



REPUBLIC OF KENYA



**KENYA LAW**  
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**Atingo v Mbalanya (Environment and Land Appeal E004 of 2022)  
[2022] KEELC 3471 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3471 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT AND LAND APPEAL E004 OF 2022**

**E ASATI, J**

**JULY 28, 2022**

**BETWEEN**

**READON ELISHA ATINGO ..... APPLICANT**

**AND**

**OLIVER SHADRACK MBALANYA ..... RESPONDENT**

*(Being an Appeal from the decision of Ho. R. M. Ndombi- SRM in  
Vihiga SRM in Vihiga ELC NO. 66 OF 2018 delivered on 3/3/2022)*

**RULING**

1. This ruling is in respect of the Appellants Notice of Motion Application dated 9<sup>th</sup> June 2022. It seeks for orders that;
  - i. That the present application be and certified urgent and ne heard on priority basis.
  - ii. That pending the hearing of the application inter partes there be a stay of execution of the decree in Vihiga SPMC MCL & E No. 66 of 2018.
  - iii. That pending the hearing of the appeal there be stay of execution of the decree in Vihiga SPMC MCL & E No. 66 o.f 2018.
  - iv. That the costs hereof be in the cause.
2. The application is premised on the grounds shown on the face of the Notice of Motion and the averments in the Supporting Affidavit sworn by the Applicant on 9<sup>th</sup> June 2022 and the annexures thereto.
3. The Application is opposed vide the contents of the Replying Affidavit sworn by the Respondent on 22<sup>nd</sup> June 2022.



4. The Application was canvassed by way of written submissions.
5. The substantive prayer sought in the Application is an Order of stay of execution pending appeal as per prayer (iii) of the Application. Prayers 1 and 2 have already been dealt with at the first instance.
6. The Applicant's case is that he is in actual possession of the suit land. That the trial court issued a Judgment wherein it gave orders of permanent injunction and eviction for the Applicant to be evicted from the suit land upon the expiry of 90 days from 3/3/2022 when the Judgment was delivered. That the 90 days period was about to elapse. That the premises on the property may be destroyed any time from now leading to substantial loss. That the applicant and his family have been on the suit land since 1960. That the appeal will be rendered nugatory if the stay order is not granted.
7. The Respondent on the other hand opposed the Application and deposed in the Replying Affidavit that the application lacks merit and is an abuse of the due process of the law. That the Applicant has not met the conditions for granting an order of stay of execution. That he (the Respondent) stands to suffer irreparable loss and damage as the Applicant's actions have denied him the right of user and yet he is the registered proprietor of the suit land. That the Applicant stands to suffer no loss at all and that it is in the interest of justice that the application should not be granted. That the appeal is unmeritorious with no chances of success.
8. It was submitted on behalf of the Applicant that in the case of *Butt vs Rent Restriction Tribunal* (1979) the Court of Appeal laid out factors to consider in determining whether to grant or refuse stay of execution of decree pending appeal. These are that:-
  - a. The power of the court to grant or refuse an application for stay of execution is discretionary and the discretion should be exercised not to prevent the appeal.
  - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance a stay on appeal may not be rendered nugatory should the appeal court reverse the Judge's discretion.
  - c. Thirdly, a Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
  - d. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its power under Order XLI Rule 4 (2) (b) of the *Civil procedure Rules* can order security upon application by either party or on its own motion, failure to put security of costs as ordered will cause the order of stay to lapse."
9. It was further submitted that execution of the order will mean eviction of the applicant from the suit land and the buildings thereon be demolished thereby occasioning substantial loss to the Applicant who has been in use and occupation of the land since 1960. That there was no inordinate delay in filing the application. That the application has met the conditions in Order 42 Rule 6(1) (a) and (b). He prayed that the Application be allowed.
10. Written submissions dated 20<sup>th</sup> Day of July 2022 were filed on behalf of the Respondent by the firm of Athung'a & Co Advocates. Counsel submitted that the Applicant has not established the grounds upon which stay of execution can be granted. That the Applicant has not stated what loss he stands to suffer. That the Applicant is not the registered owner of the land in question. That it is the Respondent who is the sole proprietor of the land. Further that the appeal has no changes of success at all. That while the applicant's case in the lower court was based on adverse possession, it was clear during trial



that the Applicant's father was granted permission to be on part of the suit land. That the Applicant should provide security for costs in the event he is not successful in the appeal. That the Applicant has not offered such security.

11. The conditions for grant of an order of stay of execution pending appeal are contained in Order 42 Rule 6 *Civil Procedure Rules 2010*. They are that the applicant must satisfy the court that substantial loss will be occasioned to him/her unless the order is made, secondly, that the application has been brought without unreasonable delay and that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the Applicant has been given.
12. I have considered the application, the reply thereto and the rival arguments in the submissions. The Applicant contends that he is in occupation of the suit land. This is not denied. I have read the judgement appealed against. The judgment makes orders of injunction against the Appellant from entry onto the suit land and for removal of the Appellant's structures from the suit land. I am satisfied that if execution of the judgement happens the Applicant will suffer substantial loss. I am also satisfied that the Application was brought without unreasonable delay.
13. The third condition is provision of security. The purpose of this requirement as stated in the case of Aron C. Sharma vs Ashana Raikundalia t/a Raikundaria & Co Advocates under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. The Applicant has not offered to give any security. It is a mark of good faith and commitment when an Applicant undertakes to provide security as the court will order or even proposes the kind of security he offers (see *Focin Motorcycle Co Ltd v Ann Wambui Wangui & another* [2018] eKLR).
14. The duty of the court in considering an application for stay of execution pending Appeal is to prevent an appeal that has been filed from being rendered nugatory while at the same time guarding the right of a successful litigant, the decree holder, to enjoy the fruits of the Judgement. No doubt, it is a delicate balancing act of these competing interests. I will however be guided by the authority in *Butt v Rent Restriction Tribunal* [1982] KLR 417 inter alia that the court's discretion should be exercised in such a way as not to prevent an appeal.
15. In the circumstances I find that the application is merited. I allow the Application as follows:
  - i. There be an order of stay of execution of the judgement dated 3rd March 2022 in Vihiga PMC EL No 66 of 2018 and any resultant decree, pending the hearing and determination of the appeal.
  - ii. For expeditious disposal of the appeal:
    - a. Record of appeal be filed and served within the next forty-five (45) days hereof
    - b. Matter be mentioned on 20/9/2022 to confirm compliance and for a date for directions on the appeal.
  - iii. Costs to the Respondent.

Orders accordingly.

**RULING READ, DATED AND SIGNED IN OPEN COURT AT VIHIGA THIS 28TH DAY OF JULY, 2022.**

**E. ASATI**

**JUDGE**

In the presence of:



Naville: Court Assistant.

Applicant present in person

N/A for the Respondent

**E. ASATI**

**JUDGE.**

