



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kitale Chepkorok Farm Limited v Nasasa & 4 others (Environment & Land  
Case 145 of 2015) [2022] KEELC 3124 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3124 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 145 OF 2015  
FO NYAGAKA, J  
JUNE 30, 2022  
(FORMERLY BUNGOMA ELC NO. 91 OF 2015)**

**BETWEEN**

**KITALE CHEPKOROK FARM LIMITED ..... PLAINTIFF**

**AND**

**PETER NASASA ..... 1<sup>ST</sup> DEFENDANT**

**HASSAN NDAMWE ..... 2<sup>ND</sup> DEFENDANT**

**ANDREW GUTTILA ..... 3<sup>RD</sup> DEFENDANT**

**DEPUTY COUNTY COMMISSIONER TRANS-NZOIA WEST .... 4<sup>TH</sup>  
DEFENDANT**

**ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were dissatisfied with this court's decision made on 10/12/2021. As a result, they filed a Notice of Appeal dated 15/12/2021 on 16/12/2021 with intent to appeal against the whole judgment. Following that, on 17/01/2022 they filed the present Application dated 07/01/2022 seeking the following:
  - a. ...spent.
  - b. ...spent.
  - c. That at the inter partes hearing, the orders granted in (b) above to operate pending hearing and determination of the Applicants' intended appeal to the Court of Appeal arising from the judgment in this suit.



- d. That costs of the Application be provided for.
2. The Application was premised on five (5) grounds on its face and supported by the Affidavit of one Peter Nasasa, the 1<sup>st</sup> Defendant/Judgment-Debtor. He deposed that he had the authority of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Judgment-Debtors to swear the Affidavit. The gist of the grounds forming the gravamen of the Application and the Affidavit in support are that the judgment affected a multitude of people resident on the suit land and respective portions within the suit land had been demarcated and such demarcations would be interfered with by way of the execution hence the Applicants were apprehensive that execution would be commenced any time. To this end, they furthered that substantial loss shall issue if stay of execution orders were not granted.
  3. The Applicants contended they had preferred an Appeal to the Court of Appeal as indicated above herein. They annexed to the Affidavit the Notice of Appeal, a letter requesting for typed proceedings and the draft Memorandum of Appeal and marked them as PN-1A, PN-1B and PN-2 respectively. They argued that the proceedings were yet to be typed. They were willing to abide by any conditions precedent as to depositing security for Appeal. They then deposed that if the orders sought were not granted, they would suffer substantial loss should the Appeal succeed and yet no prejudice would be occasioned on the Plaintiff/Decree-Holder if the orders sought were granted.
  4. In its Replying Affidavit filed on 04/02/2022 and deposed by Felix Kipkemboi Biwot, the Plaintiff's/Decree-Holder's secretary on 03/02/2022, it was clear that the Application was vehemently opposed. Felix Biwott deposed that the Application was incompetent and for striking out as the same was filed by an Advocate not on record. As a result, the Application breached Order 9 Rule 9 of the Civil Procedure Rules. It was deposed that the Plaintiff/Decree-Holder had not been served with a Notice of Appeal or letter requesting for typed proceedings and that the Applicants had not evidenced proof of payment of the documents mentioned.
  5. It was pitted against the Applicants that in the Court's judgement, it was only found that the Applicants were not among the 126 people to whom the suit land should be transferrable to; that the decision to subdivide the suit land remained valid and unchallenged; and such division, whose decision was made by other courts, could not be the subject of the present Appeal. It was deposed further that Applicants were sued in their personal capacity and thus could not represent the interests of thousands of people. It was deposed that the Application failed to meet the threshold set out in grant of stay of execution orders. The Respondent urged this Court to dismiss the Application with costs.
  6. The 4<sup>th</sup> and 5<sup>th</sup> Defendants did not participate in the Application.
  7. The Applicants further filed a Supplementary Affidavit on 23/02/2022. It was sworn on 21/02/2022 by the 1<sup>st</sup> Defendant/Judgment-Debtor. In it, they annexed a consent to come on record and a Notice of Change of Advocates marked them as PN-1A and PN-1B respectively, to rebut that the present Counsel was improperly on record. Again they annexed marked as PN 2A and PN 2B, the Notice of Appeal and letter requesting for typed proceedings respectively to prove that the said documents were served upon the Respondent. The Applicants also annexed and marked PN 3, a copy of the payment receipt to discredit the Respondent's allegations that they had not paid the requisite fees. They maintained that substantial loss would occur on thousands of people on the suit land including themselves. They urged this court to find merit in the Application.

## Submissions

8. Parties relied on their written submissions in canvassing the said Application. The Applicants submitted that the Application invoked the provisions of Order 42 Rule 6 of the [Civil Procedure Rules](#).



They further added that they had met the conditions precedent set out statutorily. This they submitted they had done as above as follows:

9. Firstly, on whether the Applicants would suffer substantial loss, they reiterated that they would be dispossessed of, displaced and/or evicted from the suit land if stay of execution was not granted. It was thus necessary to preserve the suit land. Secondly, on whether the Application was made timeously, the Applicants submitted that the Notice of Appeal and letter requesting for typed proceedings were contemporaneously filed on 16/12/2021; five (5) days after judgment had been delivered. They thereafter filed the present Application on 07/01/2022 (sic). For these reasons, they maintained that the Application was filed without unreasonable delay. Lastly, on whether the Applicants were willing to deposit such security for costs, they submitted in the affirmative. They further added that the appeal remained arguable and that the Respondent stood to suffer no prejudice if the orders sought were granted.
10. On the part of the Respondent, it was submitted that the Applicants served the Respondent with the Notice of Appeal and letter requesting for proceedings outside the timelines encapsulated in the Court of Appeal Rules. It conceded that the Application was filed without undue delay. On whether the Applicants would suffer substantial loss, the Respondent submitted in the negative for the following reasons:
11. Firstly, that the suit herein did not concern the issue as to subdivision. Secondly, the Applicants did not deny that they were not among the original 126 members of the Respondent. Thirdly, since subdivision was decided by another Court, the same could not be the subject of the present Appeal. Finally, the nature of the orders of the court were that the Applicants were not among the 126 people of the suit land. Such declaration could not be stayed. They submitted that the issue of substantial loss was the cornerstone of an Application of this nature and that since the Applicants had failed to prove so, the Application must suffer its fate.

### **Analysis and disposition**

12. The Application sought to stay execution pending the hearing and determination of the Appeal to the Court of Appeal. The Applicants relied on Order 42, Rule 6 of the Civil Procedure Rules. In it, an Applicant must satisfy the following conjunctive requirements:
  - i. The Application has been made without unreasonable delay;
  - ii. Substantial loss may result to the Applicant unless the order is made; and
  - iii. That the Applicant is willing to furnish such security as the court order for the due performance of such decree.
13. The purpose of stay pending appeal was succinctly enunciated in the case of *RWW vs. EKW* [2019] eKLR, as follows:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is



discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

14. The power to grant stay of execution is discretionary. It should be exercised judiciously and this the Court is set to do herein. The Court is mandated to evaluate each circumstance of a case on a case by case basis. I will now proceed to determine the Application as follows:

**i Whether the Application has been brought timeously**

15. Following delivery of the court’s judgment on 10/12/2021, the Applicants file a Notice of Appeal and a letter requesting for typed proceedings on 16/12/2021. Thereafter, the present Application was filed on 17/01/2022. Since the Respondent conceded that the Application was filed without unreasonable delay, I proceed to make that finding.

**ii Whether the Applicant will suffer substantial loss**

16. On substantial loss, the Applicant propounded that it was among more than 856 people who were members of the Respondent. That the suit land had been demarcated into various portions to the benefit of a multitude of people; amongst them, the Applicants. If execution was allowed to proceed, they would be displaced from, dispossessed of and/or evicted from the suit land and hence suffer substantial loss.
17. The Respondent refuted that the Applicants had proved substantial loss. That since the suit herein did not concern subdivision, which was decided by another court, and the Applicants did not deny that they were not among the original 126 members of the Respondent, which was the substratum of the Court’s final orders, substantial loss had not been demonstrated aptly.
18. Substantial loss was deciphered in the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR as follows:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

19. The Applicants were apprehensive that they would be evicted from the suit premises during the pendency of the Appeal. Consequently, they would be dispossessed of the suit land. The Respondent, in my view, has advanced several grounds challenging the propriety of the Appeal. They have raised several grounds which are in the nature of a defence to the Appeal. The present Application does not need to ascertain whether the Appeal is merited. Those issues will be canvassed before the Court of Appeal. All an Applicant has to demonstrate is that the Appeal will be rendered an academic exercise of orders of stay are not granted.
20. There is no evidence that execution is about to be commenced. I do not find that if execution is not granted in the present Application, the Respondent would suffer any loss. I am thus not inclined to hold that if stay is not granted, substantial loss would be occasioned on the Applicants.



### **iii Whether the Applicant is willing to furnish security**

21. The Applicant has expressed willingness to abide by the conditions set by this court. They maintained that they were willing to furnish such security for costs but they did not demonstrate how they would do so or what the security would be. In such application as the instant one, there is always need to demonstrate to the Court what security can be availed in case stay is granted. The Respondent did not submit on this limb. Consequently, I see not fit to issue an order for security when nothing has been demonstrated as much.

### **Orders**

22. The upshot of this Ruling is that the Application dated 07/01/2022 is unmerited. I dismiss it with costs to the Respondents.

Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 30<sup>TH</sup> DAY OF JUNE, 2022.**

**DR.IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE.**

