



Forward Agencies Limited & another v Kitangila Limited & 3 others (Environment & Land Case 282 of 2012 & 162 of 2015 (Consolidated)) [2022] KEELC 2477 (KLR) (20 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2477 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 282 OF 2012 & 162 OF 2015 (CONSOLIDATED)
A NYUKURI, J
JULY 20, 2022

BETWEEN

FORWARD AGENCIES LIMITED 1ST PLAINTIFF

WISDOM PROPERTY AGENCIES LIMITED 2ND PLAINTIFF

AND

KITANGILA LIMITED 1ST RESPONDENT

NIRISH CHANDULAL SHAH 2ND RESPONDENT

AND

CHIEF REGISTRAR OF TITLES 1ST DEFENDANT

DIRECTOR OF SURVEY 2ND DEFENDANT

RULING

1. Vide an application dated December 15, 2021, the 2nd Defendant sought for the following orders;
 - a) Spent.
 - b) Spent.
 - c. That this Honourable court be pleased to grant a stay of execution of the Judgment delivered by Hon. Mr. Justice Angote on December 2, 2021 and the resultant decree pending the hearing and determination of the intended appeal by the 2nd Defendant/ Applicant.
 - d) That this Honourable court be pleased to order the parties to maintain status quo on the property Land Reference No. 10426/7 as at the date of judgment on December 2, 2021 pending the hearing and determination of the Intended appeal.
 - e) That costs of this application be in the cause.



2. The application is anchored on the affidavit sworn by the Applicant on December 15, 2021. The applicant's case is that judgment herein was delivered in the absence of the Applicant's counsel and without notice to them, and only learnt of the same when the Plaintiffs commenced construction of a perimeter wall and placed containers on the suit property. The applicant also stated that he was in actual possession of the suit property since acquiring it from the 1st Defendant and that having been dissatisfied with the decision of this court, he filed a Notice of Appeal.
3. It was the Applicant's position that the Plaintiff's intention was to dispossess the Applicant of the suit property, subdivide it and construct thereon which will cause the Applicant to suffer loss and damage. He further averred that while stay orders will not prejudice the Plaintiffs, in the event that stay orders are not granted, the Applicant will suffer substantial loss as his title will be cancelled, property developed or alienated to third parties beyond his reach, rendering the appeal nugatory as his appeal is arguable with high chances of success.
4. The application is opposed. Alex Muema a director of the 1st and 2nd Plaintiffs filed a replying affidavit sworn on December 21, 2021. He averred that the Applicant shall not suffer any harm if the orders are not granted as the application is based on falsehoods. That it is not true that the Applicant's counsel were not aware of the date of delivery of judgment as they had logged into the Microsoft teams platform and that absence of a party when judgment is delivered cannot be a ground for invalidating the judgment or seeking stay orders. That judgment notice was confirmed to have been served by the court before judgment was delivered.
5. He further deponed that via email of December 2, 2021, a draft decree was sent to the Applicant's counsel. It was also his assertion that the Plaintiffs have always been in possession of the suit properties having fenced it in 2005 to protect it from third parties grabbing it. He emphasized that the Plaintiffs' agents have been in occupation of the suit property.
6. It was the Plaintiffs' case that this was a peculiar case as there was no evidence challenging the Plaintiffs' case and therefore the application is an abuse of court process by the Applicant and meant to vex the Plaintiff. The Plaintiff's Director also stated that the evidence relied upon in the application was unlawful as the Photographs attached were not accompanied by a requisite certificate under section 106B of the Evidence Act and that the photographs produced are not a true reflection of the suit property. He stated further that the Applicant had not furnished any evidence to demonstrate that the Plaintiff was in the process of disposing of the suit property and that there is no evidence to show that the Plaintiff was in the process of execution of the judgment.
7. That the Plaintiffs have been in court for over 15 years and are entitled to enjoy the fruits of their judgment. It was his position that stay being a discretionary order ought not be granted unless the court is satisfied that the Applicant stands to suffer substantial loss and that the application has been made without unreasonable delay. It was his position that the Applicant's interest is the Kshs. 10,000,000/= which he loaned the 1st Defendant which is a liquidated claim recoverable from the 1st Defendant, and therefore he has not demonstrated that he stands to suffer substantial loss. He also averred that the Applicant had not demonstrated that they were ready to place such security as the court may order and yet the suit property was valued at Kshs. 150,000,000/= in 2019.
8. It was the Plaintiff's view that the Memorandum of appeal, attached did not raise any cogent grounds as the same is merely a regurgitation of the Applicant's case before this court and that in any event an arguable appeal is not one of the conditions for grant of stay orders. He deponed that if the orders sought are granted, the Plaintiff stands to suffer prejudice as they have not been issued with title documents despite having fully paid and issued with completion document, since 2003.



9. In a rejoinder, the Applicant filed a further affidavit on January 25, 2022. He deponed that he has always been in possession of the suit property. It was his position that while the Plaintiffs were entitled to the fruits of the judgment, he was also entitled to unfettered right of appeal and stay of execution as long as he demonstrates that he stands to suffer irreparable harm and that he had already stated at paragraph 16 of his supporting affidavit that he was ready to comply with any conditions which would include orders for security.
10. The application was canvassed by way of written submissions. On record are the Applicant's submissions filed on January 24, 2022 and the Plaintiffs' submissions filed on January 24, 2022 and their further written submissions filed on February 11, 2022; all of which this court has considered.

Analysis and Determination.

11. Having considered the application, the affidavits in support as well as the replying affidavit as well as the submissions, the sole issue that arises for determination is whether the Applicant has met the threshold for grant of stay of execution.
12. Order 42 Rule 6 of the [Civil Procedure Rules, 2010](#) provides for the power of the trial court to grant stay, as follows;
 - (1) No appeal or second appeal shall operate as a stay of execution or proceedings 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 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.
13. Essentially therefore, a court where a decree is appealed from has discretion to grant stay where the applicant demonstrates that they stand to suffer substantial loss unless stay is granted, that the application is made without undue delay and that security for the due performance of the decree has been given by the Applicant.
14. The purpose of stay of execution pending appeal is to preserve the substratum of the suit, during the pendency of the appeal. While a decree holder has a right to enjoy the fruits of their successful litigation, the judgment debtor has unfettered right of appeal which is protected under the law. Where an applicant argues that they need stay orders so as not to render their appeal nugatory, they must demonstrate that unless the order of stay is granted, they stand to suffer substantial loss.
15. In the case of [James Wangalwa & another v Agnes Naliaka Cheseto](#) [2012] eKLR, the court held as follows;

The Applicant must establish other factors which show that the execution will create a state of affairs that will create an irreparable effect...



16. The court stated the purpose of orders for stay of execution pending appeal in the case of *RWW v EKW* [2019] eKLR in the following words;

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting stay however, must balance the interests of the Appellant with those of the Respondent.

17. In the instant case, the Applicant argues that if stay is not granted, his title will be cancelled and that the suit property may be developed or alienated to third parties, rendering his appeal nugatory. The applicant in his affidavit sworn on December 15, 2021, further avers that he has been in occupation of the suit property as he is the registered owner thereof, and that on December 4, 2021, the Plaintiff descended on the same and commenced construction of a perimeter wall. I note that both parties herein insist that they are in occupation of the suit property. While the Defendant has attached a photograph showing a perimeter wall on the suit property, the Plaintiffs state that they have been in occupation since 2005 when they put up the said wall. It is not disputed that the perimeter wall on the suit property was put up by the Plaintiffs. Having considered the rival assertions, and the evidence on record, in my view, there is no evidence of possession of the suit property by the 2nd Defendant/Applicant at all, nor is there evidence that the perimeter wall on the suit property, was put up on 4th of December 2021. It is my finding that the Plaintiffs are in possession of the suit property.

18. In the circumstances of this case, it is necessary that the character of the substratum of the suit is not altered, but at the same time, no party should enjoy an advantage over the other. Therefore, to balance the parties' interests herein, I grant stay of execution of the judgment herein pending determination of the intended appeal. The 2nd Defendant/Applicant to deposit in court the title document for parcel L.R No. 10426/7 as security for the due performance of the decree within 21 days of this ruling, in default, the order of stay shall lapse. Each party to bear its own costs of the application.

19. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 20TH DAY OF JULY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Kosgey for the 2nd plaintiff

Mr. Anyona for the 1st plaintiff

Mr. Njoroge for the 2nd defendant

Ms Josephine Misigo - Court Assistant

