MKM 1.

10. From the said annexure it is clear that execution has indeed been carried out and therefore the application has been overtaken by events. In the circumstances, a stay of execution cannot be granted.

11. Consequently, the application lacks merit and it is hereby dismissed with costs to the Respondents.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 19<sup>TH</sup> DAY OF DECEMBER 2023.**

.....

**J.M ONYANGO**

**JUDGE**

**In the presence of;**

1. Mr. Kimani for the Applicant

2. Mr. Kagunza for the Respondent (absent)

Court Assistant: A. Oniala

