



Kakyema v Itinga & 2 others (Sued as the Legal Representative of the Estate of Nathan Kiiro Itinga –Deceased) (Environment & Land Case E0011 of 2020) [2022] KEELC 2917 (KLR) (29 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2917 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E0011 OF 2020**

**TW MURIGI, J
JUNE 29, 2022**

BETWEEN

REUBEN KIOKO KAKYEMA APPLICANT

AND

KIOKO WAMBUA ITINGA 1ST RESPONDENT

JAMES KYALO WAMBUA 2ND RESPONDENT

NATIONAL LAND COMMISSION 3RD RESPONDENT

**SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF NATHAN KIIRO
ITINGA –DECEASED**

RULING

1. There are two applications before this court for determination.
2. The first application is a Notice of Motion dated 1st of October 2021 filed by the Plaintiff pursuant to the provisions of Sections 1A, 1B, and 3A of the *Civil Procedure Act*, Order 10 Rule 9, Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law where the Applicant is seeking for the following orders: -
 - 1) Spent.
 - 2) That the Honourable Court be pleased to grant an order that the Plaintiff's suit proceeds as undefended.
 - 3) That the costs of the application be borne by the Respondents jointly and severally.



The Applicant's Case

3. The application is premised on the grounds appearing on its face and on the supporting affidavit of the Applicant sworn on the even date.
4. A summary of the grounds and the averments is that the Plaintiff filed this suit on 27th of November 2020. That thereafter the Plaintiff and the accompanying documents together with the Summons to Enter Appearance were served upon the 1st and 2nd Defendants on 15th of December 2020, while, service was effected upon the 3rd Defendant on 17th of December 2020.
5. He stated that, the 1st and the 2nd Defendants Advocate filed the Notice of Appointment on 8th of January 2021. It is the Applicant's position that the 3rd Defendant neither filed a Notice of Appointment of Advocate nor its Defence.
6. The Applicant contends that the delay of nine months is unreasonable and inordinate and that it has greatly prejudiced the Applicant since he lost his home through compulsory acquisition and was yet to be paid the full and fair compensation. The Applicant argued that it is only fair to block the Defendants who had failed to file their defence on time from delaying the expeditious disposal of this suit.

The 1st and 2nd Respondents Case

7. Opposing the application, the 1st and the 2nd Respondents filed grounds of opposition dated 26th of October 2021. These grounds are: -
 - a) That the Plaintiff's Notice of Motion is defective and lacks merit.
 - b) That Order 10 of the Civil Procedure Rules 2010, does not allow a party to approach the Court by way of a Motion.
 - c) That the affidavit of service sworn on 16th December, 2020 by Jane Mutungi does not disclose the elements of proper service upon the 1st and 2nd Respondents.
 - d) That the Plaintiff is allegedly circumventing the law and that in the interest of justice the application must fail.
 - e) That the 1st and 2nd Defendants have a Counsel on record and that a written Statement of Defence has been lodged.
8. Though duly served, the 3rd Respondent did not enter appearance or file a response to the application.
9. The application was canvassed by way of written submissions.

Submissions

The Applicant's Submissions

10. The Applicant's submissions were filed on 7th of December 2021. Counsel for the Applicant submitted that the law is clear on the time lines within which parties should file their defence upon service of summons to enter appearance. Counsel submitted that the 1st and 2nd Defendants' statement of defence dated 26th of October 2021 is defective as it was sneaked into the Court record nine months after the prescribed time had expired and without the leave of the Court. In addition, Counsel argued that no reason was advanced by the Respondents to explain the inordinate and unreasonable delay in filing their defence.



11. Counsel further submitted that it was evident that the summons to enter appearance together with the Plaintiff were served upon the 1st and 2nd Defendants as their Counsel had filed a Notice of Appointment of Advocate. Counsel placed reliance on the following authorities to support his submissions: -
 1. [*KTDA Farmers Company Limited v Kei Matt Ltd*](#) [2018] eKLR.
 2. [*Beatrice Wanjiru Kamuri v John Kibira Muiruri*](#) [2016] eKLR.
12. Counsel went on to submit that the Respondents had flouted the provisions of Section 1A of the [*Civil Procedure Act*](#) by failing to adhere to the time lines set for filing a Defence and by failing to seek leave of the Court before filing the Defence. In addition, Counsel urged the Court to strike out the Defence and allow the matter to proceed for hearing as undefended.
13. Counsel argued that in the event the Court is inclined to admit the defence, the Respondents should be condemned to pay thrown away costs.

The 1st and the 2nd respondents submissions

14. The 1st and 2nd Respondents submissions were filed on 23rd of December 2021. Counsel submitted that the motion was only relevant to the 3rd Respondent since the 1st and 2nd Respondents had filed a Statement of Defence. In addition, Counsel submitted that there was no evidence that the 3rd Respondent was ever served. Counsel urged the Court to dismiss the application.
15. The second application is a Notice of Motion dated 26th of October 2021 filed by the 1st and the 2nd Defendants pursuant to the provisions of Articles 50 and 159 of [*the Constitution*](#) of Kenya 2010, Sections 1A, 3A and 63 (e) of the [*Civil Procedure Act*](#) and Order 42 Rule 6(1) and (2) and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law where the Applicant is seeking for the following orders: -
 - 1) Spent.
 - 2) That the Honourable Court Order of 2nd September 2021 be stayed pending the determination of the intended Appeal.
 - 3) That any other orders which the Honourable Court may be pleased to grant in the circumstances.
 - 4) That the costs of this application be provided for.
16. The application is premised on the grounds appearing on its face and on the supporting affidavit of the Applicant sworn on the even date.

The Applicants Case

17. A summary of the grounds and the averments is that the Defendants/Applicants have filed an Appeal against the Order dated 2nd of September 2021 where the National Land Commission was directed to compensate the Plaintiff with the sum of Kshs 3,270,435/-.
18. The Applicant contends that the said order was issued at the interlocutory stage leaving the main suit hanging. The Applicants argued that pursuant to the orders issued by the Court, the Plaintiff has applied for the execution of the decree and that unless the order of stay is granted, the Applicants would suffer irreparable loss.



The Respondent's Case

19. Opposing the application, the Respondent vide his replying affidavit sworn on 15th of November 2021 averred that the application is mischievous, frivolous, misconceived and an attempt to stop him from enjoying the fruits of the successful litigation in respect to payment of compensation due to him from the 3rd Respondent for the improvements that he had caused on the suit properties since 2002 after he purchased the same from Nathan Kiio Itinga.
20. He further averred that 1st and 2nd Respondents had not filed a Memorandum of Appeal. The Respondent contends that the Notice of Appeal does not constitute to an Appeal and that therefore it cannot operate as a stay.
21. It is the Respondents position that the Applicants did not object to the award of compensation being issued in his favour. The Respondent asserts that when the assessment and valuation of the suit properties was carried out by the 3rd Respondent, he was the only one in attendance on the ground since the Applicants were not in possession of the suit properties. He contends that the Applicants are estopped from making such claims over the suit properties 4 years down the line since they did not present any claim during the inquiry stage after the publication of notice to acquire by the 3rd Respondent. The Respondent argued that the valuation Reports issued by the 3rd Respondent clearly indicate that the Respondent and his family are the beneficial owners.
22. He further argued that his Advocate had commenced execution proceedings. It is the 1st Respondent's position that during the pendency of this suit, the Applicants fraudulently, secretly and on grounds of non-disclosure caused the Chief Magistrate in Succession Cause No. 139 of 2016 to issue contradictory orders that directed the 3rd Respondent to pay them the entire compensation for the suit properties despite being aware of the fact that the succession proceedings had on 28th of April 2021 been stayed pending the hearing and determination of the ELC proceedings.
23. He argued that the Applicants filed the present application after their attempts to coerce the 3rd Respondent to pay them the compensation award hit a dead end.
24. The Respondent contends that after his only home was acquired in 2016, he has continued to suffer substantial loss due to lack of funds to enable him to relocate his family.

The Applicant's Response

25. In response, the Applicant vide his supplementary affidavit sworn on 21st of December 2021, stated that the Respondent had drifted from the application since the Court had already dealt with the issues raised in his replying affidavit. The Applicant argued that the Respondent was misdirecting himself by dwelling on matters which ought to be addressed by the Court of Appeal.
26. The application was canvassed by way of written submissions.
27. The Applicant's written submission were filed on 23rd December 2021.

The Submissions

The Applicants Submissions

28. Counsel for the Applicants submitted that for the Court to exercise its discretion under Order 42 of the Civil Procedure Rules, a party must demonstrate that it has lodged an Appeal and that the intended Appeal would be rendered nugatory if the order of stay is not granted. Counsel placed reliance on *HGE*



v SM [2014] eKLR where Justice Musyoka J made reference to the decision in the case of *RWW Vs EKW* (2019) eKLR. Counsel argued that the Respondents had exhibited that a Notice of Appeal had been lodged.

29. Counsel further submitted that the Applicants would suffer irreparable loss if an order of stay is not granted as the entire subject matter would be extinguished. Counsel argued that there was no order for a money decree save for an order for compensation in favour of the Plaintiff/Respondent.

The Respondent's Submissions

30. The Respondent's written submissions were filed on 7th of December 2021. Counsel for the Respondent submitted that the application ought to fail on the following grounds: -
- a) That the Defendants have not demonstrated sufficient cause why the application should be allowed as the order of 2nd of September 2021 was a restatement of the assessed award given to the Plaintiff.
 - b) That there is no substratum to be preserved pending the Appeal in respect to the award as Section 113 of the *Land Act* states that the awards issued by the 3rd Defendant are final and conclusive.
 - c) That the application is a delaying tactic and if allowed it will cause the Respondent irreparable loss which cannot be compensated by way of damages.
 - d) That the Applicant has not filed a draft Memorandum of Appeal hence the application cannot succeed on the basis of written submissions and the supporting affidavit.
 - e) That the Applicant has not offered any security for the performance of the order.
 - f) That the Plaintiff continues to suffer substantial loss while the Defendants are not affected as the order was solely for payment of the extensive improvements caused by the Plaintiff on the suit properties and the 1st and 2nd Defendants have no claim whatsoever.
 - g) That the law under Section 112 of the *Land Act* provides that after publishing of the notice of intention to acquire land, the issues of proprietary interest shall be heard in an inquiry. That the 1st and 2nd Defendants are estopped from bringing complaints on the award issued by the 3rd Respondent at this point having failed to exhaust the established framework for redress before approaching the Court on such a claim.

Analysis and determination

31. Having considered the application dated 1st of October 2021 the affidavits and the rival submissions, I find that the issue for determination is whether the Plaintiff's suit should proceed as undefended.
32. The Applicant seeks to have this matter declared as an undefended since the Defendant failed to file its defence or filed its defence without leave of the Court.
33. The time for filing defence is prescribed by Order 7 Rule 1 of the Civil Procedure Rules which provides as follows: -

“where a Defendant has been served with a summons to appear he shall, unless some other or further order made by the court file his defence within 14 days after he has entered an appearance in the suit and serve it on the Plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.”



34. In the present case, the 1st and the 2nd Defendants appearance was filed on 8th of January 2021. It is not in dispute that the 1st and the 2nd Defendants Statement of Defence dated 26th of October 2021 was filed without leave of the Court. The 1st and the 2nd Defendants have not denied that they filed the Defence out of time and without the leave of the Court. Counsel for the Defendants did not bother to give any reason why the 1st and the 2nd Defendants filed their Defence late in the day. The Defendants did not give any reasons why the Defence was filed late and without leave of the Court.
35. Counsel for the Applicant urged this Court to strike out the Defence and allow the matter to proceed for hearing as undefended.
36. Striking out is an extreme measure which should only be resorted to where it is clear that a party is abusing the Court process. Article 159(2)(d) of the Constitution, Section 1A and 1B of the Civil Procedure Act emphasises on substantive justice as opposed to undue regard to procedural technicalities.
37. I am alive to the rules of natural justice which demand that both parties have a right to be heard. In the case of *Githere v Kimugu* [1976-1985] E.A. 101 the Court of Appeal stated that;
- “.....the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress and that the court should not be too far bound and tied by the rules, which are intended as general rules of practice, as to be compelled to do that which will cause injustice in a particular case.”
38. Similarly, the Court of Appeal in the case of *Nicholas Kiptoo Arap Korir Salat Vs IEBC & Another* (2013) eKLR stated that;
- “Deviation from and lapses in form and procedures which do not go to the jurisdiction of the court, or the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting a heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach on striking out proceedings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person such infraction should not have invalidating effect. Justice must not be sacrificed on the altar of strict adherence to the provisions of procedural law which at times create hardships and unfairness.”
39. In this regard, I find that by allowing the application, the Defendants will be barred from participating or being heard in this matter, which in my view will be a draconian step to take. I will therefore in the interest of justice admit the Defence filed by the 1st and the 2nd Defendants although out of time. However, I will impose sanctions to deter other parties from flouting the prescribed rules. A party who files his documents late should not be allowed to go scot free.
40. For the Plaintiff to have filed this application it is evident that he was desirous of bringing this matter to a logical end.
41. In the exercise of my discretion I will admit the Defence on the following conditions: -
- a) Leave be and is hereby granted to the 1st and 2nd Defendants to file and serve their statement of Defence out of time within the next 7 days from the date of this ruling.



- b) The 1st and the 2nd Defendants/Respondents shall pay to the Plaintiff Kshs 20000 thrown away costs within the next 14 days from the date of this ruling.
 - c) The 1st and the 2nd Respondents to pay the Applicant the cost of this application.
 - d) If the orders made in (A), (B) and (C) above are not complied with, the order admitting the defence will be vacated forthwith and the matter will proceed for hearing as undefended.
42. As regards the application dated 26th of October 2021, I have considered the affidavits and the rival submissions and I find that the main issue for determination is;

Whether the Applicants have satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for the grant of stay of execution pending Appeal.

43. Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules outlines the guiding principles to be met for the grant of stay and provides that;

6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

6(2) 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

such security of costs for the performance of such decree or order as may ultimately be binding on him has been given by Applicant.

44. Going by the above provisions of the law, it is clear that in an application for stay of execution pending Appeal, the Applicant must satisfy the following three conditions: -
- a) The Court is satisfied that substantial loss may result to the Applicant unless the order is made.
 - b) The application has been made without unreasonable delay.
 - 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.
45. In considering an application for stay of execution, I am guided by the case of *Butt Vs Rent Restriction Tribunal* (1982) KLR 417 where the Court of Appeal gave the following guidelines;

“The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision. A judge



should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicants at the end of the proceedings. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

46. The grant of an order of stay of execution is a discretionary one which must be exercised judiciously and within the confines of the law. In the case of *RWW v EKW* [2019] eKLR the Court held that;

“...the purpose of an application for stay of execution pending an appeal is to preserve the subject 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 the 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 damages.”

47. The Court is therefore called upon to balance both the successful party so as not to hinder him from his fruits of judgment and those of the Appellant whose Appeal may succeed and be rendered nugatory if stay of execution is not granted.

48. The purpose of stay of execution is to preserve the substratum of the case. In the case of Consolidated *Marine vs Nampijja & Another* Civil App No. 93 of 1989 (Nairobi) the court held that;

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the Appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.”

49. The Applicants are seeking stay of execution of the Order issued on 2nd of September 2021.

50. The Court will now determine whether the Applicants have satisfied the conditions upon which the orders can be granted.

51. On the first condition of proving substantial loss may result unless stay orders are granted, the Applicant should not only state that he is likely to suffer substantial loss, he must prove that he will suffer substantial loss if stay orders are not granted. In so finding, I am persuaded by the Court of Appeal decision in the case of *Charlse Wabome Gethi vs Angela Wairimu Gethi* (2008) eKLR where the court held that;

“...it is not enough for the Applicants to say that they live or reside on the suit land and they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”



52. What amount to substantial loss was expressed by the Court of Appeal in the case of *Mukuma v Abuoga* [1988] KLR 645 where the Court held that;
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
53. On the issue of substantial loss, the Applicants stated that on 2nd of September 2021 the Court issued orders directing the National Land Commission to compensate the Respondent with Kshs 3,270,435/- The Applicants argued that the Orders were issued at the interlocutory stage leaving the main suit pending. They stated that the Plaintiff/Respondent was in the process of executing the order. The Applicants argued that if the compensation is paid out to the Respondent, they would suffer substantial loss and that their Appeal would be rendered nugatory.
54. The Respondent on the other hand stated that the Applicants were not entitled to the orders sought as they had not presented a Memorandum of Appeal. The Respondent contends that he is entitled to enjoy the fruits of the successful litigation.
55. I have read the Orders issued by Hon. Justice C. Mbogo delivered on 2nd of September 2021 with regards to the application dated 26th of November 2020. The Order state as follows: -
- It is hereby ordered that;
- 1) An Order is granted directing the National Land Commission to pay to the Plaintiff/Applicant Kenya Shillings Three Million Two Hundred and Seventy Thousand Four Hundred and Thirty-Five (Kshs. 3,275,435/-) being the assessed compensation awarded to the Plaintiff/Applicant for the immovable assets and extensive developments on the properties known as Mavindini/Mavindini/1238 and Mavindini/Mavindi/1239 (the suit properties) for compulsory acquisition of the suit properties for development of Thwake Multipurpose Dam project pending the hearing and determination of the suit.
 - 2) That costs of this application be borne by the Respondents jointly and severally.
56. It is evident from the Order issued by Hon. Justice Mbogo, that the National Land Commission was directed to pay the Plaintiff the sum of Kshs. 3,270,435/- being the assessed compensation awarded to the Plaintiff/Applicant for the immovable assets and the extensive development on the properties known as Mavindini/Mavindini/1238 and Mavindini/Mavindini/1239 (the suit properties) for compulsory acquisition of the suit properties for the development of Thwake multipurpose dam pending the hearing and determination of the suit. The Applicants stated that the Respondent was in the process of executing the orders and that if the order of stay is not granted the Appeal would be rendered nugatory. The Respondent did not refute the fact that he was in the process of executing the decree. The Respondent did not in his affidavit state that he would be in a position to refund the money in the event that the Appeal is successful. I find that if the order of stay is not granted, the Appeal would be rendered nugatory. The Applicant has convinced this Court that he is likely to suffer substantial loss if the substratum of the Appeal is released or paid out to the Respondent.
57. In an application for stay of execution pending Appeal, an Applicant must also satisfy the Court that the application has been made without unreasonable delay. It is not in dispute that the Court on 2nd of September 2021 issued an Order directing the National Land Commission



to release Kshs 3,270,345/- to the Respondent herein. The Applicant averred that he filed a Notice of Appeal on 15th of September 2021. The present application was filed on 27th of October 2021. I find that the application was brought without undue delay.

58. On the last condition as to the provision of security for costs, Order 42 Rule 6 (2) (b) of the Civil Procedure Rules is couched in mandatory terms to the effect that the Applicant must furnish security for the performance of the order or decree. In the case of *Arun C Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR, the court held that;

“The purpose of the security under Order 42 is to guarantee due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor....civil process is quite different because in civil process the judgment is like a debt hence the Applicant become and are judgment debtors in relation to the Respondent. That is why any security given under order 42 rule 6 of the civil procedure rules acts as a security for the performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

59. The Applicant has not provided or expressed his willingness to provide security for the due performance of any decree or order that may be binding on him. The security required by the provisions of the rules is not necessarily the value of the subject matter. This being a monetary decree I find and hold that the sum of Kshs. 100,000/- is sufficient security.
60. In the end, I will in the interest of justice grant the Applicants a conditional stay of execution pending Appeal. The upshot of the foregoing is that the application dated 26th of October 2021 is allowed in the following terms: -
- i. The Stay of execution of the Order dated 2nd of September 2021 is granted provided that the Applicants lodges his appeal within 60 days from the date of this ruling.
 - ii. The Applicants shall deposit Kshs. 100,000/- as security for costs in Court within 30 days from the date of delivery of this ruling.
 - iii. That in default of any of the clauses (i) and (ii) above, the stay granted automatically lapses.
 - iv. Each party to bear its own costs.

.....

HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 29TH DAY OF JUNE, 2022.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi

Ms Kyania holding brief for B. Musau for the Applicant

Mrs. Kemunto for the 1st & 2nd Defendant.

