



Ndege & 2 others v Mbugua & 3 others (Environment and Land Appeal 3 & 28 of 2019 (Consolidated)) [2022] KEELC 3426 (KLR) (23 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3426 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 3 & 28 OF 2019 (CONSOLIDATED)
SO OKONG'O, J
JUNE 23, 2022**

BETWEEN

JOHNSTONE NDEGE 1ST APPELLANT

DAVID KENGERE ATEBE 2ND APPELLANT

AND

JOSEPH KANG'ETHE MBUGUA 1ST RESPONDENT

ABDALLA MOHAMED 2ND RESPONDENT

AS CONSOLIDATED WITH

ENVIRONMENT AND LAND APPEAL 28 OF 2019

BETWEEN

ABDALLA MOHAMED APPELLANT

AND

JOSEPH KANG'ETHE MBUGUA 1ST RESPONDENT

JOHNSTONE NDEGE 2ND RESPONDENT

DAVID KENGERE ATEBE 3RD RESPONDENT

(Being an application for stay of execution of the instant court's judgement delivered on April 29, 2021, pending the hearing and determination of the intended appeal to the Court of Appeal.)



RULING

1. On April 29, 2021, the court entered judgment in this appeal in favour of Abdalla Mohamed, Johnstone Ndege and David Kengere Atebe (hereinafter referred to only as “the appellants”) against Joseph Kang’ethe Mbugua (hereinafter referred to only as “the respondent”). In the judgment, the court reversed and set aside the decision that was made on January 18, 2019 by Hon GA Mmasi, SPM in CMCC No 13297 of 2006 (hereinafter referred to only as “the lower court”). In the lower court’s decision that was overturned in the said judgment, Hon Grace Mmasi, SPM had set aside the orders that had been made earlier by Hon TS Nchoe, RM on September 23, 2015 dismissing the respondent’s application for reinstatement of the lower court suit, reinstated the suit and on top of that, granted the respondent an injunction restraining the appellants from dealing with all that parcel of land known as LR No 6845/93 (hereinafter referred to only as “the suit property”).
2. In the judgment of this court, the court made the following orders;
 1. The consolidated appeals are allowed.
 2. The ruling and orders made by Hon Grace Mmasi, SPM on 1 January 8, 2019 in the lower court are set aside and in place thereof, there shall be an order dismissing the respondent’s notice of motion application dated November 23, 2018 that was filed in the lower court on November 26, 2018.
 3. For the avoidance of doubt, the respondent’s suit against the appellants in the lower court shall remain dismissed.
 4. The appellants in the two appeals shall have the costs of the appeals and of the lower court application aforesaid.”
3. What is now before me is the respondent’s application brought by way of notice of motion dated May 3, 2021 in which the respondent has sought an order for stay of execution of the said orders made by this court on April 29, 2021 pending the hearing and determination of the intended appeal against the same to the Court of Appeal. The application that was supported by the affidavit of the respondent sworn on May 3, 2021 was brought on the grounds that the respondent was dissatisfied with the judgment of the court and intended to appeal against the same to the Court of Appeal. The respondent averred that he had already filed a notice of appeal. The respondent averred that its title to the suit property would be revoked if the stay sought was not granted thereby rendering his appeal nugatory. The respondent contended that he stood to suffer substantial loss if the orders sought were not granted. The respondent contended that the appellants were anxious and desirous of dispossessing him of the suit property and were likely to take advantage of the orders sought to be stayed to achieve that aim.
4. The application was opposed by the appellants through a replying affidavit sworn by David Kengere Atebe sworn on May 24, 2021. The appellants contended that the respondent had not been in possession of the suit property since 2004 and as such stood to suffer no prejudice or loss if the orders sought were not granted. The appellants contended that the orders sought by the respondent would serve no purpose as there was nothing to stay.
5. The application was heard on November 10, 2021. The respondent relied entirely on his affidavit in support of the application and urged the court to allow the same. The respondent submitted that he had already filed an appeal in the Court of Appeal. In their submissions in reply, the appellants also



- relied on their affidavit in reply filed in opposition to the application and urged the court to dismiss the application as there was nothing to stay.
6. I have considered the application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the appellants in opposition to the application. Finally, I have considered the submissions by counsels from both sides.
 7. The respondent's application was brought under order 42 rule 6 of the Civil Procedure Rules. Order 42 rule 6(2) of the Civil Procedure Rules provides that:
 - (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
 - (b) such security as the court orders for the due performance of such decree or order as ultimately be binding on him has been given by the applicant.
 8. In Kenya Shell Limited v Karuga [1982 – 1988] I KAR 1018 the court stated that:

It is usually a good rule to see if order XLI 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 stay.”
 9. I am not satisfied that the respondent is likely to suffer substantial loss if the stay sought is not granted. I have set out the orders that were granted by this court in the judgment that was delivered on April 29, 2021. The court had allowed the appellants' appeal, set aside the orders that had been given by the lower court on January 18, 2019 and dismissed the application that the respondent had filed in the lower court. I am in agreement with the appellants that a part from the order on costs, the orders of April 29, 2021 were negative in nature and as such cannot be stayed as they are not capable of execution. The respondent was not directed to do or abstain from doing anything. Negative orders are not capable of being stayed. In Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah [2008] eKLR, the Court of Appeal stated as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on December 18, 2006. The order of December 18, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus a negative order which is incapable of execution save in respect of costs only.”
 10. The same reasoning was applied by Makhandia, J (as he then was) in Raymond M Omboga v Austine Pyan Maranga Kisii HCCA No 15 of 2010, where he stated as follows:

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order.”
 11. On costs, the same are yet to be assessed. The respondent has not contended that he is unable to pay costs or that in case he makes payment, he is not likely to recover the same from the appellants. In the circumstances, there is no evidence that the respondent would suffer substantial loss unless the stay sought is granted. Having made a finding that no substantial loss would be suffered by the respondent



unless the stay sought is granted, it is not necessary for me to consider the other conditions for granting an order of stay of execution.

12. The upshot of the foregoing is that the notice of motion dated May 3, 2021 has no merit. The application is dismissed with costs to the appellants.

DELIVERED AND DATED AT NAIROBI THIS 23RD DAY OF JUNE 2022

S OKONG'O

JUDGE

Judgement delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the appellants in ELCA/3/2019.

N/A for the appellant in ELCA/28/2019.

Mr Ndaiga for the respondent.

Ms C Nyokabi - court assistant.

