



**Chebiego v Chepkuyeng (Environment and Land Appeal 9 of 2023)
[2023] KEELC 22173 (KLR) (11 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22173 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL 9 OF 2023
JM ONYANGO, J
DECEMBER 11, 2023**

BETWEEN

JOHN CHEBIEGO APPELLANT

AND

BARNABA CHEPKUYENG RESPONDENT

RULING

1. By a Notice of Motion dated 15th May, 2023 the Appellant/Applicant filed an application seeking an order of stay of execution pending appeal.
2. 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 the 15th May, 2023. The gist of the application is that the Applicant being dissatisfied with the judgment of the lower court delivered on the 6th April, 2023 has filed an appeal to this court.
3. He deposes that he has been residing on the suit property for the last 27 years and he derives his livelihood therefrom. He fears that if he is evicted before his appeal is heard and determined, he shall suffer substantial loss.
4. The application is resisted by the Respondent through his Replying affidavit sworn on the 7th June 2023 in which he deposes that the Applicant has not demonstrated that he shall suffer substantial loss nor has he explained the delay of more than a month in filing his application.
5. The application was canvassed by way of written submissions and both parties filed their submissions which I have considered.



Parties' Submissions

6. In his submissions learned counsel for the Appellant submitted that the Appellant had been residing on the suit property with his family since 1997 and if they were evicted before his appeal is heard and determined, he would suffer substantial loss. On what constitutes substantial loss he relied on the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR where the court held that substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
7. He relied on the case of *RWW v EKW* (2019)0 eKLR for the proposition that the purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising his undoubted right of appeal are safeguarded and if the appeal is successful, it is not rendered nugatory. In the same case, the court observed that in granting the stay the court must balance the interests of the Appellant with those of the Respondent.
8. Counsel submitted that the Appellant's appeal had high chances of success and failure to grant a stay would render the appeal nugatory. He relied on the case of *Absalom Dova v Tarbo Transporters* (2013) eKLR. He was of the view that the Appellant had met the conditions for stay.
9. On the other hand, learned counsel for the Respondent submitted that the Appellant had not satisfied the conditions for stay laid out in Order 42 Rule 6 of the *Civil Procedure Rules*. He contended that the Appellant had failed to explain the delay of one month and two weeks and that the delay was inordinate. He relied on the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* (2018) eKLR for the proposition that any delay has to be explained.
10. Counsel further submitted that the Appellant had not proved that he would suffer substantial loss. He relied on *James Wangalwa* (*supra*) for the proposition that in order to establish substantial loss the Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. He was of the view that the Appellant's assertion that they had been living on the suit property ought to have been backed by evidence of the developments thereon.
11. Lastly counsel submitted that the Appellant had not furnished security for costs.

Analysis and Determination

12. The only issue for determination is whether stay of execution ought to be granted.
13. Order 42 Rule 6 of the *Civil Procedure Rules* sets out the conditions that one should meet in order to qualify for an order of stay pending appeal. In particular Order 42 Rule 6(2) provides as follows:
 - (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.
14. In order to grant an order for stay of execution the court must be satisfied that the above three conditions have been met.
15. I will now proceed to determine if the Applicant has met the conditions of stay set out in Order 42 Rule 6 of the *Civil Procedure Rules*.



16. On the question of substantial loss, the Appellant has stated on oath that he has been occupying the suit property from 1997 and his eviction before his appeal is heard and determined would occasion his substantial loss. This assertion was not controverted by the Respondent.
17. It is also evident that the application for stay of execution was filed without undue delay as judgment was delivered on 6th April 2023 and the application was filed on 15th May 2023 which is a period of six weeks. I am of the considered view that his delay though unexplained, cannot be said to be inordinate.
18. Regarding the question of security for costs, the Applicants have not offered any security for the due performance of the decree. However, this does not preclude the court from imposing conditions with regard to security for costs.
19. Having considered the application, the replying affidavit and rival submissions together with the authorities cited to me and having weighed the interests of both parties, I am of the view that justice would be served if a stay of execution is granted so as not to render the appeal an academic exercise.
20. Consequently, I grant a stay of execution on condition that the Appellant deposits the sum of Kshs.100,000/= in court as security for costs within 30 days failing which the order of stay shall automatically lapse.
21. The costs of the application shall be borne by the Applicant.

DATED SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 11TH DAY OF DECEMBER 2023.

.....

J.M ONYANGO

JUDGE.

In the presence of;-

1. Mr. Cheruiyot for the Appellant
2. Miss Kayeli for the Respondent

Court Assistant: Oniala.

