



**Board of Trustees Kenya Good News Outreach Churches v Masinde Muliro Primary School  
(Environment & Land Case 160 of 2016) [2022] KEELC 2983 (KLR) (21 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2983 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 160 OF 2016  
FO NYAGAKA, J  
JUNE 21, 2022**

**BETWEEN**

**BOARD OF TRUSTEES KENYA GOOD NEWS OUTREACH  
CHURCHES ..... PLAINTIFF**

**AND**

**MASINDE MULIRO PRIMARY SCHOOL ..... DEFENDANT**

**RULING**

1. In the present Application, dated 14/01/2022 and filed on 18/01/2022, the Judgement-Debtor sought the following prayers:
  1. ...spent.
  2. ...spent.
  3. That there be a stay of execution pending hearing and determination of this application and pending the hearing and determination of the appeal to the court of Appeal.
  4. ...spent.
  5. That costs be provided for.
2. The Application was supported by the grounds on the face of it and by the Affidavit of, one Henry Barasa, one of the trustees of the Applicant. From the facts espoused in the Application, judgement was entered against the Applicant on 10/11/2021. The Applicant contended that as a consequence of the judgment, it is likely to be evicted from its place of worship. In this regard, the Applicant deposed that the Respondent had commenced the takeover process by fencing the plot. It annexed photographs of the fence and marked them as HB2.



3. The Applicant stated further that if stay was not granted, the Applicant stood to suffer substantial loss and the appeal would be rendered nugatory and an academic exercise. It annexed a Notice of Appeal filed on 16/11/2021 and a letter requesting for proceedings and marked them as HB1 (a) & (b). It contended further that the Appeal had high chances of success. The Applicant committed to abiding by any conditions set forth by this Court for grant of stay orders. The Applicant stated in this regard that it was willing to deposit in Court title number Kiminini/Kinyoro Block 5/Matisi/275 as security as well as abide by other conditions imposed by the Court. Finally, the Applicant deposed that it was in the interest of justice that the Application be allowed as prayed.
4. The Applicant swore a Supplementary Affidavit on 14/01/2022 through one Kennedy Wanakacha Simiyu. It was filed on 18/01/2022. In it, he deposed that the deponent was the legal proprietor of all that parcel of land known as Kiminini/Kinyoro Block 5/Matisi/275 measuring 0.3642 Ha. He annexed and marked as KWS1, a copy of the Title Deed. He stated that the property stood valued at Kshs. 5,000,000.00. He annexed the Valuation Report dated 07/01/2022 and marked it as KWS2. He added that the property was free from encumbrances as evinced from the Certificate of Official Search which he annexed and marked as KWS3. He expressed willingness to deposit the title as security on behalf of the Applicant until the appeal was heard and determined.
5. The Respondent filed Grounds of Opposition dated 01/03/2022 on 02/03/2022. It stated that the Application failed to meet the threshold for the grant of the orders sought. Further, that the Applicant was intent on protracting the matter with a view to denying the Respondent the enjoyment of the fruits of a successful litigation. It stated that the public interest in using the suit land for educational purposes outweighed by far the Applicant's personal interest. It argued that the structure erected on the suit premises could be compensated by the Respondent if their Appeal was successful. Their argument was that the security offered had no direct connection to the Applicant. Again, that the Plaintiff remained an amorphous and unregistered person in law hence realizing the security offered in the event of loss would have attendant costs and inconvenience. Lastly, they stated the Applicant lacked proprietary interest in the land since their letter of allotment was cancelled.

### **Submissions**

6. The Application was canvassed by way of written submissions. The Applicant's submissions dated 25/02/2022 were filed on 01/03/2022. It submitted that it was only fair and just for the Application to be granted to enable the Applicant seek audience at the Court of Appeal. It stated that even if stay of execution was granted, the Respondent stood to suffer no prejudice. Conversely, the Applicant submitted, it would suffer prejudice as it would have no place to worship and would lose its congregation. It reiterated that it was willing to abide by the conditions for stay granted by this Court. Additionally, it furnished a title to a parcel of land, valued at Kshs. 5,000,000.00. According to the Applicant, the security was sufficient. The Applicant also submitted that the Application was filed within two (2) months after the delivery of judgment hence it was filed bereft of inordinate delay. It submitted that it fulfilled all the conditions precedent for stay of execution. It urged this court to allow the Application as prayed.
7. In its submissions dated 08/03/2022 and filed on the same date, the Respondent reminded this Court that the nature of the present Application was that the Court had wide discretionary powers in balancing the competing interests of the Applicant/Judgment-Debtor and the Respondent/Decree-Holder. It cited that an Applicant must meet the three (3) conditional requirements set out in Order 42 Rule 6 of the *Civil Procedure Rules*, which it explained as below.



8. Firstly, on whether the Application was filed timeously, it was submitted that the Applicant took seventy (70) days to lodge the Application. In its view, that was delay that remained unreasonable and inexcusable. It was, however, submitted that since execution proceedings had not been set in motion, the Application ought not to be defeated due to the Applicant's delay. Secondly, on whether the Applicant stood to suffer substantial loss, the Respondent submitted that the Applicant had not demonstrated the quantitative and/or substantive loss it would suffer if stay was not granted. It relied on the case of *Joseph Tireito -vs- Jacob Kisigat Arap Lagat & Another* [2014] eKLR for this presupposition. It added that since the Applicant remained inexistent and amorphous, it was incapable of benefiting from orders of this Court. It added that the suit land remained intended for educational purposes that militated against the prayers sought. It advanced further the need for the land, following the institutionalization of the Competency Based Curriculum program. Its proposition was that it was intent on expanding its institution to accommodate such growing needs.
9. It submitted that the Applicant erected a mud-walled mabati structure siting on  $\frac{1}{8}$  acre of the suit land yet the entire land measured over 1 acre. It submitted further that the Respondent deserved to utilize the suit land during the pendency of the appeal. The Respondent further questioned the credibility of the Applicant's decisions to appoint the present Counsel on record as well as have the deponents swear the Affidavits since no resolutions were placed on the Court record. It summed it that the deponent in the Supporting Affidavit at trial, testified that he was not a registered trustee of the Applicant and was therefore a stranger to the present Application.
10. Additionally, the Respondent pointed out that the parcel of land whose title was intended to be deposited as security did not belong to the Applicant and there was no nexus created between the owner and the Applicant, for the benefit of this Court's understanding on sufficiency of the intended security. Still on substantial loss, the Respondent submitted that the suit land was safer in the custody of the Respondent rather than the Applicant and that the Respondent was financially capable of indemnifying the Applicant's risk that may be accrued in the process.
11. Lastly, on whether the Applicant was willing to furnish security for due performance of the decree, the Respondent submitted that the security proffered by the Applicant was not sufficient. However, the Respondent intimated that it was willing to grant the Applicant use of the portion of the suit land where it had erected a structure, for the Applicant to be a licensee, upon request, pending the hearing and determination of the appeal. For these reasons, it urged this Court to dismiss the present Application with costs.
12. In brief rejoinder, the Applicant filed its supplementary submissions dated 27/05/2022 on the same day. It submitted that the period of seventy (70) days as computed by the Respondent was not inordinate. Its view was that time stopped running from 21/12/2021 to 13/01/2022 so that in actual sense, the Application was filed within forty-five (45) days after judgment. It then submitted that the reason was that during the time, it also took into account the fact that the Applicant sought the services of another Advocate. It then reaffirmed the contents in its Application and initial submissions.

### **Analysis and Disposition**

13. Before determining the Application on its merits, I will address myself to two issues that were raised by the Respondent. The first one was that the Applicant was an amorphous non-existent person. On this, I find no legal basis supporting the Respondent's grounds. In the judgement delivered on 10/11/2021, this Court did not make any finding to the effect that the Applicant is a non-existent person. The existence or otherwise of the Applicant was not an issue in the judgment. What the Court found was



that the suit land appeared to have been acquired by the Applicant bore it come into existence, which was practically impossible. I thus dismiss this ground.

14. Secondly, the Respondent, in my understanding, purported to hold that the deponent lacked authority to swear Affidavit on behalf of the Applicant. This issue was raised in the Respondent's submissions and discussed therein extensively. This Court will continue to remind parties to matters that submissions are not pleadings hence do not introduce issues for determination by a court. I now turn to the real issues in the instant Application.
15. The Application sought to stay execution pending the hearing and determination of an Appeal preferred to the Court of Appeal. The Applicant invoked the provisions of Order 42, Rule 6 (1), (2) and (6) of the *Civil Procedure Rules*, 2010. Under the provisions, 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.
16. The purpose of stay pending appeal was succinctly explained in the case of *RWW vs. EKW* [2019] eKLR, where the Court described its purpose in the following words:

“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.”

17. The power to grant stay is discretionary. The court is mandated to evaluate every application on a case by case basis, and those of the instance case this the Court will now proceed to consider. I now proceed to determine the Application as follows:

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

18. In ascertaining whether an Application has been made without unreasonable delay, Courts are reminded to look at the circumstances surrounding in making its own determination. A number of factors will militate against longer periods of time taken by parties. For instance, the time taken for preparation of proceedings in case of appeals to the Court of Appeal, the lack of knowledge of the delivery of the judgment or ruling, time taken to obtain instructions, among others. From the facts herein, judgement was delivered on 10/11/2021. The Applicant thereafter filed a Notice of Appeal on 16/11/2021, which was six days afterward. The Application was filed on 18/01/2022 by the Applicant's new firm of Advocates. I also note that no execution proceedings have been commenced. Given that time to do certain acts under the Rules stopped running, I find that the Application was filed within reasonable time.



## ii. Whether the Applicant will suffer substantial loss

19. On substantial loss, the Applicant submitted that it will suffer substantial loss as the Respondent will take over the plot where the Applicant's had erected a structure for a place of worship for their congregants. It was further submitted that the Applicant will lose its members.
20. The Respondent dismissed the Applicant's submissions. It stated that no sufficient material had been placed before Court to conclude that the Applicant would suffer substantial loss. That since it had not massively invested on the suit land, no substantial loss would be occasioned. It was added that the structure erected therein is simply a mud-walled mabati structure sitting on a  $\frac{1}{8}$  of an acre that can be shifted. Furthermore, the Respondent had plans set in motion to utilize the entire suit land for educational advancements.
21. *Agnes Naliaka Cheseto* [2012] eKLR as:

“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.”
22. My understanding of substantial loss is that it is not necessarily attributed to financial strength. The substantial loss one must demonstrate is that if the stay orders are not granted, the appeal will be rendered nugatory. The Applicant is apprehensive that it will be evicted from the suit premises during the pendency of the appeal. Eviction of itself will not constitute substantial loss since it is as a result of a lawful process. However, the likelihood of loss of its congregants who are the cornerstone of their institution is a possible substantial loss the Applicant will suffer if there is no alternative place of worship. But that has not been demonstrated by way of evidence. Be that as it may, since the Respondent demonstrated willingness to licence the Applicants to use the  $\frac{1}{8}$  acre portion it had erected a structure on and occupies, this Court takes the view that the Respondents must have considered the fact of lack of alternative premises for the Applicant.
23. This warm consideration above being made by the secular for the sacred reminds me of a Documentary I have watched before of unlikely and unexpected adoptions by animals in the wild. Looking at the history of the suit giving rise to this application, I would say that at times those considered to be secular act in a holier manner than those who profess to be holy. This, the Respondent herein is leading by extending an olive branch to the one who should have relooked at the whole issue and left to the moths their treasure so that it concentrates on laying its elsewhere where moths and rust will not reach or destroy. Anyway, for the above reason, the Court agrees with the Applicant, although from the unlikely conduct of the Respondent, that substantial loss is likely to result if the Application is not granted.

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

24. The Applicant has expressed willingness to abide by the conditions set by this Court. The Applicant submitted that it was willing to deposit security. It attached title number Kiminini/Kinyoro BLK3/Matisi/275 registered in the name of Kennedy Wanakacha Simiyu for this supposition.



25. Under this head, a Court must be satisfied that the security to be furnished is sufficient. Courts have held time and again security does not necessarily have to be in the form of money deposit. I too hold as much. Thus, in deciding security, each case must be looked at in its own circumstances.
26. In the present suit, I find that the Applicant furnished security but in the name of one Kennedy Wanakacha Simiyu. As much as it is alleged that the said deponent was a trustee of the Applicant, I find no direct nexus between him and the Applicant. He is not a life trustee of the Applicant. Trustees can be removed any time. That may necessitate the Court being moved to change the security and thus expose the Respondent's position yet the Appeal shall have been filed. There ought to have been a clear deposition that the security would be at the disposal of the Court irrespective of a possible change of trusteeship of the said deponent. I thus find that since the title is not in the name of the Applicant, the security furnished is not sufficient. I, however, note that the Applicant is willing to abide by any conditions set by this court. Consequently, I see fit to issue security in monetary form in the stead of the title that has been offered.
27. The upshot of this ruling is that I allow the Application dated 14/01/2022 on condition that the Applicant shall deposit the sum of Kenya Shillings Six Hundred Thousand Shillings Only (Kshs. 600,000.00) to court as security within thirty (30) days from the date of this ruling failing which the orders shall be discharged without any further reference to this court.
28. In the alternative, the Applicant is given a temporary stay of execution for thirty (30) days to negotiate with the Respondent to license the Applicant to use the  $\frac{1}{8}$  acre portion of the suit land where it has erected the structure pending the hearing and determination of the intended Appeal.
29. Lastly, since the proceedings in this file are already typed and ready for further use, the Applicants are given thirty (30) days only from the date of this Ruling to prepare, file and serve the Record of Appeal, and take steps to prosecute the intended Appeal, in default of which the stay of execution granted herein shall lapse even if the Applicants shall have fulfilled conditions in paragraph 26 and 27 above. The days are inclusive of those when the Court shall be on vacation.

Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 21ST DAY OF JUNE, 2022.**

**DR. IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE.**

