



**Pandya & another v Baya & others (Environment & Land Case
404 of 2017) [2022] KEELC 2265 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2265 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 404 OF 2017**

M SILA, J

JUNE 23, 2022

**FORMERLY MOMBASA HCCC NO. 74 OF 2006 AND MOMBASA HCCC NO. 170 OF
2008 O.S**

BETWEEN

LALICHANDRA DURGASHANKER PANDYA 1ST PLAINTIFF

PRAVINA RAMESHANDRA PANDYA 2ND PLAINTIFF

AND

E.K. BAYA DEFENDANT

RULING

(Plaintiffs filing suit for eviction of defendants from suit land; defendants filing a counter suit for title to the land by way of adverse possession; judgment delivered where the suit for adverse possession was dismissed and defendants given 90 days to vacate the land; defendants filing appeal and now seeking stay pending appeal; plaintiffs filing a counter-application for eviction; stay pending appeal issued on condition that status quo is maintained and the taxed costs are deposited in a joint interest earning account within 90 days of taxation)

1. Before me are two applications. The first is that dated 28 June 2021 which seeks stay of execution of the judgment pending appeal. The second application is that dated 18 October 2021 filed by the decree holder. He seeks an order of eviction of the defendants from the land parcel LR No. 258/I/MN (the suit land) in execution of the judgment.
2. To put matters into context, the judgment in issue relates to two suits. The first suit serialised as Mombasa HCCC No. 74 of 2006, was filed by the registered owners of the suit land, vide which they sought orders of declaration of ownership over the land and for injunction to restrain the defendants from the suit land. The defendants on the other hand filed the case serialized as Mombasa HCCC No. 170 of 2008 (OS) wherein they claimed to have acquired title to the suit land by way of adverse possession. The two suits were consolidated and I delivered judgment on 9 June 2021 in favour of the



registered land owner and dismissed the suit for adverse possession (for ease of reference, I will use the terms plaintiffs to refer to the registered owners of the land, and the term defendants to refer to the claimants in the case for adverse possession). In the judgment, I ordered the defendants to vacate the land within 90 days of the judgment and issued an order that in default, the plaintiff was at liberty to apply for their eviction. It will be noted that the plaintiff's application now seeks eviction of the defendants whereas the defendants seek a stay of the decree pending appeal to the Court of Appeal. I directed that the two applications be heard together. It follows that if I allow the application for stay pending appeal, the other application will fall by the wayside, and if I do not allow it, then I will have no reason not to grant the order of eviction. I will therefore first interrogate whether the defendants deserve an order for stay pending appeal.

3. In the application for stay pending appeal, the defendants aver that they have filed a Notice of Appeal and that they stand to be evicted which will render useless their appeal. The plaintiffs have opposed the application vide the Replying Affidavit of Joseph Karanja Kanyi, who is counsel on record for the plaintiffs. The affidavit is sworn on 9 August 2021. In it, he has deposed inter alia that the decree is yet to issue; that the filing of an appeal is itself no reason to grant stay; that the applicant is guilty of material non-disclosure of the effect and purpose of certificates of delay; that the time for the judgment is yet to crystallise; that the applicant has failed to satisfy the requirements for stay, chief being provision of security and diligence.
4. I have taken note of the above alongside the submissions made by counsel for both parties.
5. Applications for stay pending appeal are addressed in Order 42 Rule 6 (2) of the [Civil Procedure Rules, 2010](#). It is drawn as follows:-

- (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 may ultimately be binding on him has been given by the applicant.

From the above, it will be seen that an applicant needs to satisfy three criteria, that is :-

- (i) That the application has been filed without unreasonable delay.
 - (ii) That the applicant stands to suffer substantial loss if the stay order is not made.
 - (iii) That the applicant is ready to abide by such order on security that the court may issue.
6. On the first issue, that of delay, judgment was delivered on 9 June 2021. The application for stay was filed on 30 June 2021. It cannot in the circumstances be said that the application was filed late especially considering that the defendants had been given 90 days from the date of the judgment to vacate the suit property. There was attempt to assert that the application was filed prematurely but there is no basis for this. The defendants did not have to wait until a formal decree is issued or until the lapse of 90 days before coming to court to seek stay pending appeal. In fact, if they had come after the 90 days, they may have been found to have been guilty of inordinate delay. The application was filed timeously and I will entertain it.



7. The other issue is substantial loss. The defendants occupy the suit land. I am persuaded that they stand to suffer substantial loss if they are evicted and they subsequently succeed on appeal. Counsel for the plaintiffs tried to argue that what the defendants suffered was a dismissal order which is incapable of being stayed. That is not the position. Within the judgment there was an order in favour of the plaintiffs for the eviction of the defendants which order is capable of being executed. It is that order which the defendants seek to stay, not the order of dismissal of their suit for adverse possession. I therefore find that the defendants have demonstrated that they will suffer substantial loss if the decree is executed.
8. The final issue is security. This was not a money decree but a decree for possession of land though there may be a monetary element with regard to costs. On the possession of the land, I think what is important is to have the land maintained in the status that it is until the completion of the appeal. Thus, I issue an order that the current status quo prevailing be maintained until conclusion of the appeal or any contrary orders of court. The defendants are barred from undertaking any new developments or introducing other persons into the suit land. They are also barred from selling, leasing, or in any other way dealing with the land. If they do so, then they will be altering the status quo, and this order of stay pending appeal will lapse. In addition, I order the defendants to deposit any taxed costs within 90 days of taxation. If they do not do so, then the order of stay pending appeal will lapse and the plaintiffs will be at liberty to execute the decree.
9. The only issue left is costs. If the defendants abide by the above conditions, then costs of the two applications will be in the appeal. If they do not, then they will bear the costs of both applications.
10. Orders accordingly.

DATED AND DELIVERED THIS 23 DAY OF JUNE 2022

JUSTICE MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT AT MOMBASA

