



REPUBLIC OF KENYA



**Kilifi Colours & Dreams Limited v Soso Investments Limited & another (Environment & Land Case 129 of 2015) [2022] KEELC 2800 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2800 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 129 OF 2015**

**JO OLOLA, J  
JUNE 30, 2022**

**BETWEEN**

**KILIFI COLOURS & DREAMS LIMITED ..... PLAINTIFF**

**AND**

**SOSO INVESTMENTS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**EMMANUEL PATRICK BAHA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By the Notice of Motion dated February 24, 2021, Soso Investments Limited (the 1<sup>st</sup> defendant) prays for an order of stay of execution of the Judgment delivered herein on February 19, 2021 pending the hearing and determination of their Appeal.
2. The application which is supported by an affidavit sworn by Francis Samuel Kazungu Bayah, the 1<sup>st</sup> defendant's Director is premised on the grounds inter alia, that:
  - (i) The 1<sup>st</sup> defendant has filed a Notice of Appeal dated February 23, 2021 against the said Judgment;
  - (ii) Immediately the Judgment was rendered, the plaintiff did on February 22, 2021 send its agents to the premises and threatened to forcefully evict the 1<sup>st</sup> defendant's premises;
  - (iii) There is real and imminent possibility that the plaintiff will commence execution proceedings against the 1<sup>st</sup> defendant unless restrained by an order of this court;
  - (iv) If the Judgment and decree is executed, the intended Appeal would be rendered nugatory and academic and the 1<sup>st</sup> defendant stands to suffer substantial loss; and
  - (v) The 1<sup>st</sup> defendant is willing to abide by conditions as to security as to costs the court may find just and equitable.



3. The application is opposed by Kilifi Colours & Dreams Limited (the plaintiff). in a replying affidavit sworn by its Director Peter Cannobio and filed herein on March 22, 2021, the 1<sup>st</sup> defendant avers that the allegations that the plaintiff visited the suit premises on February 22, 2021 are untrue as the plaintiff was still in the process of obtaining a decree in the matter.
4. The plaintiff avers that the 1<sup>st</sup> defendant has used the suit premises for a period of 12 years and should now vacate the same immediately as per the Judgment of the court. The plaintiff further avers that for the said period, it has not benefitted from the property as it has been kept away therefrom and the plaintiff stands to suffer further prejudice should the court grant the orders sought.
5. The plaintiff avers that in the event that this court is inclined to grant the orders sought, the 1<sup>st</sup> defendant should be ordered to deposit Kshs.5,000,000/- as security for costs in this case and in the Intended Appeal.
6. Emmanuel Patrick Baha (the 2<sup>nd</sup> defendant) is equally opposed to the 1<sup>st</sup> defendant's application. In his replying affidavit sworn and filed herein on March 15, 2021, the 2<sup>nd</sup> defendant avers that the 1<sup>st</sup> defendant's rights over the suit property were extinguished after the Judgment was delivered on February 19, 2021 and that the 1<sup>st</sup> defendant has failed to establish any special circumstances warranting an order of stay of execution.
7. The 2<sup>nd</sup> defendant further avers that the 1<sup>st</sup> defendant has gravely failed to adequately demonstrate the substantial loss that it is likely to suffer if the orders are not granted as it has only made mere assertions and/or excuses without furnishing the court with any empirical evidence in support of the same.
8. I have carefully perused and considered the 1<sup>st</sup> defendant's application as well as the responses thereto by both the plaintiff and the 2<sup>nd</sup> defendant. I have similarly perused and considered the rival submissions and authorities placed before me by the Learned Advocates representing the parties herein.
9. By their application herein, the 1<sup>st</sup> defendant has urged the court to grant an order of stay of execution of the Judgment and decree of this court dated February 19, 2021 pending the hearing and determination of an Appeal that has been lodged with the Court of Appeal. It is the 1<sup>st</sup> defendant's case that unless the said orders are granted, it stands to suffer irreparable loss and its Appeal shall be rendered nugatory and be reduced to a mere academic exercise.
10. The conditions to be met before a stay of execution can be granted are stipulated under Rule 6(2) of Order 42 of the [Civil Procedure Rules](#) 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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
11. Commenting on an application such as the one before me in [Kenya Shell Limited v Kibiru](#) (1986) KLR 410, Platt Ag J A (as he then was) expressed himself thus:

“It is usually a good rule to see if Order XL 1 Rule 4 of the [Civil Procedure Rules](#) can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in



its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence, it is difficult to see why the respondents should be kept out of their money.”

12. It is trite that in a situation such as this, the court must balance the right of appeal against the weighty right of the decree-holder to enjoy the fruits of his judgment. As was stated in *Ndubiu Gitahi & another v Anna Wambui Warugongo* (1988) 2 KAR:

“We are faced with a situation where a judgment has been given. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the defendant while giving no legitimate advantage to the plaintiff ... It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal ...”

13. In the matter before me, the 1<sup>st</sup> defendant/applicant entered and occupied the suit premises pursuant to a Sale Agreement dated January 12, 2002 and executed between itself and the 2<sup>nd</sup> defendant. That Agreement provided that the purchase price in the sum of Kshs.6,500,000/- be paid within 60 days.
14. The timelines for the said Agreement were not honoured. By their own admission and while they took possession of the suit premises immediately upon execution of the Sale Agreement on January 12, 2002, the 1<sup>st</sup> defendant had not completed payment of the purchase price as at the year 2009 when this suit was initially filed by the plaintiff herein.
15. Tired of waiting for payment from the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant gave notice to the 1<sup>st</sup> defendant of its intention to treat the contract as broken on November 7, 2006 unless the balance of the purchase price was made. The 1<sup>st</sup> defendant did not perform its obligations within the fixed timelines and the 2<sup>nd</sup> defendant proceeded to sell the suit property two years later to the plaintiff herein. When the plaintiff moved to take over the premises, the 1<sup>st</sup> defendant objected to the takeover claiming it had purchased the property.
16. From the material placed before me, the suit property was transferred to the plaintiff on December 15, 2008 after the 1<sup>st</sup> defendant failed to honour the Agreement executed between itself and the 2<sup>nd</sup> defendant on January 12, 2002. Since then the plaintiff has never taken possession of its property that it purchased from the 2<sup>nd</sup> defendant.
17. In considering the issue of substantial loss, the applicant has to establish 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. I did not in the circumstances herein think that it is the 1<sup>st</sup> defendant that stands to suffer substantial loss. On the contrary, it is apparent to me that the 1<sup>st</sup> defendant's loss if any is quantifiable and that it is the plaintiff who has been deprived of the enjoyment of its property for a period in excess of (12) years.
18. Accordingly I am persuaded that the Motion dated February 24, 2021 is devoid of merit. I dismiss the same with costs.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 30<sup>TH</sup> JUNE, 2022.**

In the presence of:

No appearance for the Plaintiff

No appearance for the Defendants



Court assistant - Kendi

**J. O. OLOLA**

**JUDGE**

