



**Kenyoro F.C.S Ltd v Land Registrar Kisii County & 5 others (Environment & Land Case 426 of 2014) [2023] KEELC 22222 (KLR) (13 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22222 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 426 OF 2014**

**M SILA, J**

**DECEMBER 13, 2023**

**BETWEEN**

**KENYORO F.C.S LTD ..... PLAINTIFF**

**AND**

**LAND REGISTRAR KISII COUNTY ..... 1<sup>ST</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> DEFENDANT**

**ISABELLA GESARE PETER ..... 3<sup>RD</sup> DEFENDANT**

**ELIUD PETER OMAE ..... 4<sup>TH</sup> DEFENDANT**

**ALLOYS MANYANGE MOTUKA ..... 5<sup>TH</sup> DEFENDANT**

**DAVID KENYANYA MAGARE ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

(Application for stay pending appeal; principles to be considered; applicants having been sued by respondent over certain land; respondent successfully demonstrating that she never sold the land to the applicants and successfully obtaining judgment in her favour for rectification of the register to reflect her as proprietor; applicants also permanently restrained from the suit land and condemned to pay general damages and costs to the respondent; applicants aggrieved and filing a notice of appeal and now seek stay; court not persuaded that in the circumstance of the case, the applicants will suffer substantial loss if the register is rectified in accordance with the judgment and if they remain restrained as the register can be returned to their proprietorship if they succeed on appeal; respondent however ordered not to enter into any dealings for the duration of the appeal; no substantial loss if applicants remain restrained from the land as they were never in possession; general damages and costs ordered deposited in a joint interest earning account within a specified time)



1. The application before me is that dated 26 June 2023 filed by the 3<sup>rd</sup> and 4<sup>th</sup> defendants. It is an application that seeks stay of execution of the judgment, delivered on 14 June 2023, pending hearing of an intended appeal to the Court of Appeal. The application is opposed by the plaintiff.
2. To put matters into context, through a plaint filed on 4 November 2014, the plaintiff/respondent averred that she is the rightful proprietor of the land parcel Kisii Municipality/Block III/78. She averred that she purchased this property between the years 1979 and 1983 and obtained registration of title on 22 September 1998. She averred that had been in possession since November 1983 and that she has developed the property and let it out to tenants. The respondent came to court after a notice was placed on the premises on 3 October 2014, by the applicants, demanding that the tenants in the premises vacate on the basis that they now own the plot. The respondent contended that she had never sold the plot to the applicants and their proprietorship was thus obtained through fraud. The applicants filed defence and asserted that it is them with title to the suit land. I heard the case and delivered judgment on 14 June 2023. I held in favour of the respondent and ordered the cancellation of the entries in the register which led to issuance of title in favour of the applicants. I also issued an order of permanent injunction to restrain the applicants from the suit land and ordered them to pay Kshs. 750,000/= as general damages for trespass. I further ordered the applicants to pay the costs of the suit jointly with the 1<sup>st</sup> defendant (Land Registrar, Kisii). Aggrieved by the judgment, the applicants filed a notice of appeal and they have followed that up with this application seeking stay pending appeal.
3. The supporting affidavit is sworn by Isabellah Gesare Peter, the 3<sup>rd</sup> defendant. She avers that she is the registered proprietor of the suit land and entitled to exclusive rights over it. She states that following delivery of the judgment the respondent is keen to execute the same. She thinks that she has a good appeal and unless stay is granted the appeal may be rendered nugatory. She is willing to offer such security as may be just and reasonable.
4. The plaintiff has opposed the application through the replying affidavit of Thomas Masese, who is her current Chairman. He avers that the applicants have not demonstrated how they stand to be prejudiced as their title was declared a nullity. He believes that the respondent should be allowed to enjoy the fruits of the judgment.
5. A supplementary affidavit was filed whereby the applicants contend that Mr. Thomas Masese has not annexed a resolution authorizing him to swear the affidavit. The deponent states that she stands to suffer prejudice if the register is rectified as ordered, and the appeal will be an academic exercise, since the property may be put beyond her reach.
6. I invited counsel to file written submissions, and I have seen the submissions of Mr. Ochwangi, learned counsel for the applicants, and Mr. Soire, learned counsel for the respondent. I have taken these into account before arriving at my decision.
7. This is an application for stay pending appeal and I stand guided by the provisions of Order 42 Rule 6 (2) of the *Civil Procedure Rules*, 2010, which is drawn as follows :-
  - (2) 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.



8. From the above, it will be noted that the court ought to consider three issues when addressing an application for stay of execution pending appeal. These are :-
  - (i) That the application has been made without unreasonable delay;
  - (ii) That the applicant satisfies the court that she stands to suffer substantial loss if the order for stay is not made;
  - (iii) That there is provision of security as the court may order for the due performance of the decree.
9. I will be guided by the above principles in my assessment of this application.
10. But before I go to these, there is the little issue about the affidavit of Thomas Ratemo not being accompanied by a resolution. I will not take this assertion too seriously. Mr. Thomas Ratemo is the Chairman of the plaintiff and you would expect such a person to have authority of the Society. Unless something is shown to me that he is not authorized to swear an affidavit on behalf of the Society, I take it that he has authority to do so. The applicants have presented nothing that would suggest to me that he has no such authority. I thus find no substance in the contention that his affidavit is devoid of authority and I will proceed to assess the application.
11. I have already demonstrated the three issues that the court needs to look at. The first is delay. I find no delay since this application was filed just about two weeks after the judgment.
12. The next is substantial loss. I will assess this in light of the judgment of the court. There were four points in that judgment that will affect the applicants. The first is the order of rectification of title. The second is the order of permanent injunction against them. The third is the order to pay damages of Kshs. 750,000/=. The fourth is the order to pay costs.
13. . Starting with the order of rectification of title, for the circumstances of this case, I do not see any substantial loss that the applicants will suffer by the rectification of the register in accordance with the judgment. If they succeed on appeal, they are at liberty to reverse the entries and have the title revert to them. The only order I will make is that upon rectification of the register, in accordance with the judgment, the respondent not to enter into any dispositions until the appeal is heard and determined. On the order of permanent injunction, I see nothing to stay. All along, the respondent was the entity in possession of the suit property. I cannot order the applicants to take possession while the appeal is pending. Thus, pending the hearing and determination of the appeal, the applicants remain permanently restrained from the suit land. For the avoidance of doubt, possession remains with the plaintiff/respondent.
14. The next order was for payment of general damages. I am prepared to order a stay of execution of the award but subject to the said amount of Kshs. 750,000/= being put in a joint interest earning account, to be held in the name of counsel for the applicants and counsel for the respondent, and such money to remain in this account until the appeal is heard and determined. Stay of execution of this award will apply only if counsel for the applicant confirms to counsel for the respondent that the said funds are available, and show proof of availability of the said funds, within the next 30 days, after which the joint account be opened 14 days thereafter. If no proof of availability of funds is shown within the 30 days, then the order for deposit of the money in a joint interest earning account will lapse, and there will be no stay of execution of the decree on the monetary award, and the respondent will be at liberty to execute for the same.
15. The last aspect of the judgment is on costs. I will allow the taxation of costs to proceed. After taxation, the amount taxed again be made available within 30 days of taxation for purposes of being deposited in a joint interest earning account in the same fashion as I have directed for deposit of the amount



awarded in general damages. If the amount is not made available as directed, there will be no stay order regarding execution of the taxed costs, and the same may be executed.

16. The last issue is costs of this application. If the applicants abide by the conditions on deposit of the monetary award and taxed costs, then the costs of this application will be costs in the appeal. If they do not, then they will pay the costs of this application.
17. Orders accordingly.

**DATED AND DELIVERED AT KISII THIS 13 DAY OF DECEMBER 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

In the presence of: -

Ms. Nyakweba holding brief for Mr. Ochwangi for the applicants

Mr. Ndiritu state counsel, for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

Mr. Soire for plaintiff/respondent – Absent

No Appearance for 3<sup>rd</sup> – 6<sup>th</sup> defendants

Court Assistant – Lawrence Chomba

