



Republic v Director Land Administration Ministry of Lands and Physical Planning & 2 others; Roysa Community Development Society Ltd (Exparte) (Environment and Land Judicial Review Case 008 of 2020) [2022] KEELC 15741 (KLR) (28 March 2022) (Ruling)

Republic v Director Land Administration Ministry Of Lands And Physical Planning & 2 others; Ex Parte Roysa Community Development Society Ltd [2022] eKLR

Neutral citation: [2022] KEELC 15741 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 008 OF 2020**

EK WABWOTO, J

MARCH 28, 2022

IN THE MATTER OF AN APPLICATION FOR AN ORDER FOR MANDAMUS

=AND=

IN THE MATTER OF THE LAND REGISTRATION ACT

=AND=

IN THE MATTER OF THE CONSTITUTION ARTICLES 40 AND 47

=AND=

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT

BETWEEN

REPUBLIC APPLICANT

AND

**DIRECTOR LAND ADMINISTRATION MINISTRY OF LANDS AND
PHYSICAL PLANNING 1ST RESPONDENT**

**THE CHIEF LAND REGISTRAR MINISTRY OF LANDS AND PHYSICAL
PLANNING 2ND RESPONDENT**

THE ATTORNEY GENERAL 3RD RESPONDENT

AND

ROYSA COMMUNITY DEVELOPMENT SOCIETY LTD EXPARTE



RULING

Introduction

1. By a Notice of Motion dated 19th December, 2021, the applicants moved this court under a Certificate of Urgency, seeking a stay of execution of the judgment delivered at the Environment and Land Court in Nairobi on 14th December, 2021. The application is anchored under Order 42 Rule 6 of the Civil Procedure Rules, Section 1, 1A, 3 and 3A of the Civil Procedure Act Cap 21 and other enabling provisions of the law. The Applicant seeks orders that;
 - i) Spent
 - ii) That pending the hearing and determination of this application inter-partes this Honourable Court be pleased to grant an order of stay of execution of the judgment dated 14th December 2021 and order the condition of status quo to be maintained on suit parcel of land.
2. The application is premised on the following grounds;
 - i) On 14th December 2021 the Environment and Land Court delivered a judgment in ELC JR No. E008 of 2020 in which it dismissed the Exparte Applicant's Notice of Motion.
 - ii) The exparte applicant being dissatisfied with the said judgment has opted to file an appeal against the entire judgment to the Court of Appeal.
 - iii) There are third parties who have now moved heavy machinery and equipment on to the suit parcel of land with the intention of starting developments on the same.
 - iv) The title to the said suit land is still in dispute by virtue of this appeal.
 - v) The Exparte Applicants are likely to suffer if the status quo is not maintained pending the said appeal.
 - vi) That in the interest of the parties and of this Honourable Court that the orders sought herein be allowed.
 - vii) The Applicant is willing to abide by any conditions granted by this court for performance of the orders sought.
3. By a supporting affidavit sworn by PETER KIHUYU MUTHEE the applicant deposes that after the delivery of the judgment third parties have invaded the suit parcel with heavy machinery including lorries, excavators and other trucks and are busy starting construction on the suit parcel and that the actions of those third parties are injurious to the Applicants interests should the appeal succeed. That being aggrieved by the said judgement the Applicant lodged an appeal to the Court of Appeal which they believe has overwhelming chances of succeeding as the issues as to whether the suit was res judicata needs to be re-analyzed by the Court of Appeal.
4. The respondent opposes the application though grounds of opposition dated 12th January 2022 saying that this instant application lacks merit and is an abuse of the court process since the Applicants are not the registered proprietors of the suit property and they cannot attempt to ask the court to stay any activities being undertaken on the same. It was also stated that the Applicants have not met the threshold to warrant issuance of orders of stay pending appeal pursuant to the provisions of Order 42 Rule 6.



Applicants submissions

5. The applicants counsel filed written submissions dated 2nd February 2022, in support of the Notice of Motion Application. They submitted as follows:

Substantial Loss:

6. On the issue of whether the applicants stand to suffer substantial loss in the absence of orders of stay, it was submitted that they had incurred a substantial amount of financial expenditure thought the survey of the land and its subdivision. They also submitted that if the orders sought are not granted then the appeal will be rendered nugatory. The applicant cited the case of James Wangalwa v Agnes Naliaka Cheseto [2021] eKLR in which the court defined as to what amounts to substantial loss.

Security for costs:

7. With regard to the issue of security for due performance of the decree the applicants cited the decision in Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR and Mawji v U.S International Univeristy and Another (1976-80)1 KLR 229 and Bernadatte Wangare Muriu v National Social Security Fund Board of Trustee & 2 others [2012] eKLR to submit that they are willing to maintain and not interfere with the title of the suit property during the pendency of the appeal.

Whether there is an arguable appeal?

8. The applicants stated that the appeal raises triable issues since the Environment and Land Court erred in finding that their suit was res judicata. It was there submission that the bar for res judicata had not been met in this case. It was contended that their suit was filed by Roysa Community Development Society and the previous suit had involved Roysa Community Self Help Group which in their view were totally different and distinct entities and hence it was their submission that the same needs to be re-analyzed by the Court of Appeal.

The Respondents submissions

9. The respondents in their submissions took issue with the fact that the applicants herein are not the registered owners of the suit property. That from the foregoing this Court may not be in a position to issue specific orders of stay as insinuated by the applicants.
10. It is further submitted that the applicants have not satisfied the provisions of Order 42 Rule 6 and thus they are underserving of the orders sought, as they have not demonstrated the substantial loss likely to be suffered should stay be denied.
11. It was further submitted that the Applicants seeks stay against a negative order since their suit was dismissed by a judgment delivered on 14th December 2021, reference being made to the case of Western College of Arts and Applied Sciences v Oranga & Others (1976-80) 1 KLR and Kaushik Panchamatia & 3 Others v Prime Bank Limited & Another [2020]eKLR Siegfried Busch V MCSK [2013] eKLR.
12. It was also contended that the three (3) pre-requisite conditions set out in Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed, and all the three conditions must be met simultaneously. This court is urged to dismiss the application with costs on grounds that it lacks merit.

Analysis and determination

13. Upon considering the application, the response and the written submissions the salient issue which arise for determination is whether the application is merited.



14. The principles that guide the Court when deciding on application for stay of execution pending appeal are clearly set out under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, which provides:
- (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.
15. A stay of execution under order 42 of the Civil Procedure Rules is an interim order to suspend the rights of one party who is aggrieved with the judgment of the trial court or tribunal and wishes to exercise his or her right of appeal. Its main objective is to protect the substratum of the suit by delaying the execution process like attachment until the determination of the appeal. Being a discretionally remedy the applicant must demonstrate that he or she has approached the court of equity with clean hands as succinctly stated in the case of *Jajbhay v Cassim* 1939 AD 537-551 where the court held on this maxim that: “All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice.”
16. The general principle of law is that the successful litigant in possession of a valid court judgement is entitled to the fruits of judgement unless there exist exceptional circumstances to deny him or her that right.
17. In considering an application for stay of execution I am guided by the case of *Butt vs Rent Restriction Tribunal Civil App No. NAI 6 of 1979* (Madan, Miller and Porter JJA) where the following guidelines were given: -
- “The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion. A 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. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”
18. The first limb of consideration is whether there was unreasonable delay in filing the application for stay of execution. Judgment was delivered on 14th December, 2021 and the applicants filed their notice of motion dated 19th December 2021. There was no delay in the filing of this instant application.



19. From the cited decision, it is clear that for the Court to grant stay of execution of the Ruling, the Applicant needs to satisfy the Court that he will also suffer substantial loss. In the case of Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007 the court stated

“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue.

The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

In Bungoma HC Miscellaneous Application No 42 of 2011 James Wangalwa and another Vs. Agnes Naliaka Cheseto the court further discussed what substantial loss entails:

“The application 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. This is what substantial loss would entail.”

20. A party should not only state that he is likely to suffer substantial loss but he must also prove that he will suffer loss. In the instant case, the applicants say that they had incurred a substantial amount of financial expenditure though the survey of the land and its subdivision and hence substantial loss would be suffered if stay is not granted.
21. The Applicants bears the burden of proving that by refusal to grant stay they stand to suffer substantial loss. Having perused the instant application, the applicants did not tender any evidence to show the nature of loss likely to be suffered should an order of stay be denied.
22. The mere filing of a Notice of Appeal does not automatically warrant the issuance of orders of stay.
23. From my perusal of the Notice of Appeal on record I am not able to determine what is this exceptionally compelling ground of appeal that can persuade this court that the intended appeal has high chances of success. I find that the Applicants have failed to demonstrate that there exists an arguable appeal with high chances of success nor have they satisfied the pre-requisite conditions set out in Order 42 Rule 6 of the Civil Procedure Rules, 2010 to warrant grant of stay of execution of the judgment pending the hearing and determination of the intended appeal.
24. On whether the Application for stay is against a negative order, it is not in doubt that this court dismissed the applicants suit vide a judgment delivered on 14th December 2021 and I entirely agree with the submissions of the respondent that it is not in doubt that the same is a negative order and hence no stay of execution can be granted as against such a negative order. The Court of Appeal decision in



the case of Kaushik Panchamatia & 3 Other vs Prime Bank Limited & Another [2020] eKLR stated as much and as the Court reiterated and which I fully adopt, that;

“...that a negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by applicants.”

Disposition

25. In view of the foregoing, the applicants have not met the conditions precedent set out under Order 42 Rule 6 of the Civil Procedure Rules and the application thus lacks merit and is hereby dismissed with an order that each party meets their own costs of the application.

26. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH 2022.

E. K. WABWOTO

JUDGE

In the Virtual Presence of: -

Ms. Anyango appearing for Mr. Yogo for the Applicants.

N/A for the 1st, 2nd and 3rd Respondents.

Court Assistant: Caroline Nafuna

