



**Lihanda (Suing on behalf of Pentecostal Assemblies of God) v Egunza (Environment & Land Case 17 of 2021) [2022] KEELC 2539 (KLR) (14 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2539 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT VIHIGA**  
**ENVIRONMENT & LAND CASE 17 OF 2021**  
**E ASATI, J**  
**JULY 14, 2022**  
**FORMERLY KAKAMEGA ELC NO.118 OF 2019**  
**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF**  
**KENYA**  
**IN THE MATTER OF PARCEL NO. SOUTH MARAGOLI/KEGOYE/709**

**BETWEEN**

**PATRICK LIHANDA ..... PLAINTIFF**  
**SUING ON BEHALF OF PENTECOSTAL ASSEMBLIES OF GOD**

**AND**

**FREDRICK MANOA EGUNZA ..... DEFENDANT**

**RULING**

1. This ruling is in respect of the Defendant/Applicant's Notice of Motion Application dated 15<sup>th</sup> June 2022 stated to be brought pursuant to the provisions of article 50 (1) (d) of *the Constitution* of Kenya 2010, Sections 1A,1B and 63 of the *Civil Procedure Act* and Order 42 Rule 6 (1) of the *Civil Procedure Rules* 2010 and all other provisions of the law. The Applicant, Fredrick Manoa Egunza seeks the following relief:
  - a. That this matter be certified urgent and be heard ex parte of interim relief as services is temporarily dispense with the first instance.
  - b. That pending inter partes hearing of this application there be a stay of execution of decree as a result of judgement delivered on 14<sup>th</sup> day of June 2022.
  - c. That order of stay once granted do remain in force after inter partes hearing until the final determination of the appeal.



- d. Costs occasioned by the instant application abide the outcome of the appeal.
2. The application is premised on the grounds shown on the face of the Notice of Motion and the Supporting Affidavit sworn by the applicant on 15<sup>th</sup> June 2022.
  3. The application was not opposed or responded to by the Plaintiff/Respondent. An affidavit of Service sworn on 29<sup>th</sup> June 2022 by Joyce Nelisa Pepela a court process server and filed in court on 1<sup>st</sup> July 2022 shows that the Respondent's Advocates were served with the Application dated 15/6/2022, the Court Order and Notice of Appeal on 23/6/2022. To the Affidavit of Service was attached annexures, inter alia, a copy of the court order dated 16/6/2022. The same is duly received by stamping with the stamp of Karani Grey & Company Advocates and signed on 23/6/2022. The court order indicated that the application was to be heard inter partes on 5<sup>th</sup> July 2022. As at the time the file was called out in court on 5/7/2022 for the hearing there was no reply filed and no attendance/appearance for or by the Respondent. Since there was evidence of service the matter proceeded in the absence of the Respondent pursuant to the provisions of Order 12 Rule 2 (a) of the [Civil Procedure Rules](#), 2010.
  4. Prayers 1 and 2 of the application are spent having been dealt with ex parte at the first instance. Prayer 3 which is the substantive prayer for consideration herein is a prayer for stay of execution of the judgement delivered on 14<sup>th</sup> June 2022 pending hearing and determination of the appeal to the Court of Appeal
  5. The Applicant's case is that he was the Defendant in this case where judgement was delivered on 14/6/2022 allowing the Plaintiff's claim. That he was dissatisfied with the Judgement and intends to appeal to the Court of Appeal. To this end he has filed and served a Notice of Appeal dated 15<sup>th</sup> June 2022 and applied for copies of the proceedings in the case. That in the meantime the Plaintiff may proceed with execution. He contends that execution of the judgement will transfer proprietorship of the land from his name to the name of the Respondent thus rendering his appeal useless. He therefore seeks for stay of execution.
  6. The Application is brought pursuant to the provisions of order 42 Rule 6(1) [Civil Procedure Rules](#) 2021. The same provides that:

“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 of execution 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.”
  7. The grounds for grant of orders of stay of execution of decree/judgement are provided for in Order 42 Rule 6(2) of the [Civil Procedure Rules](#) 2010 it provides as follows:

“No order for stay of execution may 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.”
8. Firstly, the court must be satisfied that the Applicant will suffer substantial loss if the order of stay of execution is not granted. Substantial loss has been described in Dr. *Daniel Chebutuk Rotich v Morgan Kimaset Chebutuk* Nakuru H.C.C.C No.368 of 2001 thus:
- “Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an Applicant is likely to suffer if stay of execution is not granted and the Applicant is therefore forced to pay the decretal sum.”
9. The burden of proof lies with the Applicant to prove that substantial loss will result to him if the order sought is not granted. In the case of *Charles Wahome Gethi v Angela Wairimu Gethi* [2008]eKLR the Court of Appeal held-
- “...it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the applicants stand to suffer if the Respondent execute the decree in this suit against them”
- In the case of *Shell Kenya Ltd vs Benjamin Karuga Kibiru & Another* [1986] eKLR 410 the court stated that
- “if it is shown that execution would render a proposed appeal nugatory then a stay can properly be granted.”
10. In the case of *Rhoda Mukuma vs John Abuoga* [1988]eKLR the court held that the issue of substantial loss is the cornerstone of both the jurisdiction under order 42 rule 6 Civil Procedure Rules and Rule 5 of the Court of Appeal of Appeal Rules. That substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
11. It is the Applicant’s case that if an order of stay of execution is not granted, the Respondent will proceed with execution. That the execution process will transfer proprietorship of the suit land from him to the Respondent thus rendering the appeal useless. The record shows that the suit land is in the name of the Applicant. It further shows that the suit land is in the occupation and exclusive use of the Respondents for over 40 years. The effect of an order of stay of execution herein will be to preserve this status quo pending the hearing and determination of the appeal
12. The applicant has filed and served a notice of appeal to appeal dated 15/6/2022. Pursuant to the provisions of Order 42 Rule 6(4), the Applicant is deemed to have filed an appeal. Order 42 Rule 6(4) provides that
- “For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of Appeal has been given.”
13. Adjudicating an application for stay of execution pending appeal is about balancing the competing interest of the Appellant and the Respondent; while the Respondent is eager and interested in execution of the judgement so as to enjoy the fruits thereof, the applicant’s interest is to preserve the



status quo pending the outcome of the appeal. In the case of *Absolom Dova v Tarbo Transporters* [2013]eKLR the court held that

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The courts in balancing the two competing rights focus on their reconciliation.”

14. I am satisfied that the status quo need to be preserved pending the determination of the Appeal.
15. The second ground for grant of stay of execution is that the Application should be brought without undue delay. The application was filed without unreasonable delay. The Judgement was delivered on 14<sup>th</sup> June 2022 and the Application for stay of execution filed on 15<sup>th</sup> June 2022.
16. Thirdly the law requires that 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. The Applicant indicated that he is ready to offer security. The purpose of this requirement as stated in the case of *Aron C. Sharma vs Ashana Raikundalia t/a Raikundaria & Co Advocates & 2 others* [2014]eKLR is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. In *Focin Motorcycle Co. Ltd –vs- Ann Wambui wangui & Another* [2018] eKLR the court held that 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. The court stated that:

“My view is that it is sufficient for the Applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security.”

In the case of *HGE vs SM* [2020] eKLR the court held that the issue of security is discretionary and that it is upon the court to determine the same.

17. In the case of *Butt vs Rent Restriction Tribunal* [1982]KLR 417 the court held, inter alia, that:
  - a.) The power of the court to grant or refuse an Application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal
  - b.) The general principle in granting or refusing a stay is: if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory...”
19. Having considered all the above discussed matters and in view of the fact that the application was unopposed, I find that the application has merit and make the following orders:
  - i. An order of stay of execution of the judgement dated 14/6/2022 is issued pending hearing and determination of the appeal to the Court of appeal.
  - ii. The Applicant do deposit in court the original title deed for the suit land as security within fourteen days hereof.
  - iii. Costs of the Application be in the appeal.



Orders accordingly.

**RULING READ, DATED AND SIGNED IN OPEN COURT AT VIHIGA THIS 14<sup>TH</sup> DAY OF JULY, 2022.**

E. ASATI

JUDGE

In the presence of:

Ajevi:- Court Assistant.

Defendant/Applicant – In person

No appearance for the Plaintiff/Respondent

**E. ASATI**

**JUDGE.**

