



Otieno (Suing as the Administrator Ad Litem of the Estate of Dison Otieno Odongo - Deceased) v Odongo & 2 others (Environment and Land Appeal E007 of 2023) [2023] KEELC 22178 (KLR) (14 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22178 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E007 OF 2023
AY KOROSS, J
DECEMBER 14, 2023**

BETWEEN

HENRY ODENDE OTIENO (SUING AS THE ADMINISTRATOR AD LITEM OF THE ESTATE OF DISON OTIENO ODONGO - DECEASED) APPELLANT

AND

THOMAS SAWANDA ODONGO 1ST RESPONDENT

GEORGE OCHILLO 2ND RESPONDENT

LAND REGISTRAR, SIAYA COUNTY 3RD RESPONDENT

RULING

1. In the notice of motion dated 6/10/2023 that is the subject of this ruling, the appellant seeks several reliefs from this court some of which are spent and the main prayers pending determination are: -
 - a. That pending hearing and determination of the appeal or until further orders, this Hon. Court do issue an interim order for stay of execution of the judgment and decree rendered on 6/09/2023 in Siaya SPM. ELC Case no. 52 of 2019.
 - b. That pending hearing and determination of the appeal or until further orders, this Hon. Court do issue an order of injunction restraining the respondents either by themselves, their servants, agents, anyone or otherwise dealing adversely and/or disposing of, selling and buying by any means or otherwise interfering with the North Gem/Maliera/876.
 - c. That the costs of the motion abide the outcome of the appeal.
2. The motion is predicated on grounds particularised on its face and on the annexed affidavits of the appellant and that of Fred Odera Otieno who is the registered owner of motor vehicle registration no.



KBM 218S which vehicle the appellant furnished as security. Both of these affidavits were deposed on even date.

2. The appellant avers he is aggrieved by the trial court's decision and has since lodged an appeal. He avers the appeal is meritorious, raises triable issues and he has overwhelming chances of success. He states there is sufficient cause for an order for stay of execution as well as an injunction because he and his family have been in occupation, possession and use of one-half portion of Gem/Maliera/876 (suit property) since 21/05/1952 and he and his family risk loss if evicted therefrom since he has structures, crops and graveyards on the suit property.
2. In addition, he avers he would suffer irreparable harm and substantial loss. Thus the appeal would be rendered nugatory. He states that the 2nd Respondent is not a man of means.
2. Despite service, the respondents did not participate in these proceedings. The appellant, by his counsel on record Arika & Co. Advocates, argued the motion by filing written submissions dated 12/10/2023.
2. On the 1st prayer, counsel submits stay pending appeal is underpinned in Order 42 Rule 6 of the Civil Procedure Rules which sets out the applicable principles as substantial loss, unreasonable delay and provision of security for due performance of such decree.
2. Further, counsel submits the grant of such a relief is discretionary and relies on the case of Daudi Isingi vs. Joseph Muthini Wamba, ELC Appeal Number 24 of 2020 where the court relied on the well cited decision of Butt vs. Rent Restriction Tribunal [1982] KLR 417 where the Court of Appeal held that:

“...it is a discretionary power, a stay must be granted so that an appeal may not be rendered nugatory and judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.”
2. On the 1st principle of substantial loss, counsel reiterates averments made in the appellant's affidavit and relies on the case of Pamela Awuor Ochieng & Another v Elisha Odari Ogony, ELC Appeal Number 32 of 2020 where the court cited the case of Mukuma v Abuoga [1988] KLR 645 which stated: -

“What amounts to substantial loss was expressed by the Court of Appeal in the case of Mukuma v Abuoga [1988] KLR 645 where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.” ”
2. As to the 2nd and 3rd principles, counsel submits judgment was delivered on 6/09/2023 and the instant motion filed on 6/10/2023 hence there is no delay. Counsel urges this court to consider the proposed security as it would guarantee performance.
2. Consequently, having carefully considered the motion, affidavits as well as the appellant's submissions and well cited provisions of law and precedents, the issue for determination is whether the appellant has met the legal threshold to warrant the grant of the orders sought. Therefore, in dealing with the issue, I will deal with the prayers sought in a sequential manner.
2. The 1st prayer is on stay of execution pending appeal. This court has to satisfy itself the 3 principles emphasised by counsel and enunciated in Order 42 Rule 6 (2) of the Civil Procedure Rules are met. This provision states as follows:

“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.”
Emphasis added.
2. The purpose of stay of execution is to preserve the substratum of the case so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory. See *Consolidated Marine. v Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi) cited with approval in *Charles Kariuki Njuri v Francis Kimaru Rwara* (suing as Administrator of Estate of Rwara Kimaru alias Benson Rwara Kimaru (Deceased) [2020] eKLR.
 2. Now, as to the circumstances of this case, it is undoubted this motion is filed without unreasonable delay and the appellant filed this motion way before the stay order of 60 days that was issued by the trial court on 6/09/2023 had lapsed. In addition, the appellant has furnished security and having satisfied these two limbs of the principles, the court is left to interrogate the 3rd limb of substantial loss.
 2. In the instant case, the appellant contends that he would suffer substantial loss if the judgement of the lower court is executed. The order of eviction that was issued by the trial court evidences the appellant is in occupation of the suit property. He has allegedly been in occupation for a copious period of time and certainly, he will suffer loss as he alludes. Further, the grounds of appeal are arguable.
 2. Therefore, it is my considered view the appellant will suffer substantial loss if execution proceeds. Further, execution orders are likely to cause irreversible or highly prejudicial harm on the appellant so as to render the appeal nugatory. This is a matter that warrants preservation of the suit property pending the hearing and determination of the appeal. I find and hold the appellant warrants the grant of this prayer.
 2. On the 2nd prayer, the provision of law that empowers this court to grant a relief of injunction pending appeal is envisaged in Order 42 Rules 6(6) of the Civil Procedure Rules which reads: -

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
 2. Having looked at the appellant’s submissions, it not lost to this court the appellant did not argue this prayer. The trial court issued a positive order and the prayer for stay of execution and injunction have the same effect of preserving the substratum of the suit. Nevertheless, this court will address this prayer.
 2. The principles of injunction pending appeal were applied in the Court of Appeal decision of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR as follows: -

“This Court, in accordance with precedent, has to decide first, whether the applicant has presented an arguable appeal, and second, whether the intended appeal would be nugatory if these interim orders were denied.”
 2. On the 1st prerequisite, the memorandum of appeal on record raises 9 grounds of appeal. In it and amongst other grounds, the appellant states the trial court misdirected itself in not finding the



respondents held the suit property in trust for him and erred in finding the respondents had proved their counterclaim.

2. It must be noted an arguable appeal is one that is sufficient for interrogation by the court though it may not succeed. A scrutiny of the grounds does not demonstrate any of the grounds of appeal are frivolous. As to the 2nd prerequisite, this court had earlier addressed it by stating that the appeal will be rendered nugatory if certain prayers are not granted. Consequently, I find and hold the prayer for injunction pending appeal is merited.
2. Utmost, in light of the above reasoning, I find that the motion dated 6/10/2023 has merits and hereby allow it. Costs shall abide the outcome of the appeal. I hereby issue the following disposal orders: -
 - a. That stay of execution of the judgment and decree rendered on 6/09/2023 in Siaya SPM. ELC Case no. 52 of 2019 is granted pending hearing and determination of the appeal.
 - b. That pending appeal, an order of injunction is hereby issued restraining the respondents either by themselves, their servants, agents, anyone or otherwise dealing adversely and/or disposing of, selling and buying by any means or otherwise interfering with North Gem/Maliera/876.
 - c. That within 14 days from the date of delivery of this ruling, the appellant do deposit the logbook of motor vehicle registration no. KBM 218S with this court. In default, prayers (a) and (b) herein above shall automatically lapse.
 - d. That costs shall abide the outcome of the appeal.
 - e. That the matter shall be mentioned for further directions on 28/2/2024. Mention notice to be served.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 14TH DAY OF DECEMBER 2023.

HON. A. Y. KOROSS

JUDGE

14/12/2023

Ruling delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

Mr. Arika for the appellant

N/A or the respondents

Court assistant: Ishmael Orwa

