



REPUBLIC OF KENYA



**Rono & another; Ochera (Respondent) (Environment and Land Appeal
15 of 2021) [2022] KEELC 3336 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3336 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND APPEAL 15 OF 2021
FO NYAGAKA, J
JULY 28, 2022**

IN THE MATTER OF

DAVID KIKWAI RONO 1ST APPELLANT

AMON KIMUTAI RONO 2ND APPELLANT

AND

VINCENT KEBIRO OCHERA RESPONDENT

RULING

1. The appellants have filed the notice of motion application dated 07/06/2022 on 08/06/2022 seeking the following reliefs:
 1. ...spent.
 2. ...spent.
 3. That pending the hearing and determination of this appeal there be a stay of execution of the judgment delivered by Hon. V. Karanja read on 15/09/2021 in Kitale CMC Land Case No. 60 of 2018 and all consequential orders.
 4. That this Honorable Court be pleased to stay the enforcement of the consent order entered into between the 1st Appellant and the Respondent herein on 06/05/2022 in Kitale CMC Land Case No. 60 of 2018.
 5. That this Honorable Court do allow the Applicants to deposit the sum of Kshs. 250,000.00 in court, or in the joint account of the Counsels (sic) on record in a reputable Bank within such time as this Honourable Court may deem fit, while pending the hearing and determination of the pending Appeal.
 6. That costs be in the cause.



2. The Application was supported by the grounds on the body of the Motion and by Supporting Affidavit of the 2nd Appellant. The fundament of the Application is that the Appellants are partly aggrieved by the judgment delivered in Kitale CMC Land Case No. 60 of 2018 and have since filed a Memorandum of Appeal. The annexed the Memorandum of Appeal and letter requesting for proceedings and judgment were marked DKR1 and DKR2 respectively.
3. In the impugned judgment, the trial court ordered the Appellants to pay Kshs. 1,000,000.00 to the Respondent, the sum representing the suit land's current market value that had been initially sold to the Respondent at Kshs. 530,000.00; in spite of the fact that the Appellant refunded the said sum vide cheque No. 302142 dated 12/03/2022. They produced the forwarding letter and copy of the cheque marked DKR3a and DKR3b. They further challenge the trial court's decision as it failed to affirm that the transaction breached the mandatory provisions set out in sections 6 and 22 of the Land Control Act. The trial court further failed to consider that the Respondent gained use and benefit from the suit land as he remained in actual use and occupation of the suit land for three (3) years post nullity of the transaction. As a consequence thereof, the Respondent was only entitled to a refund of the purchase price and not as ordered by the trial court. Flowing from this, the Appellants have been condemned to pay the sum of Kshs. 470,000.00.
4. The 2nd Appellant was arrested pursuant to the extraction of warrants and arraigned in court on 06/05/2022. He had been earlier on served with a notice to show cause dated 23/02/2022. The 2nd Appellant bound himself to pay Kshs. 150,000.00 on 10/06/2022 and subsequently, monthly installment of Kshs. 100,000.00 until payment in full of Kshs. 470,000.00. This consent was made pursuant to his apprehension that his right to liberty would have been fettered.
5. The Appellants maintained that the Appeal will be rendered nugatory if the full sum is paid as the Respondent may not refund the said sum. They urged this court to direct the Appellants to deposit Kshs. 250,000.00 to court or in a joint interest earning account. He added that the record of Appeal was yet to be prepared as the proceedings at trial were yet to be typed. Finally, it was in the interest of justice that the Application be allowed as prayed.
6. In opposition thereto, the Respondent filed his Replying Affidavit on 15/06/2022. He deposed that the Application and Appeal had been overtaken by events as the Appellants have already paid Kshs. 530,000.00 being part of the decretal sum. He further deposed that by consent of the parties' Counsel, the 2nd Appellant committed to pay Kshs. 150,000.00 by 10/06/2022.
7. He maintained that the consent remained binding and valid and cannot be impeded. He added that a consent can only be side aside or modified by consent. He deposed that he was aggrieved by the Appellants who locked him out of the suit land for more than (3) years. As a matter of fact, the trial court ought to have awarded Kshs. 1,500,000.00. He urged this court to dismiss the Application as it lacked merit, was an afterthought and intended to mislead this court.

Submissions

8. Parties canvassed the Application by way of written submissions. In their submissions dated 22/06/2022 and filed on that day, the Appellants fortified that this court has jurisdiction to grant the reliefs sought pursuant to the provisions of sections 13 (1) 14 and 19 (2) of the Environment and Land Court Act. The Appellants submitted that the Respondent was unable to demonstrate how he would refund the decretal sum if the Appeal is merited. Consequently, he stood to suffer substantial loss if stay was not granted. Additionally, the Appellants were ready, able and willing to deposit part of the contested decretal amount as security for due performance. They urged this court to stay the consent as



the 2nd Appellant only entered into a consent on the apprehension that he would have been committed to civil jail.

9. The Respondent on 16/06/2022 reiterated the contents of his Replying Affidavit. He submitted that this court could not stay a consent that was not the subject of challenge by way of review and/or set aside. The consent thus remained binding on the parties. They added that no cogent reasons were furnished to justify the grant of the orders sought. They submitted that since the Appellant had already paid part of the decretal sum, the Application and Appeal had been overtaken by events.

Analysis And Disposition

10. The Application seeks to stay execution pending the hearing and determination of the present Appeal. It further seeks to stay the enforcement of the consent entered into on 06/05/2022 pending the determination of the present Appeal. The Appellants have pertinently invoked order 42, rule 6 of the *Civil Procedure Rules* which provides that 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.
11. The discretionary power to grant stay mandates the court to evaluate every circumstance on a case by case basis. The Application shall now be determined under the following heads:

Whether the Application has been filed timeously
12. I will chronologically set out the events that antecedently transpired the present Application. The trial court on 15/09/2021 delivered judgment in favor of the Respondent. Thereafter on 14/10/2021, the Appellants filed a Memorandum of Appeal (DKR1). On the very same day, the Appellants requested for certified copies of the proceedings and judgment in furtherance of filing their Record of Appeal herein (DKR2).
13. The Respondent, in the absence of stay and rightfully so, commenced the execution process. He served the 2nd Appellant with a notice to show cause dated 23/02/2022. On 12/03/2022, the Appellants through their Counsel forwarded a cheque No. 302142 with a letter stating that the sum was a reimbursement of the sale of the suit land to the Respondent (DKR 3a & 3b).
14. Subsequently, the matter was mentioned on 16/03/2022. It was confirmed that the 2nd Appellant had partly settled the decretal sum. As a consequence, warrants of arrest were issued and the 2nd Appellant presented in court on 06/05/2022. It was on this day that the 2nd Appellant, by consent with the Respondent, committed to settling the decretal sum in installments until payment in full. It was then after that the Appellants filed the present Application on 08/06/2022.
15. I find that firstly, the Appellants were only jolted by the execution process. The Appellants failed to explain why the present Application was not brought soon thereafter they filed the Appeal. They failed to demonstrate to this court the difficulty or any impediment that prevented them from filing the present Application sooner rather than later.



16. Interestingly, the Application was only filed after the 2nd Appellant entered into a consent with the Respondent in settlement of the decretal sum that remained due and owing. I therefore find that the Application was filed with inordinate delay bereft of justification for the same.

Whether the Applicant will suffer substantial loss

17. The case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR discussed substantial loss as follows:

“No doubt, in law, the fact that the process of execution has 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.”

18. On substantial loss, the Appellants submitted that they were apprehensive that the Respondent may be unable to settle the decretal sum if the total is paid out to him. Since the Respondent failed to address this fact, then it was in itself an admission of his inability. The Appellants proposed that in the stead of settling the decretal sum, he be allowed to pay Kshs. 250,000.00 in court or a joint interest earning account.
19. As stated by court, the fact that the process of execution has been set in motion, does not amount by itself to substantial loss. Courts are reminded that execution is a lawful process. Consequently, substantial reasons must be advanced by the propounder justifying the stay of such lawful procedure.
20. The appellants on substantial loss state that the respondent will be unable to refund the decretal sum if the Appeal succeeds. However, the Appellants have failed to adequately demonstrate that the respondent lacks the financial muscle thus unable to refund the Appellants if the Appeal succeeds. Consequently, I find that the Appellants have not demonstrate that they will likely suffer substantial loss.

Whether the Applicant is willing to furnish security

21. The Appellants have proposed to deposit Kshs. 250,000.00 in court or a joint interest earning account as security for the due performance of the decree. While I find that the appellants have expressed willingness to abide by the court's orders in terms of security, I find that the Application can only succeed if all three (3) conjunctive constituent elements of stay have been met. Since the first two (2) have been found in the negative, I cannot thus grant the Application for stay.

Whether this court ought to stay the enforcement of the consent entered on 06/05/2022?

22. The grounds in support of this prayer as advanced by the Appellants are that if the 2nd Appellant liquidates the decretal sum, the Respondent cannot repay if the Appeal succeeds. In rebuttal, the Respondent submitted that the said prayer would have been an adequate remedy had the Appellants sought to challenge the consent by either review or setting aside.



23. The nature of the stay of the enforcement of the consent is such that it does not challenge the consent itself. As admitted by the 2nd Appellant, the consent was entered into willingly as he was apprehensive that his right to liberty would have been clogged if he did not enter into a post judgment consent. The said order is rather strange and untenable.
24. Firstly, the Appellants are not challenging the credibility of the consent that can only be set aside, varied or reviewed if it can be demonstrated that the consent was obtained by fraud, collusion or any other sufficient reason. Secondly, it would have been hygienic, that if indeed the Appellants were aggrieved by the adoption of that order, make such an application before the court that adopted the consent. Thirdly, it appears that the Appellants are only intent on defeating the course of justice. In March, 2022, the Appellants began settling the decretal sum. Now they want to approbate and reprobate so as to avoid what is lawfully their obligation. Lastly, the said consent adopted as an order of the court was a consequential order arising out of the judgment delivered on 15/09/2021. Had the Application been successful at the onset, it was really gratuitous for the Appellants to seek such an order as the same would have automatically been stayed as forming part of an execution process.
25. In the end, I find that the Application dated 07/06/2022 lacks merit. It consequently fails and is hereby dismissed with costs to the Respondent.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 28TH DAY OF JULY, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

