



**Said v Lepapa & another (Environment and Land Appeal E011 of 2023)
[2023] KEELC 22424 (KLR) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22424 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E011 OF 2023
LC KOMINGOI, J
DECEMBER 18, 2023**

BETWEEN

ABDIRHAMAN MUSA SAID APPELLANT

AND

PHYLIS MUSOI LEPAPA 1ST RESPONDENT

COUNTY GOVERNMENT OF KAJIADO 2ND RESPONDENT

RULING

1. This is Notice of Motion dated 29th August 2023 brought under;

Section 1A, 1B, 3A and 65 of the *Civil Procedure Act*, Order 42(6) and Order 51 of the *Civil Procedure Rules*, 2010 article 40, 48 of the *Constitution* of Kenya, 2010.
2. It seeks orders;
 - i. Spent.
 - ii. Spent.
 - iii. Spent.
 - iv. That pending the hearing and determination of the application and intended appeal, the Hon. Court be pleased to issue an order of stay of execution of the judgement issued on 17th August 2023 and all consequential orders thereto.
 - v. That costs of the application be awarded.
3. The Application is supported by the grounds on the face of it and in the sworn Affidavit of Abdirahaman Musa Said. The Applicant avers that he is the lawful owner of Plot No 1313 Residential Ongata Rongai having purchased it on 30th June 2011. The property was then transferred to his



name, he was issued with an allotment letter, took possession, sought development approvals which were approved and he had been paying statutory payments. Sometime in 2011, the 1st Respondent trespassed on the property and constructed temporary structures. The Applicant demolished the structures with authority from the 2nd Respondent but the 1st Respondent once again put up another structure. The Applicant thus filed Kajiado CMCC No 44 of 2014 *Abdirhaman Musa Said v Phylis Lepapa Musoi* seeking eviction and permanent injunction. He later discovered that the 1st Respondent had filed suit being Machakos ELC No. 252 of 2011 *Phylis Lepapa Musoi v Abdirhaman Musa Said* where she obtained *ex parte* orders injuncting the Applicant from taking possession of plot no 1313. The Applicant sought discharge of the orders because the 1st Respondent had sworn a false affidavit that she had served the Applicant. The suits Kajiado CMCC No 44 of 2014 and Machakos ELC No 252 of 2011 were transferred to Ngong and consolidated as Ngong CMC ELC No 19 of 2018.

4. The Applicant avers that despite several contradictory evidence, the judgement delivered on 17th August 2023 declared the 1st Respondent as the lawful owner of Plot No 1313 and ordered revocation of his ownership. He thus sought stay of execution of the said judgement so as not to render the Appeal nugatory and if the judgement was executed, he would suffer irreparable loss and damage.
5. The 1st Respondent in her Replying Affidavit contested the application on grounds that the Applicant had not met the threshold for grant of stay of execution of judgement because the Lower Court's judgement issued permanent injunctions against the Applicant. As such, staying an injunctive relief was tantamount to premature determination of the Appeal. She deponed that having been declared the rightful owner of the suit property, she should be allowed to enjoy fruits of the judgement which had taken 12 years to conclude. She urged that should the orders sought be granted, the Applicant should be ordered to deposit security of Kshs. 5,000,000 in a joint interest earning account in the names of the advocates. She however prayed for dismissal of the application.
6. The Applicant in his Supplementary Affidavit contested the issue of security indicating that it did not meet the established threshold.
7. On the 20th September 2023, the court with the consent of the parties directed that the Notice of Motion be canvassed by way of written submissions.

The Appellant's Submissions

8. Counsel submitted that the Applicant had met the grant of stay of execution under order 42 rule 6(2) of the *Civil Procedure Rules* and the application/ Appeal had been filed timeously. Counsel submitted that the Applicant risked losing the suit property which would render the Appeal nugatory if the orders sought were not granted. Adding that they were unaware of the 1st respondent's financial status and should the orders not be granted then the Appeal succeeds, they stood to suffer and lose more than the 1st Respondent. Reference was made to *James Wangalwa & another v Agnes Naliaka Cheseto* (2012) eKLR and *Machira t/a Machira & Co. Advocates v East African Standard (No 2)* (2002) KLR 63. Counsel added that while it was the court's discretion to issue the orders sought as well as security, they had an arguable appeal citing *Butt v Rent Restriction Tribunal* [1982] KLR 417, *Global Tours & Travels Limited v Five Continents Travel Limited* [2015] eKLR and that the Applicant was willing to deposit security should the court order so although he contested that he was not subject to provisions of order 42 rule 14 of the *Civil Procedure Rules*.

The 1st Respondent's Submissions

9. On the issue of substantial loss, Counsel submitted that the Applicant had not evidenced how the execution would cause him irreparable loss citing *James Wangalwa* (*supra*) and *Mohammed Salim t/*



a Choice Butchery v Nasserputia Memon Jamat (2013) eKLR. That the application was a delay tactic and that the Applicant's fear the 1st Respondent would dispose of the suit property was unfounded. And if required, she could give an undertaking that the land would not be disposed of pending the Appeal. Counsel added that the Applicant did not have an arguable case, had not come to court with clean hands since he had not paid costs in the lower Court as ordered and had equally not given any form of security and as such the application should be dismissed.

Analysis and determination

10. I have considered the Notice of Motion, the affidavit in support, the response thereto, the written submissions and the authorities cited. The issues for determination are:
 - i. Whether the Applicant's application has met the set threshold for grant of stay of execution pending Appeal of the Judgement delivered on 17th August 2023.
 - ii. Who should bear costs of this Application?
11. The principles guiding the grant of a stay of execution pending appeal are settled order 42 rule 6(2) of the *Civil Procedure Rules*:

“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.”
12. The Court of Appeal in *Butt v Rent Restriction Tribunal*[1979] eKLR held that it was in Court's discretion to determine whether or not to issue stay orders:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory...”
13. In this particular case, the Applicant states that he will suffer substantial loss if the 1st Respondent was to execute the judgement. In the impugned judgement, the lower court ordered revocation of the Applicant's title to the suit property. The contention is who the lawful owner of the suit property is as has been highlighted in the lengthy rival Affidavits. While the Applicant seeks stay so as not to suffer loss of property pending hearing of the Appeal, the Respondent asks to be allowed to enjoy fruits of her judgement. Both are valid positions. The Court therefore, shall to weigh the likely consequences of granting the stay or not and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. It cannot be gainsaid that land is an emotive issue in Kenya and Court's should handle such issues in a way that balances and protects the interests of parties involved. In making this determination, the court is guided by the Court of Appeal in *In re Estate of Harish Chandra Hindocha (Deceased)*[2021] eKLR where it held:

In law, an arguable appeal need not be one that will succeed but one that is sufficient for interrogation by the court. One that is not frivolous. We detect no frivolity in the highlighted



intended grounds of appeal and which we find well founded on the background to the application set out above.

...

Turning to the second prerequisite, the position in law is that, an appeal would be rendered nugatory if the consequential effects for the failure to grant the relief sought would be either irreversible or highly prejudicial so as to render of no consequence the intended appeal or appeal if ultimately successful.

14. On this limb, the Court finds that the Applicant has an arguable case and if the judgement is executed, the appeal would be rendered nugatory.
15. The 1st Respondent asked that should court stay execution of the judgement, then the Applicant should be ordered to deposit security of Kshs. 5,000,000 in a joint interest earning account. The 1st Respondent averred that this is because the Applicant had not paid his lower court costs and the security would be sufficient to cushion the 1st Respondent should the appeal be dismissed. The Applicant submitted that while the order of security for costs was unnecessary, he was ready to pay security should the court order so.
16. In conclusion I find merit in the application and the same is allowed.
17. Accordingly, I make the following Orders;
 - a. That there be stay of execution of the judgement issued on 17th August 2023 pending the hearing and determination of the Appeal on condition that the Appellant does deposit Kshs.500,000/= in a joint interest account in the names of counsel for the Appellant and for the Respondent within forty five (45) days from the date of this ruling. In default the stay of execution orders shall lapse automatically.
 - b. That costs of this Application do abide the outcome of the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 18TH DAY OF DECEMBER 2023.

L. KOMINGOI

JUDGE.

