



REPUBLIC OF KENYA



KENYA LAW
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**Simon v Adel (Environment & Land Case OO5 of 2021)
[2022] KEELC 50 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEELC 50 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE OO5 OF 2021
GMA ONGONDO, J
APRIL 28, 2022**

BETWEEN

MICHAEL OCHOO SIMON APPELLANT

AND

SALMON KWANYA ADEL RESPONDENT

(The appellant moved to court for stay the execution of the decree trial court's case (Homa-BC Chief Magistrates court land case No. 60 of 2019) pending the hearing and determination of the pending appeal)

RULING

1. By a Notice of Motion dated 5th October 2021 and duly filed in court on 18th October 2021 under various legal provisions including Order 42 Rule 6 (1) of the [Civil Procedure Rules, 2010](#) (the application herein), the appellant, Michael Ochoo Simon (the applicant) through the firm of G.S Okoth and Company Advocates is seeking twin orders;
 - a. The Honourable Court be pleased to stay the execution of the decree trial court's case (Homa-Bay Chief Magistrates court land case No. 60 of 2019) pending the hearing and determination of the pending appeal.
 - b. Costs of this application do abide the result of the appeal.
2. The application is based on grounds 1 to 6 stated on the face of the same. It is also based on the applicant's supporting affidavit sworn on even date and a copy of memorandum of appeal dated 28th September 2021 marked as "MOS-1" and annexed thereto. In a nutshell, the applicant's complaint is that the respondent sued him by a plaint dated 28th October 2019 in Homa Bay Chief Magistrate's Court Land Case No. 60 of 2019 and judgment was entered in favour of the respondent. That therefore, if the respondent executes the judgment and decree thereof, the applicant and his family who



- depend on the suit land, LR No. Kanyada/Kalanya-Kanyango/3129, may be rendered homeless and substantially suffer loss. That the intended appeal as discerned in memo “MOS-1”, will be rendered nugatory.
3. The respondent, Salmon Kwanya Adel through the firm of Nyauke and Company Advocates, opposed the application by way of the following grounds of opposition dated 10th November 2021 and filed in court on 16th November 2021;
 - a. The Applicant for stay of execution herein does not meet the threshold set in law.
 - b. The Applicant is not deserving of the orders sought as he has not offered any deposit as security for costs.
 - c. The application does not have credible merit at all.
 4. The application was heard by way of written submissions pursuant to this court’s directions of 1st December 2021 and in line with Order 51 Rule 16 of the Civil Procedure Rules, 2010; see also Practice Direction number 33 of the Environment and Land Court Practice Directions, 2014.
 5. By the submissions dated 12th January 2021, learned counsel for the applicant referred to the application, the trial court’s suit and judgment thereof as well as framed a singular issue for determination namely whether the applicant has satisfied the conditions for grant of stay of execution as set out under Order 42 Rule 6 (supra). In analyzing the issue, counsel made reference to the decisions in *James Wangalwa and another v Agnes Naliaka Cheseto* (2012) eKLR, *Absolom Dova-vs-Tarbo Transporters* (2013) eKLR and *Jaber Mohsen Ali and another v Priscillah Boit and another* E & L No. 200 of 2012 (2014) eKLR, in support of the orders sought in the application. Counsel implored upon the court to find merit in the application and allow the same with costs.
 6. In the submissions dated 8th February 2022, learned counsel for the respondent cited Order 42 Rule 7 of the Civil Procedure Rules, 2010 and *Kiplagat Kotut v Rose Jebor Kipngok* (2015) eKLR on stay of execution. Counsel submitted on the competing interests of the successful and unsuccessful litigants in an application for such stay. That the applicant’s intention to offer security is not stated in the application hence, the applicant be subjected to deposit with the Honourable court, a sum of Kenya shillings Two Hundred Thousand only (Kshs 200,000) as security herein.
 7. I have carefully considered the entire application, the grounds of opposition and the parties’ respective submissions. On that account, has the applicant satisfied the requirements for the orders sought in the application?
 8. The application was commenced under, among others, Order 42 Rule 6 (1) (supra) which provides for the three conditions for stay of execution namely-
 - a. That substantial loss may result to the applicant unless the order is made.
 - b. The application has been made without unreasonable delay, and
 - c. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.
 9. Regarding substantial loss, I note grounds 2 and 4 of the application and paragraphs 2 and 6 of the applicant’s supporting affidavit that he is likely to be evicted from the suit land which is his only place of abode as pointed out at paragraph 2 hereinabove. Therefore, there is likelihood of substantial loss on the part of the applicant, if the trial court’s judgment is executed as noted by the Court of Appeal in *Kenya Shell Limited v Kibiru* (1986) KLR 410.



10. As regards delay, I am guided by article 10 (2) (b) of *the Constitution* of Kenya, 2010 in respect of the principles of equity which include equity aids the vigilant and not the indolent. I bear in mind Order 50 Rules 1,2, 3, 4 and 8 of the *Civil Procedure Rules, 2010*. The application was brought twenty six (26) days after the delivery of the trial court’s judgment. By the character of the application and the prevailing circumstances, I am of the considered view that the delay is not unreasonable.
11. Concerning security, no person or entity is exempt from providing security for the due performance of a decree as I subscribe to the reasoning in *Doshi Iron Mongers Ltd v Kenya Revenue Authority and another* (2020) eKLR. However, the form of security to be deposited herein is within the discretion of the Honourable court.
12. In addition, the instant appeal is clearly arguable. This is in light of triable issues, including, jurisdiction and adverse possession as disclosed in memorandum of appeal duly filed herein.
13. In the case of *Butt v Rent Restriction Tribunal* (1979) eKLR, the Court of Appeal held in part-

“.....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.....The appellant has an undoubted right of appeal.....” (Emphasis added)
14. Section 13 (7) (a) of the *Environment and Land Court Act*, 2015 (2011) mandates this court to grant interim preservation orders. No doubt, the stay order sought in the application is envisaged thereunder.
15. In the foregone, I find that, the application has met the threshold for the grant of the stay order sought as noted in *Butt* and *Kenya Shell Cases* (*supra*). The same is meritorious.
16. Wherefore, the applicant’s application by way of motion on notice dated 5th October 2021 and duly filed in court on 15th October 2021, be and is hereby determined as follows;
 - a. Stay of execution of the decree issued in Homa Bay Chief Magistrate’s court Land case number 60 of 2019 pending the hearing and determination of the instant appeal as sought therein, is hereby granted.
 - b. The applicant shall deposit security for the performance of decree herein in the sum of Kenya Shillings fifty thousand only(Kshs.50,000/-) or relevant security duly valued in the said amount within the next 30 days from this date, failing which the stay orders granted herein to lapse without further order of this court being necessary.
 - c. The costs of the application to abide this appeal.
17. It is so ordered

DATED, DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF APRIL 2022.

G.M.A ONG’ONDO

JUDGE

In the presence of;

Ms Opar instructed by G.S Okoth learned counsel for the applicant.

Ms Odera instructed by Nyauke and company Advocates for the respondent.

Terence, court Assistant.

