



Kaigua v Presbyterian Foundation as The Trustte of The Presbyterian Church of East Africa – Pwani Presbytery & 2 others (Civil Suit 198 of 2012) [2022] KEELC 3181 (KLR) (8 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3181 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 198 OF 2012**

M SILA, J

JUNE 8, 2022

BETWEEN

NICHOLAS MUNYI KAIGUA PLAINTIFF

AND

PRESBYTERIAN FOUNDATION AS THE TRUSTTE OF THE PRESBYTERIAN CHURCH OF EAST AFRICA – PWANI PRESBYTERY 1ST DEFENDANT

JUMA JEFA MBOE 2ND DEFENDANT

SIDI CHENGO NGATO 3RD DEFENDANT

RULING

(Application for stay pending appeal; judgment having been entered for the plaintiff against the applicant for the applicant to give vacant possession of land and pay general damages of Kshs. 2,500,000/= for trespass; applicant now wishing to appeal before the court of appeal; application allowed subject to the applicant depositing the sum of Kshs. 2,500,000/= and the taxed costs in a joint interest earning account)

1. The application before me is that dated 23 December 2021 filed by the 1st defendant. It is an application seeking stay of execution of the judgment herein pending determination of an appeal to the Court of Appeal. The application is opposed.
2. To put matters into perspective, the plaintiff filed suit against the applicant and two other persons. In his suit, the plaintiff inter alia sought a declaration that he is the rightful proprietor of the land parcels Kilifi/Kawala 'A'/Kadzonzo/304 and 305 and a mandatory injunction requiring the applicant to remove the buildings and structures that it had developed on the land. He also sought general damages for trespass and costs. The defence of the applicant was that the subject land was its land, having purchased it from the 2nd and 3rd defendants, and that it was registered as LR No. 208405,



which title was in the name of the 2nd and 3rd defendants. On the land, the applicant had developed a school which was operating. The position of the 2nd and 3rd defendants was that the title LR No. 208405 registered in their name was a fraudulent title and that the plaintiff was the rightful proprietor of the land parcels Kilifi/Kawala 'A'/ Kadzonzo/304 and 305. I heard the case and delivered judgment on 28 October 2021. I upheld the titles of the plaintiff. I further ordered the applicant to remove her structures from the suit properties within 3 months. I also awarded the plaintiff the sum of Kshs. 2,500,000/= in general damages for trespass and costs of the suit. Aggrieved, the applicant filed a Notice of Appeal and followed up the same with this application seeking stay of the judgment pending appeal.

3. The application is supported by the affidavit of Rev. Boru Samuel Tulicha, the Presbytery Clerk of the applicant. He has deposed inter alia that the applicant is aggrieved by the judgment and has elected to exercise its right of appeal. He has averred that on the property is a secondary school which is fully occupied by pupils and if the orders of vacant possession are executed, coupled with payment of the amount of Kshs. 2,500,000/=-, it will cause untold irreparable and substantial loss to the applicant. He has averred that the financial status of the plaintiff is unknown whereas the applicant is a financially stable institution which has made investment on the property which exceeds the monetary aspect of the judgment. He has then gone to lengths on matters which I think should fall within the purview of the appeal.
4. The plaintiff filed a replying affidavit where he inter alia justified his title to the disputed land. He deposed further that the application herein was filed five weeks after the judgment and was served about two and a half months after judgment. In the circumstances, he believes that the applicant is guilty of inordinate delay. He has averred that it is not true that he is unable to refund the sum of Kshs. 2,500,000/= if it is paid to him. He avers that he has waited for over ten years for justice and as a successful litigant, he is entitled to harvest the fruits of the judgment.
5. I have considered the application alongside the submissions made by Mr. Kamau, learned counsel for the applicant, and Mr. Gikandi, learned counsel for the plaintiff.
6. What is before me is an application for stay pending appeal and I stand guided by the provisions of Order 42 Rule 6 (2) which is drawn as follows :-
 - (2) 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.
7. It will be seen from the above that before a court issues an order of stay pending appeal, it needs to be satisfied that the applicant has demonstrated that she stands to suffer substantial loss unless the order is made, and the applicant also needs to furnish security for the due performance of the decree. In addition, the application needs to have been filed without unreasonable delay.
8. In our case, the judgment was delivered on 28 October 2021. In the judgment, I gave the applicant 3 months to remove her structures from the land. This application was filed 5 weeks after the judgment. I do not think that in the circumstances of this case, it can be said that the applicant is guilty of unreasonable delay.
9. On whether the applicant stands to suffer substantial loss, it is apparent that she does stand to suffer immense loss if the decree is executed. She has a school that is operating on the suit property and it must have been made through massive investment. If the school is demolished and the applicant succeeds



on appeal, there will certainly be substantial loss occasioned to the applicant. The final issue is security for the performance of the decree. The decree is two fold; one aspect requires the applicant to give vacant possession of the land and the second aspect is a money decree for Kshs. 2,500,000/=. I am persuaded that in the circumstances herein, it would be just that the applicant deposits the amount of Kshs. 2,500,000/= , alongside any taxed costs, in a joint interest earning account so as to be entitled to stay of execution of the decree.

10. I therefore order the applicant to deposit the amount of Kshs. 2,500,000/= in a joint interest earning account to be held in the names of counsel for the applicant and counsel for the plaintiff, within the next 60 days. I further order that the taxed costs be deposited in this same account within 60 days of taxation. In the event that the applicant will not deposit the above amounts of money within the time specified, then the applicant will have to argue her appeal without the benefit of an order of stay of execution and the plaintiff will be at liberty to execute the decree.
11. On the costs of this application, if the applicant abides by the above conditions, then the costs of the application will be costs in the appeal. If the applicant does not abide by the conditions herein, then she will shoulder the costs of this application.
12. Orders accordingly.

DATED AND DELIVERED THIS 8TH DAY OF JUNE 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

