



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Ochieng (Suing on his Own behalf and on behalf of:) & 112 others v Kabarak Farm Ltd & 23 others; County Government of Trans Nzoia & 9 others (Interested Party) (Environment & Land Petition 3 of 2017) [2022] KEELC 2975 (KLR) (21 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2975 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND PETITION 3 OF 2017
FO NYAGAKA, J
JUNE 21, 2022
IN THE MATTER OF INFRINGEMENT AND OR VIOLATION
OF THE PETITIONERS CONSTITUTIONAL RIGHTS
CONTRARY TO ARTICLES 19(2), 20(5), 21(1), 2, 2,
22(1), 23(1,2-A,D&E), 26, 27, 27(6), 28, 29, 35, 40,
40(1),(3)(A-B), (4), (6), 431(C & D),(3), 47,47(1-2),
60(1A), 62(4), 65(4), 66(1), 67, 68(C-IV, V, VII), 73(1),
(A),III &IV, 95 AND 165 OF THE NEW CONSTITUTION OF
KENYA, 2010 AND IN THE MATTER OF SECTION 3, 9 & 12 THE
GOVERNMENT LAND ACT, CAP 280, LAWS OF KENYA
AND IN THE MATTER OF SECTION 65, 66,
67,68,69,70,167,177 & PART X11 OF AGRICULTURAL
ACT, CAP 318 LAWS OF KENYA

BETWEEN

CHARLES OPONDO OCHIENG (SUING ON THEIR OWN BEHALF AND ON BEHALF OF:) 1ST PETITIONER
NICK MUSUNGU (SUING ON HIS OWN BEHALF AND ON BEHALF OF:) 2ND PETITIONER
BONIFACE MAKOKHA TELEWA (SUING ON HIS OWN BEHALF AND ON BEHALF OF:) 3RD PETITIONER
JACOB PEPELA 4TH PETITIONER
JOHN WEKESA TELEWA 5TH PETITIONER



STANLEY SHAKILO	6 TH PETITIONER
JAMIN WEKESA	7 TH PETITIONER
GODFREY WANJALA	8 TH PETITIONER
SIMON ENGOLAN	9 TH PETITIONER
JOSEPH OCHIENG	10 TH PETITIONER
ALEX MALAKWEN	11 TH PETITIONER
WYCLIFF WAFULA	12 TH PETITIONER
STEPHEN MABOKO	13 TH PETITIONER
FRED MUTORO	14 TH PETITIONER
WILSON KIMONGO	15 TH PETITIONER
SIMON MATETE	16 TH PETITIONER
WALTER LUI	17 TH PETITIONER
FRANCIS WEKESA	18 TH PETITIONER
PATRICK WANGIRA	19 TH PETITIONER
DISMASS WAFULA	20 TH PETITIONER
MARGARET NASAMBU	21 ST PETITIONER
RONALD BARASA	22 ND PETITIONER
NICKSON WEKESA	23 RD PETITIONER
AGNES KARORI	24 TH PETITIONER
LAZARO WEKESA MARAN	25 TH PETITIONER
JONES NASAMBU	26 TH PETITIONER
JOEL MUNG'ARE	27 TH PETITIONER
GRACE N. LUTURIAN	28 TH PETITIONER
LABAN WEFILA	29 TH PETITIONER
LINET KWAMBOKA	30 TH PETITIONER
STANLEY SIATAKO	31 ST PETITIONER
RUTH CHEPCHUMBA	32 ND PETITIONER
WILLIAM N. MARUTI	33 RD PETITIONER
PETER WANYONYI	34 TH PETITIONER
GRACE CHEMAYEK KUTWA	35 TH PETITIONER
RHODAH N. MNUPI	36 TH PETITIONER
MATAYO MWALATI	37 TH PETITIONER



JACOB S. MSIEBEBE	38 TH PETITIONER
JANE N. SUDI	39 TH PETITIONER
FLORENCE KERUBO OMOYO	40 TH PETITIONER
JUMA NYONGESA	41 ST PETITIONER
RICHARD WEKESA WANDERA	42 ND PETITIONER
EUNICE BARASA	43 RD PETITIONER
BENSON NAMUNYU	44 TH PETITIONER
RONALD NALULWE	45 TH PETITIONER
FRED W. MAKHAPILA	46 TH PETITIONER
JOHN SIMIYU	47 TH PETITIONER
ISAAC MKENDA	48 TH PETITIONER
BENSON M. WASILWA	49 TH PETITIONER
CYLUS L. LUCHACHA	50 TH PETITIONER
KENNEDY W. JUMA	51 ST PETITIONER
NANCY MUNYASIA	52 ND PETITIONER
JAMES WANJALA	53 RD PETITIONER
RICHARD KIMENGICH	54 TH PETITIONER
KATHLEEN K. M	55 TH PETITIONER
PETER KITUYI MFUTI	56 TH PETITIONER
W. WANJALA	57 TH PETITIONER
EVERLYNE LUTURIAN	58 TH PETITIONER
EDWIN NAMSHULE	59 TH PETITIONER
JANIFER SIMATWA	60 TH PETITIONER
RAFAEL SIMATWA	61 ST PETITIONER
PATRICK MADEGWA MATASO	62 ND PETITIONER
METRINE LUSIKE	63 RD PETITIONER
MARY N. NYONGESA	64 TH PETITIONER
AGNES MLONGO	65 TH PETITIONER
WYCLIFFE MPALIO	66 TH PETITIONER
ISAAC WASAI	67 TH PETITIONER
TITUS KITUYI	68 TH PETITIONER
TERESA KERUBO	69 TH PETITIONER



WEKESA B. MASINDE	70 TH PETITIONER
JOYCE KEMUMA	71 ST PETITIONER
TOM JOSEPH OMOYO	72 ND PETITIONER
WILKISTER MORAA	73 RD PETITIONER
LOICE NYAMBURA	74 TH PETITIONER
WILFRED SHIRENGO	75 TH PETITIONER
JAMES NGUNGI	76 TH PETITIONER
MARY NAFUNA	77 TH PETITIONER
MELABI WAMBIA	78 TH PETITIONER
DORIS BWARI	79 TH PETITIONER
ESTHER KINUTHIA	80 TH PETITIONER
EMELDAH K. OKOTOYI	81 ST PETITIONER
EMILLY NEKESA	82 ND PETITIONER
JOSPHAT WAFULA	83 RD PETITIONER
JOSEPH MASIKA	84 TH PETITIONER
ANDREW MAJIMBO	85 TH PETITIONER
ROBERT WANJALA	86 TH PETITIONER
CALEB WANJALA	87 TH PETITIONER
ROSELINE ONZERE	88 TH PETITIONER
GRACE KANANU	89 TH PETITIONER
MOURICE NYONGESA	90 TH PETITIONER
JOSEPH MHEMBERI	91 ST PETITIONER
DAVID NYUKURI	92 ND PETITIONER
MARK RAJA OKWARA	93 RD PETITIONER
JOHN OJIMU	94 TH PETITIONER
HUMPHREY W. BARASA	95 TH PETITIONER
CLEOPHAS B. MAYENDE	96 TH PETITIONER
CHILSON MLUPI	97 TH PETITIONER
NELSON SITOKI	98 TH PETITIONER
ALICE N. WEKESA	99 TH PETITIONER
FRANCIS SIATI	100 TH PETITIONER
REUBEN KACHUI	101 ST PETITIONER



KENNEDY WAFULA	102 ND PETITIONER
TOM SIMIYU	103 RD PETITIONER
WAMALWA SANYANDA	104 TH PETITIONER
JOHN MAKOKHA TALEWA	105 TH PETITIONER
ERNEST POPOI	106 TH PETITIONER
ROSELYNE KHAKASA	107 TH PETITIONER
YOHANA WAFULA	108 TH PETITIONER
JOSEPHAT MBITO	109 TH PETITIONER
HELLEN WAFULA	110 TH PETITIONER
PHILISTER N. NYONGESA	111 TH PETITIONER
BEN MLANGO	112 TH PETITIONER
IRINE OMUNAKI VIHIMA	113 TH PETITIONER

AND

KABARAK FARM LTD	1 ST RESPONDENT
ABMA INVESTMENT LTD	2 ND RESPONDENT
KIPSINENDE FARM LTD	3 RD RESPONDENT
LINSHIRE LTD	4 TH RESPONDENT
SIMON MBUGUA THUNGU	5 TH RESPONDENT
KENNETH HAMISH WOOLER KEITH (BEING SUED AS EXECUTORS OF THE ESTATE OF NICHOLAS BIWOTT)	6 TH RESPONDENT
DESTERIO ANDADI OYATSI (BEING SUED AS EXECUTORS OF THE ESTATE OF NICHOLAS BIWOTT)	7 TH RESPONDENT
ELIZABETH KLEM (BEING SUED AS EXECUTORS OF THE ESTATE OF NICHOLAS BIWOTT)	8 TH RESPONDENT
SETTLEMENT FUND TRUSTEE	9 TH RESPONDENT
COMMISSIONER FOR LANDS	10 TH RESPONDENT
LAND REGISTRAR, TRANS-NZOIA COUNTY	11 TH RESPONDENT
DIRECTOR, LAND ADJUDICATION & SETTLEMENT TRANS-NZOIA COUNTY	12 TH RESPONDENT
COUNTY LANDS SURVEYOR TRANS NZOIA COUNTY .	13 TH RESPONDENT
CABINET SECRETARY FOR LANDS, HOUSING & URBAN DEVELOPMENT	14 TH RESPONDENT
NATIONAL LAND COMMISSION	15 TH RESPONDENT
INSPECTOR GENERAL OF POLICE	16 TH RESPONDENT



DIRECTOR OF PUBLIC PROSECUTIONS 17TH RESPONDENT
 NATIONAL ASSEMBLY OF KENYA 18TH RESPONDENT
 ATTORNEY GENERAL 19TH RESPONDENT
 CABINET SECRETARY, MINISTRY OF INTERIOR & CO-
 ORDINATION 20TH RESPONDENT
 DOMINIC K. SINGOEI (AS A REPRESENTATIVE OF 205 MEMBERS OF
 KIMNON INVESTMENT CO) 21ST RESPONDENT
 ALBERT K. TOO (AS A REPRESENTATIVE OF 205 MEMBERS OF KIMNON
 INVESTMENT CO) 22ND RESPONDENT
 WALTER K. KEMBOI (AS A REPRESENTATIVE OF 205 MEMBERS OF
 KIMNON INVESTMENT CO) 23RD RESPONDENT
 KAPSITWET RIVER ESTATE LTD 24TH RESPONDENT

AND

COUNTY GOVERNMENT OF TRANS NZOIA INTERESTED PARTY
 AREA MP, KWANZA CONSTITUENCY INTERESTED PARTY
 KENYA HUMAN RIGHTS COMMISSION INTERESTED PARTY
 ELDORET EXPRESS LTD INTERESTED PARTY
 JOHN LONYANGAPUO INTERESTED PARTY
 HENRY KIPLAGAT KIPTIONY INTERESTED PARTY
 JOHN PORIOT (ON OWN BEHALF AND AS THE REPRESENTATIVE
 OF 80 OTHERS NAMED IN THE APPLICATION DATED
 26/8/2017) INTERESTED PARTY
 MOSES CHELELGO (ON OWN BEHALF AND AS THE REPRESENTATIVE
 OF 296 OTHERS NAMED IN THE APPLICATION DATED
 24/6/2019) INTERESTED PARTY
 JOB SANG (ON OWN BEHALF AND AS THE REPRESENTATIVE
 OF 296 OTHERS NAMED IN THE APPLICATION DATED
 24/6/2019) INTERESTED PARTY
 DANIEL KIBUNDO (ON OWN BEHALF AND AS THE REPRESENTATIVE
 OF 296 OTHERS NAMED IN THE APPLICATION DATED
 24/6/2019) INTERESTED PARTY

RULING

On stay of execution of Decree

1. This is a Ruling on an application filed by the 6th Respondent/Applicant on 18/05/2021. It was dated 17/05/2021. It was brought under Order 42 Rule 6 of the *Civil Procedure Rules*, 2010, Rule 32 of



the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and all other enabling provisions of law. The application sought the following orders:

- (1) ...spent
 - (2) ...spent
 - (3) There be a stay of execution of the Judgment and Decree of the Honourable Court rendered on 03/03/2021 pending the hearing and determination of the 6th Respondent/Applicant's Appeal against the judgment and decree.
 - (4) This Court be pleased to give any further or other orders as it may deem just and expedient.
 - (5) Costs incidental to this application abide with the results of 6th Respondent/Applicant's Appeal.
2. The Application was based on eleven (11) grounds and supported by an affidavit sworn by Kenneth Hamisi Wooker Keith, learned counsel but who was one of the executors of the estate of the 6th Respondent/ Applicant, on 17/05/2021 and filed on 18/05/2021 together with the Application.
 3. The Applicant is the 6th Respondent in the Petition. He stated, in the grounds in support of the Application, that he was aggrieved by the judgment and decree of the Court rendered on 3/05/2021; he filed a Notice of Appeal against the said judgement and decree; he believed that there were reasonable grounds of appeal and that without a stay of execution of the appeal the same would be rendered nugatory and academic exercise; that there was a likelihood of substantial loss resulting since he would be compelled to pay Kshs. 1,500,000/= for unlawful arrest, Kshs. 1,500,000/= for malicious prosecution and Kshs. 3,000,000/= for unlawful eviction yet the Petitioners were persons of limited means hence unable to repay the sums if the appeal was successful. He then posited that he was willing to abide by any conditions the Honourable Court would find just and equitable to issue as a condition for stay of execution, including depositing security for due performance of the decree if the appeal was not successful; and the Petitioner would suffer no prejudice if the application, which he stated was brought timeously, was granted.
 4. The Deponent of the Supporting Affidavit reiterated the contents of the grounds in support of the Application. However, he attached to the Affidavit the copy of the impugned judgment of this Court and gave a detailed summary of the find reliefs in it. He then stated that the execution of the sums in the judgment would occasion the 6th Respondent irreparable harm in the event the Appeal succeeded. He stated that the Applicant was willing to give security by way of a bank guarantee or in the alternative deposit the sum in question in Court if directed to do so. He prayed for the application to be allowed.
 5. The Application was not opposed.
 6. On 11/06/2021 the Applicant filed written submissions dated 16/06/2021. In them he referred to the Application dated 11/05/2021 yet the same was dated 17/05/2021. The content of the submissions was on all fours about the Application dated 17/05/2021. In summary the 6th Applicant stated that he relied on Order 42 Rule 6 of the *Civil Procedure Rules*, and the list of authorities he attached to the submissions. They included the High Court case of *HGE v SM* [2020] eKLR and *G.N. Muema P/A (Sic) Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & another* [2018] eKLR both of which gave the principles the Court should rely on in applications of such a nature, and which he summarized in the submissions.
 7. On substantial loss, he relied on the High Court case of *Victory Construction v BM (a minor suing through next friend one PMM)* [2019] eKLR. In it the Court relying on the earlier case of *Century*



Oil Trading Co. Ltd v Kenya Shell Ltd, Nairobi Milimani 1561 of 2007 held that where execution of a monetary decree is sought to be stayed the financial position of the Applicant and Respondent become an issue in case of considering whether substantial loss would result, and the Court has to strike a balance between the interests of the Applicant seeking to preserve the status quo and those of the Respondent.

8. In regard to whether the Application was made with unreasonable delay, the Applicant relied on the case of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR. On security for due performance of the decree he relied on the case of *HE. V SM (supra)* and Focin (supra) together with those of *Lee G. Muthoga v Habib Zurich Finance Ltd & Anor* (2016) eKLR and *Arun C Sharma v Ashana Raikundalia T/A A Raikundalia & Co Advocates & 2 Others* [2014] eKLR. And, lastly, about whether there was reasonable belief that the appeal was based on sustainable grounds that had good prospects of success, the Applicants relied on the case of *Daniel Walter Rasugu v. Johana Nyakwoyo Buti & 2 Others* [2008] eKLR.

Analysis and Determination

9. The fact that an Application is not opposed does not necessarily lead to an automatic grant of thereof. The Court is enjoined to examine its merits or otherwise and make a finding on them. As such I have carefully considered the Application and the affidavit in support, the submissions on record as well as the law and the case law cited. I find two issues for determination. These were:
 - a. Whether the Applicant has satisfied the criteria for grant of stay of execution pending appeal.
 - b. Who to bear the costs of the Application?
10. I begin by analyzing whether the application is merited by way of a demonstration of meeting the requirements for grant of an order for stay of execution pending appeal. First, it is not lost sight of the fact that the grant of an order of such a nature is discretionary and is given by a Court acting judiciously, that is to say, a Court weighing all circumstances of the case and acting reasonably within the law by applying its mind properly to the law. It is now settled law in regard to applications for stay of execution of judgment pending (an intended) appeal that certain conditions have to be met by an applicant. The Applicant has to place himself within the parameters set out in Order 42 Rule 6 of the Civil Procedure Rules.
11. The said provision states 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.
12. The provision gives three conditions that ought to be satisfied, namely:
 - i. That substantial loss may result in case the order is not granted
 - ii. The application is brought without undue delay
 - iii. Security for due performance of the decree has been offered by the Applicant.



13. To purport to reinvent the wheel on the import and interpretation of this provision would be overly ingenious. I will not take time to do so as of now. Rather I will restate them and add other or further conditions that other courts, including this one, have previously added to the three. This, looking at what my brother and sister judges have stated over the issue, I would summarize it by taking an excerpt from one authority as hereunder: In Civil Appeal No.107 of 2015, Masisi Mwita -vs- Damaris Wanjiku Njeri (2016) eKLR, the Court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another..Vs...Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-

“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.

“In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo...Vs...Straman EA Ltd (2013) as follows:-

“In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory.”

These twin principles go hand in hand and failure to prove one dislodges the other”

14. In the instant case the Applicant emphasized that he had filed a Notice of Appeal against the said judgement and decree of the Court and that he believed that there were reasonable grounds of appeal. The belief itself in there being reasonable grounds of appeal is not one of the conditions that the law requires that it be fulfilled. The Applicant ought to demonstrate that he has an arguable appeal. By the appeal being arguable does not mean that it must succeed. However, he must show that the grounds of appeal raise points which the appellants Court can consider as worth urging before it. The applicant failed to do this. He ought to have demonstrated that the appeal would not be a frivolous one.
15. Again, the Applicant contended that the intended appeal would be rendered nugatory and academic exercise if a stay of execution of the judgment was not granted. He gave a breakdown of the sums of money that he would lose which would amount to substantial loss in case the execution was not stayed. Moreover, he argued that the Petitioners were persons of limited means hence would be unable to repay the sums if the appeal was successful. In a bid to safeguard the sums due under the decree, the Applicant stated that he was willing to abide by any conditions this Court would find just and equitable to issue as a condition for stay of execution, including depositing security for due performance of the decree if the appeal was not successful.
16. Having considered the totality of the facts, arguments and submissions herein, and considering the fact that this Court has already found that the rights of the Respondents in the instant were violated, they were unlawfully evicted from the respective portions of land they occupied and were maliciously prosecuted, even if it can be and was argued that they are of limited, they are human like the Applicant and deserved and still do human dignity. This Court is of the view, and doing the best it can do, balancing all the interests of the parties, that it would be in appropriate to grant a stay of execution of the decree herein pending the hearing and determination of the intended appeal, under the following conditions:



- a. That the applicant pays half of the decretal sums in all the limbs in the judgment to the Respondents within thirty (30) days of this ruling, in default of which the orders herein shall lapse.
- b. The Applicant shall deposit the balance of the decretal sum in Court within the said period of thirty (30) days failure of which the stay of execution orders herein shall lapse.
- c. The Applicant shall file and serve the record of appeal herein within the next sixty (60) days of this ruling, in default of which the orders herein shall lapse irrespective of whether or not conditions (a) and (b) above shall have been fulfilled.
- d. There shall be no order as to costs of the instant Application.

Orders accordingly.

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

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

