



**Tonui v Chepngetich & another (Environment & Land Case
227 of 2001) [2022] KEELC 3665 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3665 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 227 OF 2001**

**OA ANGOTE, J
JULY 21, 2022**

BETWEEN

PHILIP K TONU I PLAINTIFF

AND

RUTH C CHEPNGETICH DEFENDANT

AND

ESTHER M WAMBUGU RESPONDENT

RULING

1. In the Notice of Motion dated October 15, 2021, the 2nd Defendant/ Applicant has sought for the following orders that:
 - a. This Honourable Court be pleased to issue and/or extend stay pending the hearing and determination of the intended appeal and
 - b. The costs of this application be provided for.
2. This application is based on the grounds on the face of it and the Supporting Affidavit of Sella Wanjiku Wambugu, the daughter of the 2nd Defendant. The Applicant deponed that the 2nd Defendant, who is the lawful owner of Land Reference No. 209/12919 located in Kileleshwa, is suffering senility and dementia and is not competent to swear an affidavit.
3. According to the 2nd Defendant's daughter, the 2nd Defendant does not know what is happening regarding the attachment of the suit property. She deponed that while she has instructed her advocates to file an application under the *Mental Health Act* to be appointed Guardian, due to the urgency of the matter, the court should stay execution of the Judgment herein pending her appointment as Guardian.



4. The deponent deponed that the 2nd Defendant was reliant on her husband who has since died; that the children of the deceased do not have money to settle the decretal sum and need time to settle the family monetary affairs and that the Plaintiff is in the process of selling the 2nd Defendant's property in execution of the Decree issued by the court.
5. In response to the application, the Plaintiff deponed that the Defendants filed a Notice of Appeal on November 28, 2019 against the judgement and decree delivered by Obaga J. on October 31, 2019, which appeal was filed out of time. The Plaintiff deponed that the Defendants also failed to file a Record of Appeal and that the Defendants participated in the taxation of the Plaintiff's Party and Party Bill of Costs and took no steps to regularise the status of their appeal.
6. It was deponed that Ms. Sella Wanjiku had failed to adduce evidence regarding the 2nd Defendant's mental incapacity; that the application is an abuse of court process meant to forestall the execution process and that Ms. Wanjiku had not demonstrated the reason for the delay in filing the application nor had she demonstrated willingness to deposit security for the performance of the decree.
7. The Plaintiff finally deponed that the grant of orders sought would prejudice him because this suit has been pending in court for a long time.

Submissions

8. The 2nd Defendant's counsel submitted that the Defendants were the rightful owners of the suit property and the two maisonettes built on it, having bought and been allocated the same from the government; that the Plaintiff was engaged as a broker/ agent to run errands at the Lands Office and that he sneaked his name in the title of the suit property, collected the title and withheld it from the Defendants.
9. The Plaintiff's counsel submitted that the 2nd Defendant's application was frivolous and bad in law as this court has no jurisdiction to grant stay pending the intended appeal, as the application has been filed two years after the judgement was delivered. In addition, it was submitted, the appeal was filed out of time.
10. On the mental fitness of the 2nd Defendant, counsel argued that no medical report has been provided to the court to substantiate this averment. It was submitted that the Applicant ought to move the proper forum to determine if the 2nd Defendant is fit to participate in these proceedings.

Analysis and Determination

11. The issue for determination in this matter is whether this court should grant the Applicant orders of stay of execution of judgement pending the hearing and determination of an intended appeal. Order 42 rule 6(1) and (2) of the *Civil Procedure Rules* provides as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from



whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

- (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.”

12. The Court of Appeal in *Halai & another v Thornton & Turpin (1963) Ltd* [1990] eKLR stated that while the High Court has discretion in granting orders of stay of execution, such discretion is fettered by three conditions:

“Firstly the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay.”

13. The facts in this suit are that the parties’ dispute over the suit property was heard before Obaga J., who delivered Judgement on October 31, 2019 and made a finding in favour of the Plaintiff/ Respondent.
14. The Respondent has admitted that a Notice of Appeal was filed on 28th November 2019, albeit out of time. The Defendants have not objected to the averment of the Plaintiff that the Notice of Appeal was filed out of the requisite period of 14 days.
15. Before considering whether the grounds for stay of execution have been met, this court takes notice that the application was filed by Ms. Sella Wanjiku, who is not a party to this suit. Ms. Sella has not been declared the guardian of the 2nd Defendant by this court, or by the High Court. Without orders of guardianship being issued under Section 26 of the *Mental Health Act* by the High Court, Ms. Sella lacks the locus standi to make applications on behalf of the 2nd Defendant.
16. Even if the court were to overlook Ms. Sella’s lack of locus, it would find that this application is dead in the water for the lack of proof of a valid appeal. In addition, this application for stay was made two years after the judgement whose execution it wishes to delay. The Applicant is guilty of inordinate delay in filing the application.
17. This court therefore disallows the application on the grounds that the Applicant lacks locus standi and the application fails the test of having been filed without unreasonable delay.
18. The application dated 15th October 2021 is dismissed but with no order as to costs. Other the execution process, this file is marked as closed.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 21ST DAY OF JULY, 2022

O. A. Angote

Judge

In the Presence of;

No appearance for Plaintiff/Respondent



No appearance for 1st Defendant/Respondent

Mr. Gathare for 2nd Defendant/Applicant

Court Assistant - June

