



**Juma & another v Nabichenje (Environment and Land Appeal
E012 of 2022) [2022] KEELC 3886 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3886 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E012 OF 2022**

BN OLAO, J

JULY 27, 2022

BETWEEN

MAURICE JUMA 1ST APPELLANT

JUSTINE NAFULA WANYAMA 2ND APPELLANT

AND

JULY NASAMBU NABICHENJE RESPONDENT

*(Being an Appeal from the Judgment delivered by Hon. G. Adhiambo –
Principal Magistrate on 18th October 2021 in Kimilili Senior Principal
Magistrate’s Court – Environment And Land Case No 39 of 2018)*

RULING

- (1) Maurice Juma Mutale and Justine Nafula Wanyama (the 1st and 2nd applicants respectively) first approached this court *vide* their notice of motion dated December 22, 2021 seeking the following remedies against July Nasambu Nabichenje (the respondent) In Bungoma Elc Miscellaneous Application No E020 of 2021: -
- a. Spent
 - b. Spent
 - c. The applicants be granted leave to file an appeal out of time against the Judgment of hon G Adhiambo (principal magistrate) delivered on October 18, 2021 in Kimilili Spmcc No 39 of 2018.
 - d. There be a stay of execution of the said judgment pending the hearing and final determination of this application.



- e. Pending the hearing and determination of this application, there meanwhile be a stay of further proceedings and a stay of execution in Kimilili SPMCC No 38 of 2018.
 - f. Upon the said leave to appeal being granted, there be a stay of execution and of further proceedings in Kimilili Spmcc No 39 of 2018 until the hearing and determination of the appeal.
 - g. Costs of the application be provided for.
- (2) The application was opposed and having considered it, I delivered a ruling on March 23, 2022 in which I granted leave to file the appeal out of time and made directions in that regard. I however declined to grant any orders for stay of execution pending appeal as I was not persuaded that the applicants had met the threshold stipulated under order 42 rule 6(1) and (2) of the Civil Procedure Rules.
- (3) The applicants have again moved this court by a notice of motion dated April 21, 2022 predicated on the provisions of section 3A of the Civil Procedure Act and order 42 rule 6 of the Civil Procedure Rules seeking the following orders: -
- a. Spent
 - b. Spent
 - c. Spent
 - d. There be a stay of execution of the judgment delivered by hon G Adhiambo Pm on October 18, 2021 in Kimilili Spm Elc Case No 39 of 2018 until this appeal is heard and determined.
 - e. There be a stay of further proceedings in Kimilili Spm Elc Case No 39 of 2018 until this appeal is heard and determined.
 - f. Costs of this application be provided for.
- (4) The application is founded on the grounds set out therein and is also supported by the affidavit of Marice Juma the 1st applicant herein.
- (5) The gravamen of the application is that the applicants being the judgment – debtors in Kimilili Spm Elc Case No 39 of 2018 are facing imminent eviction from the land parcels No Bungoma/tongaren/3217and 3220 (the suit land) which they have occupied for years and whose titles have been cancelled following the impugned judgment. That having been granted leave to appeal out of time which appeal they have now filed, the respondents have embarked on the post – judgment steps to execute the judgment of the lower court. That execution will result in their eviction from the suit land and they will suffer substantial loss. Further, their appeal will be rendered nugatory and an academic exercise unless the orders sought are granted. It is in the interest of justice that the application be allowed and they are willing to deposit the title deeds to the suit land and a sum of Kshs 100,000/= in court.
- (6) Annexed to the application are the following documents: -
- 1. Copy of judgment in Kimilili Spmcc Elc Case No 39 of 2018.
 - 2. Copy of my ruling delivered on March 23, 2022 in Bungoma Elc Misc Appliation No E020 of 2021.
 - 3. Memorandum of appeal.



- (7) When the application was placed before Asati J on May 17, 2022, the judge directed that the application be served upon the respondents within 14 days and the same be canvassed by way of written submissions.
- (8) The respondent filed a replying affidavit dated June 4, 2022 in opposition to the application. She averred, *inter alia*, that the applicants are not deserving of the orders sought because they have disobeyed the court's orders issued on May 9, 2019 and continued to occupy and develop the suit land notwithstanding those orders. That the applicants have not even prepared or filed the record of appeal as ordered and if anything, they should deposit in court the sum of Kshs 1,000,000/= being the current price of the suit land as well as the assessed costs of Kshs 147,830/=. This application is otherwise a delaying tactic and should be dismissed with costs.
- (9) Annexed to the replying affidavit is the order issued by the trial court on May 9, 2019 restraining the respondents from wasting, damaging, developing alienating, disposing off or transferring the suit land to any 3rd party or interfering with the boundary features.
- (10) Submissions have been filed both by prof Sifuna instructed by the firm of Sifuna & Sifuna Advocates for the applicants and by Mr Kassim instructed by the firm of Kassim Sifuma & Associates for the respondent.
- (11) I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.
- (12) Order 42 rule 6(2) of the [Civil Procedure Rules](#) provides that: -
- “No order for stay of execution shall be made under sub – rule (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”
Emphasis mine.
- (13) It must be clear by now that the application before me is similar to the previous application filed by the applicants on December 23, 2021 and which was the subject of my ruling delivered on March 23, 2022. The only difference is that by the time the applicants filed the earlier application, they did not annexe their proposed memorandum of appeal. Ideally, since that application also sought leave to file and serve the appeal out of time, there would have been no prejudice caused to the respondent if the memorandum of appeal had been annexed to that application.
- (14) It is clear that for a party to be entitled to an order of stay of execution pending appeal, the following conditions must be satisfied: -
1. The applicant must show sufficient cause.**
 2. It must be demonstrated that unless the order is granted, the applicant will suffer substantial loss.
 3. The application must be filed without unreasonable delay.
 4. The applicant must offer security.



And although this application really borders on being *res judicata*, I will nonetheless consider it on its own merit. Indeed, counsel for the respondent has submitted on that issue as follows: -

“On the 2nd issue, we strongly discredit the stay of execution pending appeal sentiments as the same had been earlier decided by hon Boaz N Olao judge in his ruling delivered on the March 23, 2022 paragraph 2214).”

Substantial loss is the cornerstone of such an application. In the case of *Kenya Shell Ltd v Benjamin Kibiru & Another* 1986 KLR 410, Platt Ag JA (as he then was) said: -

“It is usually a good rule to see if order XLI rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event.

Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.” Emphasis mine.

On the issue of substantial loss, Kuloba J described it as follows In *Machira t/a Machira & Company Advocates v East African Standard* (No 2) 2002 eKLR [2002] 2KLR 63]: -

“If the applicant cites as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given and the conscience of the court, Looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant’s business (eg appeal or intended appeal.”

On the issue of substantial loss, the 1st applicant has deponed in paragraph 8 of his supporting affidavit: -

8 “That the respondent having already embarked on post – judgment steps that will lead to their eviction therefrom, we will suffer substantial loss if the said title deed stands cancelled and we will get evicted from the said suit land as we are in occupation of that land and that is where we reside with our children hence our eviction therefrom will render us and our entire family homeless.”

The same is repeated in the submissions by the applicants’ counsel. I have looked at the impugned judgment. The orders granted by the trial court were as follows: -

1. That transfer of the suit land into the names of the applicants was declared to have been done fraudulently and was cancelled.
2. The sub – division of the land parcel No Bungoma/tongaren/527 into parcels No 3217, 3218, 3219, 3220, 3221, 3222, 3223 and 3224 were cancelled and the land to revert to Bungoma/tongaren/527.
3. The applicants were condemned to pay costs.



There was no order in the judgment for the eviction of the applicants from the suit land. There is therefore no evidence to show that the post – judgment steps will result in the eviction of the applicants from the suit land.

- (15) In any event, the respondent has annexed to her replying affidavit an order issued by the trial magistrate on May 9, 2019 in response to the respondent’s application dated May 2, 2019 seeking orders, *inter alia*, restraining the applicants from “interfering with the plaintiff’s peaceful use and occupation of the same pending the hearing and determination of this suit.” The resultant order reads in paragraph 2 thereof and in so far as is relevant to this application, that the applicants are restrained from “interfering with the plaintiff’s peaceful use and occupation of the same pending the hearing and determination of this suit.” The application seeking to injunct the respondent from interfering with the suit land was not opposed. The inevitable conclusion therefore, is that the respondent has always been and remains in occupation and possession of the suit land. It is not therefore correct for the 1st applicant to depone, as he has done in paragraph 6 of his supporting affidavit, that the applicants will suffer substantial loss if they are “evicted from the said suit land as they are in occupation of that land and that is where their matrimonial home is.” The applicants cannot be evicted from land which they don’t occupy and it is instructive to note that even in her pleadings in the trial court, the respondent did not seek the eviction of the applicants from the suit land. In the circumstances, the applicants have not surmounted the hurdle of establishing that they will suffer substantial loss if their application is not granted yet that is the “cornerstone” of such a remedy.
16. The applicants have of course offered to surrender the title deeds to the suit land and also deposit the sum of Kshs 100,000/= in court. They have therefore been able to offer security. However, an applicant seeking orders of stay of execution must meet all the conditions set out in order 42 rule 6 of the Civil Procedure Rules and not only some of them.
17. Finally, the orders sought by the applicants being equitable remedies, they were required to approach the court with clean hands. He who comes to equity must come with clean hands. In paragraph 6 of her replying affidavit, the respondent has deponed that notwithstanding the injunctive orders issued on May 9, 2019, the applicants have continued to disobey them. The applicants did not file any supplementary affidavit to rebut those very serious allegations. A party who disobeys court orders cannot be deserving of the exercise of the court’s discretion in his favour.
18. The up – shot of all the above is that the notice of motion dated April 21, 2022 and filed herein on April 25, 2022 is devoid of merit. It is accordingly dismissed with costs.

BOAZ N. OLAO.

J U D G E

27TH JULY 2022.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 27TH DAY OF JULY 2022 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO.

J U D G E

27th July 2022.

Further Order:-



I notice that the record of the Subordinate Court has already been forwarded to this Court for appeal purposes. The Deputy Registrar should expeditiously comply with Section 79B of the [Civil Procedure Act](#) and place the matter before me for admission of the appeal or otherwise.

BOAZ N. OLAO.

J U D G E

27th July 2022.

