



**Mosweta v Ogwora & 3 others (Environment & Land Case
409 of 2014) [2022] KEELC 2429 (KLR) (11 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2429 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 409 OF 2014**

JM ONYANGO, J

MAY 11, 2022

BETWEEN

JOHN NYACHIRO MOSWETA APPLICANT

AND

PIUS M. OGWORA 1ST RESPONDENT

PETER ONGERI OGWORA 2ND RESPONDENT

BENEDICT OGWORA 3RD RESPONDENT

COSMAS ONG'ANG'A OGWORA 4TH RESPONDENT

RULING

1. This Ruling pertains to a Notice of Motion dated December 14, 2021 filed by the Applicant seeking an order of stay of execution of the judgment and decree of this court in favour of the Defendants/ Respondents dated 17th of November, 2021 pending hearing and determination of the intended appeal at the Court of Appeal.
2. The Applicant filed the application pursuant to the provisions of order 42 Rule 6 and order 51 Rule I of the *Civil Procedure Rules, 2010* and Sections 1A, IB and 3A of the *Civil Procedure Act*.
3. The application is premised on the grounds listed on the face of the Notice of Motion and the Supporting Affidavit sworn by John Nyachiro Mosweta, the Applicant herein.
4. In his Replying Affidavit the Applicant deponed that since he intends to challenge the court's declaration that the Defendants had acquired prescriptive rights over a portion measuring 0.5 Hectares over his property LR No Central Kitutu/Monyerero/128 and ordered a transfer of the same to them, his Appeal will be rendered nugatory if the execution is not stayed.



5. He further averred that the grant of stay of execution shall accord the Applicant an opportunity to exercise his right of Appeal. The Applicant expressed willingness to abide by any terms and conditions in regard to security for the due performance of the decree. He deponed that it is in the interest of justice that the application be allowed and that the Respondents will not suffer any prejudice if indeed the orders sought were granted.
6. In response to the application, the Respondents filed Grounds of Opposition raising two main reasons. The first one is that the application does not meet the conditions under order 42 Rule 6 of the [Civil Procedure Rules](#) for the grant of stay of execution. The second one is that the application is meant to delay, obstruct and/or defeat the due process of the court.
7. The court with the consent of all the parties directed that the matter be canvassed by way of written submissions and both parties filed their submissions.

Issues for Determination

8. From my analysis of the application, the response by the Defendants and the written submissions by both parties, the sole issue for determination is whether the Applicant has met the requirements for grant of an order of stay of execution under Order 42 Rule 6 of the [Civil Procedure Rules, 2010](#).

Analysis and Determination

9. This application seeks to invoke the discretionary powers of the court which discretionary powers must be exercised judiciously. Stay of execution is provided for in Order 42 Rule 6(1) of the [Civil Procedure Rules, 2010](#) which empowers this court to stay execution of its judgment pending appeal. The conditions to be met before stay is granted are stipulated in Rule 6(2) as follows:

“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.”
10. Learned counsel for the Applicant submitted on the two conditions stated above. On the issue of substantial loss and while relying on the case of *Mukuma v Abuoga* [1988] KLR 645, counsel argued that since the judgment of the court ordered the Applicant to transfer to the Respondent a portion of his property measuring 0.5 HA to the Defendants jointly and severally which order he is contesting in his intended appeal, the Applicant’s right to property will be violated and his appeal rendered nugatory if the stay is not granted.
11. On the issue of timeliness in filing his application, counsel argued that the application had been filed without unreasonable delay and that the Respondents had confirmed so in their submission.
12. On the issue of security for due performance of the decree, counsel submitted that the Applicant was ready to abide by the terms that may be imposed by the court.
13. On his part the learned counsel for the Respondents vehemently opposed the Submissions by counsel for Applicant. On the issue of substantial loss, counsel submitted that, in as much as the Applicant had stated in paragraph 6 of his Supporting Affidavit that his proprietary rights to the property would be violated if a portion of his property was hived and transferred to the Respondents as ordered by the



court, he did not lay any material before the court to demonstrate how he would suffer such a violation as the said portion is occupied by the Respondents. He argued that such an averment was merely an apprehension and not a material fact to warrant the consideration of the court in determining whether the Applicant would suffer any substantial loss. Counsel drew the attention of the court to the case of in *Machira t/a Machira & Co Advocates v East Africa Standard* [2002] eKLR where Kuloba, J stated as follows;

“If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant’s business (eg appeal or intended appeal).

Sometimes litigants seek to go to a higher court or to ask for review, and simultaneously ask for further steps or execution to be stopped while they go forth, for reasons of expressing their unhappiness with what has been decided. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay merely on the ground of annoyance to feelings. Indeed, remote contingencies would not warrant the court’s interference with the ordinary course of justice and the process of law.

Moreover, a court will not order a stay upon a mere vague speculation; there must be the clearest ground of necessity disclosed on evidence. Commonly, the applicant may obtain a stay of further proceedings or execution, if he shows facts which point to a conclusion that to allow execution or further proceedings to go ahead before appeal concluded would let an impecunious party to pocket and squander or pilfer what may be needed in restitution if the appeal succeeds and is allowed. Another common factor in favour of the applicant is whether to proceed further or to execute may destroy the subject matter of the action and deprive the appellant or intended appellant of the means of prosecuting the appeal or intended appeal. So, really, stay is normally not to be granted, save in exceptional circumstances.”

14. On the issue of security for costs, t counsel submitted that whereas the Applicant had claimed that he was willing to provide security, he has not demonstrated through his Supporting Affidavit what security he is ready to provide.
15. I have considered the arguments of both parties with regard to the requirements set out under order 42 rule 6 of the *Civil Procedure Rules 2010*, and in my considered view the Applicant has not fully satisfied the said requirements. In as much as he filed the application without unreasonable delay, he has failed to convince me that he shall suffer any substantial loss if the execution of the judgment is allowed to proceed. As argued by counsel for the Respondent, the mere apprehension that the transfer of a portion of the suit property to the Respondents which the Respondents have occupied for a long time is not sufficient evidence to demonstrate that he would suffer substantial loss. As it was observed in the Machira case highlighted hereinabove, the kind of loss likely to be sustained must be specified by the Applicant giving details or particulars thereof so that this court is satisfied that the Applicant is likely to suffer substantial injury by letting the Respondents proceed with execution of the judgment.
16. The upshot is that the application lacks merit and it is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 11TH DAY OF MAY, 2022.

J.M ONYANGO



JUDGE

