



Shah (Suing as the administrator ad litem of the Estate of Rajnikant Nathoobhai Shah) v Nthuli & 4 others (Environment & Land Case 1196 of 2004) [2022] KEELC 3814 (KLR) (28 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3814 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1196 OF 2004**

CA OCHIENG, J

JUNE 28, 2022

BETWEEN

ARVINLAL NATHOO SHAH PLAINTIFF

**SUING AS THE ADMINISTRATOR AD LITEM OF THE ESTATE OF
RAJNIKANT NATHOOBHAI SHAH**

AND

EDWARD NTHULI 1ST DEFENDANT

PAUL GITHAIGA NG'ANG'A 2ND DEFENDANT

RAMJI MANJI SHAMJI 3RD DEFENDANT

COMMISSIONER OF LANDS 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. What is before court for determination is the plaintiff's notice of motion application dated the January 20, 2021 brought pursuant to order 22 rule 22 & order 42 of the [Civil Procedure Rules](#) 2010 where he seeks the following orders:
 - a) Spent
 - b) Spent
 - c) That the honourable court be and is hereby pleased to issue an interim order of injunction and/or stay against execution and/or further proceedings in respect of the whole or any of the orders as reposed in the impugned ruling and order



dated and delivered on May 29, 2020 pending hearing and determination of the application herewith or further orders of this court.

- d) That the honourable court be and is hereby pleased to issue an interim order of injunction and/or stay against execution and/or further proceedings in respect of the whole or any of the orders as reposed in the impugned ruling and order dated and delivered on appeal against the impugned ruling and order dated and delivered on May 29, 2020.
 - e) That the honourable court be and is hereby pleased to issue any further directions or orders as may be appropriate to give effect to the orders sought herein; and
 - f) That the costs of this application be provided for.
2. The application is supported by the affidavit of Arvinlal Nathoo Shah who deposes that the deceased is the registered owner of all that property comprised in LR No 209/4537 (hereinafter the “suit property”). He avers that prior to his demise, the deceased received information that some individuals had trespassed on his property and upon enquiry, the impugned title was brought to his attention which title indicated the purported sale and transfer of the suit property by the 1st defendant to the 2nd defendant including the subsequent sale as well as transfer of the said property by the 2nd defendant as per the entries in the title. He avers that the deceased subsequently filed the suit herein in 2004 to assert his lawful ownership over the suit property. He explains that the lack of cross-examination of the 2nd and 3rd defendants during the hearing largely prejudiced the case as their evidence is critical. Further, that they later filed an application seeking to re-open the matter to allow for cross-examination of the said parties, which application was dismissed. He reiterates that being aggrieved by the ruling, they filed a notice of appeal. He insists the plaintiff has an arguable appeal and if the stay is not granted then the appeal would be rendered nugatory. Further, that in the absence of the stay orders, he stood to suffer irreparable damages. He reaffirms that the application herein is timeous and they are ready to comply with any orders of the court including payment of security for costs and it is only just as well as expedient that the application be allowed.
3. In response, the 2nd and 3rd defendants filed grounds of opposition dated the February 4, 2021 where they contend that it is trite law that stay of execution or injunction pending appeal cannot be granted when the intended appeal is against a negative order. Further, that the plaintiff has not raised a *prima facie*/arguable intended appeal since the court cannot and has no power or jurisdiction to force a party in a suit to testify. He reiterates that the intended appeal is frivolous. He avers that during the hearing of the suit, the plaintiff objected to the 2nd and 3rd defendant’s introduction of new evidence arguing that the same was calculated to delay the hearing and determination of the suit. Further, that the plaintiff cannot now turn around and seek to have the suit stayed. He states that the plaintiff is responsible for the unreasonable delay in determination of this suit, and its now more than 2 years since the hearing was concluded. Further, the delay will be highly prejudicial to them.

The application was canvassed by way of written submissions.

Analysis and Determination

4. Upon consideration of the notice of motion application dated the January 20, 2021 including the supporting affidavit, grounds of opposition and rivaling submissions, the only issue for determination is whether this court should grant a stay of execution of the ruling and order dated the May 29, 2020.



5. The Plaintiff submitted that this honourable court has jurisdiction to grant the prayers as sought. Further, that he has satisfied the criteria for grant of an injunction and or stay pending appeal. He argued that the court has jurisdiction and wide discretion to grant the prayers as sought. He relied on order 42 rule 6 of the *Civil Procedure Rules*, which outline the conditions that need to be satisfied in respect to stay of execution. The plaintiff submitted that the application had been brought without undue delay and is merited. To buttress his averments, he relied on the following decisions: *Seven Seas Technologies Limited v Eric Chege* [2014] eKLR; *National Bank of Kenya Limited & another v Geoffrey Wahome Muotia* [2016] eKLR; *Raphael M Nzomo & 7 others v Nairobi County Government & another* [2018] eKLR; *Governors Ballon Safaris v Skyship Company Ltd & another* [2015] eKLR; *Mbaabu Mbui & another v Langata Gardens Limited* [2011] eKLR (Civil Application 73 of 2011); *Erinford Properties Limited v Cheshire County Council* [1974] 2 All ER 448; *In Re the Matter of Tatu City Limited* [2011] eKLR; *Antoine Ndiaye v African Virtual University* [2015]; *Yusuf Karama Timimi V Karama Mohamed Timimi & another* [2018] eKLR; Bungoma HC Misc Application No 42 of 2011 *James Wangalwa & another v Agnes Naliaka Cheseto* and *Butt v Rent Restriction Tribunal* [1979] eKLR.

6. The 2nd and 3rd defendants in their submissions contend that stay of execution pending appeal cannot be granted when the intended appeal is against a negative order. Further, that a negative order is one that cannot be executed and thus incapable of being stayed. They argued that the plaintiff has ignored various orders and decisions of the court by adamantly declining to file final submissions upon conclusion of the hearing in November 2018. They explained that there are no further orders to be stayed in the suit as the hearing was already spent and the court was being called in aid, to take an action in vain. They insisted that this court does not have jurisdiction to grant injunctions against its own orders. Further, that it can only grant such orders when its exercising appellate jurisdiction. They averred that the plaintiff had not raised an arguable appeal as demonstrated in the draft memorandum of appeal. Further, that the intended appeal is not arguable as the same is pegged on frivolous grounds which are aimed at further delaying conclusion of this matter. They contended that the plaintiff filed the suit herein but there has not been a final judgment yet. Further, in case the judgment does not favour him, he still has the right to appeal. They reiterated that the negative order is incapable of execution to warrant the orders sought. Further, that the court in failing to grant stay of execution will not have rendered the intended appeal nugatory. To support their arguments, they relied on the following decisions: *Western College of Arts and Applied Sciences v Oranga & others* [1976] KLR 63; Raymond M Omboga v Austine Pyan Maranga quoted in *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 others* [2016] eKLR; *Clesoi Holdings Limited v Prime Bank Limited* [2021] eKLR; Reliance Bank Limited v Norlake Investments Limited [2002] 1 EA 227 quoted in *Permanent Secretary Ministry of Roads & another v Fleur Investments Limited* [2014] eKLR; *Hassan Guyo Wakalo v Straman EA Ltd* [2013] eKLR; *Catherine Njeri Maranga v Serah Chege & another* [2017] eKLR; *Chris Munga N Bichage v Richard Nyagaka Tongi & 2 others* eKLR; *Kenya Tea Growers Association & another v Kenya Plantation and Agricultural workers Union* [2012] eKLR; *Re Global Tours & Travel Ltd* HCWC No 43 of 2000 Ringera, J; and *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 others* [2013] eKLR quoted in *Julius Wabinya Kang'ethe & another v Mubia Muchiri Ng'ang'a* [2017] eKLR .

7. The plaintiff has sought for a stay of execution of the ruling and order dated May 29, 2020 pending the outcome of the appeal. He contends that the appeal would be rendered nugatory if the orders sought are not granted. The orders sought to be stayed emanated from a ruling where this court dismissed the plaintiff's application seeking to reopen this case when the matter was pending filing of submissions.



Order 42 rule 6(2) of the Civil Procedure Rules provides that:

“No order for stay of execution shall be made under subrule (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.”

8. In Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR the Court of Appeal (Kantai, JA) held as follows:

“An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with....”

9. Further, in Western College of Arts and Applied Sciences v Oranga & others (1976-80) 1 KLR, the Court of Appeal for East Africa held that:

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs..... In the instant case, the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this court, and in application for stay, it is so ordered.”

10. In this instance, the plaintiff seeks a stay of execution of the order made on the May 29, 2020. The said order emanated from a ruling in respect to the plaintiff’s two applications dated the December 19, 2018 and January 30, 2019 respectively. In the two applications, the plaintiff sought leave to amend the plaint to substitute the 4th defendant with National Land Commission. He further sought leave to reopen his case and cross-examine the 1st, 4th and 5th defendants and for the court to issue witness summons to the 1st and 2nd defendants. The court dismissed the two applications and directed the parties to file submissions in sixty (60) days to enable it render its judgment. From the impugned ruling, I note the order sought to be stayed is a negative one. The plaintiff has declined to file submissions to enable the court render its judgment and also not demonstrated what substantial loss he wants to suffer as a result of the said negative order.
11. Based on the facts as presented while relying on the legal provisions I have cited and associating myself with the quoted decisions, I opine that the plaintiff has not provided any sufficient cause to warrant the orders of stay of execution as well as injunction pending appeal. Further, there is no positive order to be stayed.
12. In the circumstance, I find the notice of motion application dated the January 20, 2021 unmerited and will dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 28TH DAY OF JUNE, 2022

CHRISTINE OCHIENG

JUDGE

