



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC PETITION NO E06 OF 2022

ADRIAN CHARLES JAMES RADCLIFFE PETITIONER

VERSUS

KENA PROPERTIES LIMITED..... 1st RESPONDENT

THE PRINCIPAL MAGISTRATES COURT..... 2nd RESPONDENT

THE CHIEF LAND REGISTRAR 3rd RESPONDENT

THE ATTORNEY GENERAL..... 4th RESPONDENT

JOHN M OHAGA..... 5th RESPONDENT

AND

PRIME BANK LIMITED 1st INTERESTED PARTY

JEPHYS AUCTIONEER.....2nd INTERESTED PARTY

RULING

Background

1. In the Notice of Motion dated 15th March, 2022, the 1st Respondent/Applicant has sought for the following orders:
 - a) **This Honourable Court be pleased to stay the execution and/or implementation of its Ruling and Orders delivered on the 10th March, 2022, pending the hearing and determination of Nairobi Civil Appeal No E133 of 2022-Kena Properties Limited Vs Adrian Charles James Radcliffe & 6 Others.**
2. The Application is premised on the grounds on the face of the Motion and supported by the Affidavit of Carolla Muthoni Ngini Ohaga, the Director and shareholder of the 1st Respondent. In her Affidavit, the 1st Respondent's Director deponed that on 10th March, 2022, this court delivered a Ruling in which, *inter-alia*, it granted possession of the suit property herein to the Petitioner.
3. The 1st Respondent's Director deponed that the aforesaid orders were issued in-spite of the fact that the suit property is owned by the 1st Respondent herein; that the 1st Respondent as the registered owner of the suit property; that it demolished the residential house that the Petitioner was occupying as a rent paying tenant and that consequently, the house on the suit property is no longer available for his occupation.
4. It was deponed that the 1st Respondent, being dissatisfied with the Ruling, filed an Appeal at the Court of Appeal being Nairobi Civil Appeal No E133 of 2022; that the Appeal raises crucial and arguable issues; that the Petitioner though not the registered owner of the suit property is likely to move onto the suit premises against the proprietary interests of the 1st Respondent and that such a move will highly prejudice the Applicant who lawfully purchased the suit property and is servicing a loan from the 1st Interested Party.
5. It was deponed by the 1st Respondent's Director that the Petitioner has been on the suit property for seven (7) years as a trespasser to the detriment of the 1st Respondent who has not only been prevented from enjoying possession and user of its property, but has lost rent and income that would ordinarily have been used to service the loan obtained from the 1st Interested Party.

6. According to the 1st Respondent, the Petitioner, despite being aware of the change of ownership of the suit property in 2014, took no steps to regularize his unlawful occupation; that the Petitioner was issued with an eviction notice on 14th February, 2018, which notice he did not dispute; that the Petitioner has deponed that he presently has alternative accommodation and that the 1st Respondents' Appeal will be rendered nugatory if the orders sought are not granted.
7. In response to the Application, the Petitioner filed a Replying Affidavit and Grounds of Opposition. In the Replying Affidavit, the Petitioner deponed that on 10th March, 2022, this court granted orders *inter-alia* reinstating him to the suit property; that the court granted further orders staying the execution of its orders pending the filing of a formal application within 7 days of the date thereof and that the orders were duly served on the OCS Karen Police station.
8. The Petitioner deponed that on 17th March, 2022, his counsel visited the Court of Appeal Registry and as at 1.p.m, no application for stay of execution had been filed at the registry; that as there was no order of stay of execution by the Court of Appeal, the Petitioner and his family prepared to return to the suit property and that at around 6.00pm on 17th March, 2022, his counsel advised him that they had been served with a stay order from this court.
9. It was deponed by the Petitioner that as further advised by his counsel, this court is no longer vested with jurisdiction to entertain this matter because the Applicant has filed an appeal at the Court of Appeal.
10. In his Grounds of Opposition, the Petitioner averred as follows:
- i. This Court lacks jurisdiction in view of the Court of Appeal decision of ***Okello Another vs Osonga (1988) K.L.R.198*** because a Notice of Appeal is pending before the Court of Appeal and a Record of Appeal arising out of the High Court's Ruling is pending before the Court of Appeal.
 - ii. The orders sought are incapable of being granted as the Court of Appeal is seized of the subject matter and subsequently, the application constitutes an abuse of the court process; that granting of the orders will be contrary to public policy and the doctrine of legitimate expectation, and in the circumstances the court as a matter of necessity must exercise restraint and refuse to grant them.
 - iii. The effect of the application is that the Applicant is inviting the court to sit on Appeal of its own Ruling.
 - iv. In making its determination, the Court took into account the precautionary principle and the principle of proportionality to ensure that principles of justice and rule of law are upheld and further considered the aspects of, respect for factual possession, possession generates a common law freehold, privileges of possession, remedy by action for possession and forced eviction.

Submissions

11. The 1st Respondent's/Applicant's counsel submitted that this court is duly vested with jurisdiction to entertain the application pursuant to **Rule 32 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** and **Order 42 Rule 6(1) of the Civil Procedure Rules** and that the courts are equally vested with inherent powers to issue stay orders in order to dispense justice to the parties.
12. Reliance in this regard was placed on the cases of ***Serah Wanjiru Kung'u vs Peter Munyua Kimani [2021] eKLR, Equity Bank Limited vs West Link Mbo Limited [2013] eKLR*** and ***Board of Governors, Moi High School, Kabarak & Another vs Malcolm Bell [2013] eKLR***. According to counsel, contrary to the Petitioner's assertions, the application is not an appeal and neither does it invite the court to sit on appeal of its own decision.
13. The 1st Respondent's counsel submitted that the courts in interpreting the provisions of **Rule 32 of the Mutunga Rules** as well as **Order 42 Rule 6 of the Civil Procedure Rules** have expanded the scope of factors to be considered beyond the traditional establishment of sufficient cause, proof of substantial loss and furnishing of security and that in light of the overriding objectives, the courts are equally obligated to weigh the likely consequences of granting or refusing the stay and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. To buttress this contention, counsel cited the case of ***Kenya Women Microfinance Ltd vs Martha Wangari Kamau [2020] eKLR***.
14. It was submitted that the Appeal raises substantial questions of law; that there was no unreasonable delay in instituting the application and that the 1st Respondent has demonstrated sufficient cause being that the Petitioner has no proprietary or equitable interest in the suit property.
15. Counsel submitted that granting the Petitioner the suit property will not serve the interests of justice because he continues to deprive the 1st Respondent, its' legitimate owner, of its use and may alter the nature of the property causing substantial loss to the 1st Respondent and ultimately rendering the Appeal nugatory and that the essence of stay pending appeal is to preserve the subject matter of the suit. In support, counsel cited the case of ***Sammy Some Kosgei vs Grace Jelel Boit[2013]eKLR*** and ***George Otieno Gache & another vs Judith Akinyi Bonyo & 5 others [2017] eKLR***.
16. The 1st Respondent's counsel submitted that the Petitioner has not set out any prejudice he stands to suffer bearing in mind his admission that he has procured alternative accommodation and that the court ought to be guided by the considerations for the grant of interlocutory reliefs as set out by the Supreme Court case of ***Board of Governors, Moi High School, Kabarak & another vs Malcolm Bell [2013] eKLR***.
17. The 5th Respondent's counsel submitted that the decision of Rawal J was clear; that the Petitioner was aware that he was supposed for

look for alternative accommodation for over 15 years; that by its Ruling, this court has allowed the Petitioner to do anything on the land as he pleases and that the law does not allow a litigant to do anything he wishes on the land which does not belong to him.

18. The 5th Respondent's counsel submitted that this court did not consider the issue of conservatory orders despite having framed it as an issue for determination; that the contradiction in the Ruling of the court is apparent and that had the court considered the issue of whether the Petitioner has established a prima facie case, it would have arrived at a different decision.

19. Counsel submitted that the illegal occupation by the Petitioner on the suit property is prejudicial, and so is the loss of rental income that the 1st Respondent is entitled to. According to counsel, the Petitioner was given the first right of refusal which he declined to exercise and that the Petitioner has no known legal right over the suit property.

20. The Petitioner's counsel submitted that the 1st Respondent has not met the conditions for stay of execution pursuant to **Order 42 Rule 6(1)** of the **Civil Procedure Rules** and that no substantial loss will be suffered by the 1st Respondent as the Petitioner is incapable of alienating the suit property.

21. The Petitioner's counsel submitted that the return of the Petitioner to the suit property will not render the Appeal nugatory and that it is the Petitioner who will suffer substantial loss by the grant of the stay order because him, together with his family, have been rendered homeless which homelessness will persist.

22. To buttress the contention that evidence of substantial loss must be demonstrated by the Applicant, reliance was placed on the cases of *Peter Maina Waihenya & another vs Industrial and Commercial Development Corporation (ICDC) Ltd & another [2021] eKLR, Kenya Women Microfinance Ltd vs Martha Wangari Kamau [2020] eKLR* and *Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR*.

23. The Petitioner's counsel submitted that the application has been brought contrary to the equitable principle that he who comes to equity must come with clean hands and that the alleged new owner of the suit property doubles up as the Petitioner's previous counsel who acquired information about the suit property in the course of representing the Petitioner and used that information to pursue his interests against the Petitioner.

24. It was submitted by the Petitioner's advocate that the title the 1st Respondent is relying on was procured by fraud and illegalities and is in any event different from the actual Title Deed for the suit property; that the said title was procured by the 1st Respondent way after the original owner of the land had died and that the above notwithstanding, a purchaser cannot evict a legal occupier of a property as held by the courts in the cases of *Beard vs Porter [1948] 1QB 321* and *Jandu vs Kirpal & Another [1975] EA 225-226*. It was submitted that the 1st Respondent and by extension all the Respondents are not entitled to the orders sought.

Analysis and determination

25. Upon considering the Motion and the Affidavit in support thereof, the Replying Affidavit and Grounds of Opposition, and the parties' respective submissions, the issues that arise for determination are as follows:

i. *Whether this Court has jurisdiction to entertain the application.*

ii. *Whether this Court should grant an order of stay of execution of its orders of 10th March, 2022 pending hearing of the Appeal.*

26. Vide the Grounds of Opposition, the Petitioner contends that this court has no jurisdiction to entertain the instant application. According to the Petitioner, the 1st Respondent has filed an Appeal at the Court of Appeal with respect to the orders of this court given on 10th March, 2022; that as a result, the Court of Appeal is seized of the subject matter and that this court having been divested of its jurisdiction is incapable of entertaining the application.

27. It is undisputed that the 1st Respondent, being dissatisfied with the Ruling and Orders of this Court, lodged an appeal in the Court of Appeal being Civil Appeal No. E133 of 2022 which is now pending for hearing and determination before that court. The question before this court is whether in light of the foregoing, it has the jurisdiction to entertain the application for stay of its orders pending hearing and determination of the appeal.

28. It is trite law that any question with respect to the courts' jurisdiction must be determined in the first instance, and where the court finds that it lacks jurisdiction, it must down its tools. This proposition was well enunciated by the Court of Appeal in the case of *The Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Limited [1989] 1 KLR* where it was stated as follows:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obligated to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no need for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

29. In *Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 others [2012] eKLR*, the Supreme Court pronounced itself on jurisdiction thus;

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondent in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

30. The Petitioner commenced this suit by way of a constitutional Petition pursuant to **Articles 10, 23(3), 40(2), 47, 48, 50 and 165(6) of the Constitution**. The procedural law that guides the court while dealing with constitutional Petitions is the **Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013** also known as the *Mutunga Rules*.

31. **Rule 32** of the *Mutunga Rules* provides as follows:

“ (1) An appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed.

(2) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling and the court may issue such orders as it deems fit and just.

(3) A formal application for stay may be filed within 14 days of the decision appealed from or within such time as the court may direct.”

32. It is thus evident that the *Mutunga Rules* specifically provide for stay of execution pending appeal.

33. On whether the filing of an appeal divests this court of jurisdiction to entertain an application for stay of execution of its orders or decree, the court thinks not. It is clear from the provisions of *Rule 32 (1) of the Mutunga Rules* that an appeal or second appeal does not operate as an automatic stay of execution of a decree or order. Consequently, an Appellant has to specifically move the court for an order of stay of execution pending appeal. That is what the Court of Appeal stated in the case of **Equity Bank Limited vs West Link Mbo Limited [2013] eKLR** :

“As a general principle of law an appeal being a totally distinct proceeding from the original or appellate proceedings appealed from, the institution of an appeal does not operate as a bar to execution of a sentence in criminal matters or execution of decree, in civil matters unless otherwise expressly so provided.”

34. Further, it is trite that the import of an application for stay pending appeal is to preserve the substratum of the Appeal. Contrary to the Petitioner’s assertions, the filing of an Appeal does not divest this court of its jurisdiction but actually invokes the same. Simply put, an application for an order to stay execution pending appeal presupposes the existence of an Appeal.

35. The court has considered the case of **Okello & Another vs Osonga (1988) KLR 198** relied on by the Petitioner. With due respect to counsel, that case is inapplicable in the present circumstances. The rationale set out in the **Okello** case (*supra*) is that a judge of the High Court cannot set aside the decision of another judge of concurrent jurisdiction, whether on appeal or at first instance, unless by way of an application for review.

36. The present application being one for stay pending appeal is not concerned with the merits of the pending appeal. Its determination cannot be equated with this court sitting on Appeal of its own decision.

37. As discussed hereinabove, this is a constitutional Petition. The court will therefore be guided by the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**. In this respect, the court bears in mind the overriding objective of the Rules as provided for under Rule 3 thereof, which is to facilitate access to justice for all persons as required under Article 48 of the Constitution.

38. The court will also be guided by **Rule 3(3)** of the *Mutunga Rules* which provides that the Rules must be interpreted in accordance with **Article 259 (1) of the Constitution** and shall be applied with a view to advancing and realizing the rights and fundamental freedoms enshrined in the Bill of Rights and the values and principles of the Constitution as well as **Rule 3(4)** which provides that in exercise of its jurisdiction under the Rules, the court shall facilitate the just, expeditious, proportionate and affordable resolution of all cases.

39. **Rule 32 (2)** of the *Mutunga Rules* provides that the orders of stay may be made by the court *“as it deems fit and just.”* This shows that the grant of the orders of stay is discretionary. The Black’s Law Dictionary (10th Edition) defines judicial discretion as:

“The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court’s power to act or not to act when a litigant is not entitled to demand the act as a matter of right.”

40. The principles upon which the court exercises its discretionary jurisdiction are well settled. Although the court’s discretion is unfettered, it must be exercised judiciously and based on sound principles of law. This was expressed by the Court of Appeal in the case of **Patriotic Guards Limited vs James Kipchirchir Sambu [2018] eKLR** which stated thus:

“...It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

41. With respect to the discretion to be exercised in determining whether or not to grant or refuse an application for stay pending appeal, the court will be guided by the Court of Appeal decision of **Butt vs Rent Restriction Tribunal [1979] eKLR** where the learned judges stated thus;

“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the 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, per Brett, LJ in *Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:*

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

42. The gist of the order which the 1st Respondent intends to appeal against is this court’s decision declaring the orders by the Chief Magistrates Court allowing the eviction of the Petitioner from the suit property and the subsequent demolition the house thereon *null* and *void ab initio* for want of jurisdiction and setting them aside. In doing so, this court ordered that notwithstanding the demolition of the house on the suit property by the 1st Respondent, the Petitioner be reinstated on the suit property pending the hearing and determination of the Petition.

43. According to the 1st Respondent, the Petitioner has no legitimate rights over the suit property and has been staying thereon illegally; that despite having been given an opportunity to regularize his position by paying rent, he failed to do so; that as a result thereof, the 1st Respondent has continued to lose income; that the Petitioner having admitted to have found alternative accommodation will not be prejudiced if the stay is not granted and that if the stay order is not granted, the Petitioner may alter the nature of the suit property thus rendering the appeal nugatory.

44. The Petitioner’s case on the other hand is that he has lived on the suit property since 1989 and has been paying rates; that sometime in 2008, he filed a suit for adverse possession but the same was dismissed; that his advocates, who included the 5th Respondent herein, advised him not to appeal against the dismissal; that sometime in 2014, he received communication that the property has a new owner and was advised to pay rent to the said owner and that he was issued with eviction notices. The Petitioner’s case is that the 1st Respondent cannot legally evict him from the suit property because its title is based on fraud and illegalities.

45. While rendering its decision, this court held as follows:

“Be that as it may, it is not in dispute that the Petitioner was evicted from the suit property on 4th February, 2022 pursuant to the order of the subordinate order which this court has set aside. It is also not in dispute that after the Petitioner was evicted, the 1st Respondent demolished the house that the Petitioner was living in, presumably in execution of the lower court’s order.

Although counsel for the 1st Respondent has argued that courts do not issue orders in vain, it is a truism that where there is a wrong, there is a remedy, which is expressed in the legal maxim, *ubi jus ibi remedium*. What this maxim means is that once it is proved that a right was breached, then equity will provide a suitable remedy.

This principle underlines the fact that no wrong should be allowed to go without any remedy. In fact, it has been stated that if all remedies are gone to enforce a right, the right in point ceases to exist in law. Under section 13 (7) of the Environment and Land Court, this court can issue orders of restitution, amongst other orders.

Having found that the orders of the lower court were null and void, it follows that the status quo ante the said order in respect of the suit property should be reverted to pending the hearing and determination of the Petition.”

46. Having found that the orders of the lower court were null and void, this court directed that the *status quo ante* the said order in respect of the suit property should be reverted to pending the hearing and determination of the Petition. Indeed, in its Ruling, other than the issue of whether the lower court had the jurisdiction to order for the eviction of the Petitioner from the suit property, the court, guided by the prayers in the application, steered clear from the question of who, between the Petitioner and the 1st Respondent is entitled, *prima facie*, to the suit property.

47. The Court of Appeal will determine the issue of whether this court erred in invoking its supervisory jurisdiction and setting aside the decision of the lower court for want of jurisdiction. The Court of Appeal will also consider if this court, having set aside the decision of the lower court, was right in reinstating the Petitioner on the suit property pending the hearing and determination of the Petition.

48. In the event this court grants to the 1st Respondent the order of stay as prayed, the 1st Respondent will continue being in possession of the suit property on the basis of an order of the lower court which this court has since set aside.

49. The position that this court will take for now as to who between the Petitioner and the 1st Respondent should be in possession of the suit property pending the hearing of the Appeal or the Petition (whichever comes first), will be guided by the case of **Board of Governors, Moi High School, Kabarak & another vs Malcolm Bell [2013] eKLR** where the Supreme Court stated as follows:

“The advantages and disadvantages likely to follow upon the granting of an order must be weighed. If overall, and with due regard to the divergent interests and considerations of convenience affecting the parties, it appears that the advantages would outweigh the disadvantages, the Court would normally grant the application.”

50. The Petitioner has indisputably been in possession and occupation of the suit property for over 20 years. Whether the Petitioner’s occupation of the suit property is illegal or not can only be determined at trial or in a separate application. However, as of now, the court is not convinced that the Petitioner intends to or is capable of substantially altering the nature of the suit property so as to render the Appeal nugatory.

51. In the case of **Fred Matiang’i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government vs Miguna Miguna & 4 others [2018] eKLR**, the Court of Appeal held that in determining whether a matter would be rendered nugatory on appeal, it was necessary to show the aspect of irreversibility that could occur as a result of the orders subsisting while the appeal was decided and the court would not rely on speculation, conjecture and apprehensions. The court went on and stated as follows:

“there is nothing irreversible that could occur as a result of those orders subsisting while the appeals intended are processed, prosecuted and decided by the Court... All the applicants voiced were apprehensions ... and this Court cannot move to stay the orders made by a Court of competent jurisdiction on the basis of such far-fetched fears.”

52. In fact, it is the 1st Respondent who is likely to change the nature of the suit property if it is allowed to take possession of the suit property by either selling it or charging it further considering that it has in its possession a contested title, unlike the Petitioner who does not have any title document. Indeed, the title in the possession of the 1st Respondent shows that the 1st Respondent has already charged the suit property to the 1st Interested Party.

53. Having taken all the relevant circumstances into account, it is the view of this court that declining to grant the orders sought will serve the greater interests of justice. The *status quo ante* the order of the lower court as directed by this court on 10th March, 2022 should subsist pending the hearing and determination of the Appeal or this Petition.

54. For those reasons, the court finds and holds that the application dated 15th March, 2022 lacks merit. The application is dismissed with costs to the Petitioner.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 21ST DAY OF APRIL, 2022.

O. A. ANGOTE

JUDGE

In the presence of:

Mr. Kahungu for Dr. Khaminwa for the Petitioner

Mr. Muthee for Masika for the 1st Respondent

Ms Fatima for 2nd – 4th Respondents

Mr. Ochieng Oduol for 5th Respondent

Court Assistant: John Okumu