



**Odoyo v Ojwang (Environment & Land Case 348 of 2016)
[2022] KEELC 12724 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12724 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 348 OF 2016
A OMBWAYO, J
SEPTEMBER 30, 2022**

BETWEEN

ODOYO THADDEUS ODOYO PLAINTIFF

AND

HENRY ONYANGO OJWANG DEFENDANT

RULING

1. The matter for determination herein is a chamber summons application dated September 6, 2021 and filed on September 7, 2021 pursuant to order 42 rule 6 (2) & 7 *Civil Procedure Rules*, section 1A,1B & 3A of the *Civil Procedure Act* seeking orders that the honourable court be pleased to grant an order of stay of execution pending the hearing and determination of the appeal against the court judgment and decree dated the 15th day of November 2019. Costs of this application be provided for. Such other and/further orders as this honourable court may deem just and expedient be granted.
2. The application was based on grounds that this court rendered its judgment on November 15, 2019 ordering that the defendant herein be evicted from the suit property within a period of six months of the date of delivery of the said judgment and that six months within which the court decree was to be complied with has long lapsed and the plaintiff has threatened execution.
3. It was averred that the defendant was aggrieved by the subject judgment and decree and instructed his advocates on record to prefer an appeal against the said judgment /decree and the plaintiff has since lodged an appeal vide Kisumu Appeal No 106 of 2021. That unless stay orders are granted, the appeal would be rendered nugatory, otiose and or mere academic exercise.
4. It was the defendant's case that the appeal raises weighty issues and the applicant ought to be afforded an opportunity to be heard and should the suit be allowed to proceed while an appeal is pending, the subject appeal shall be rendered nugatory and otiose.



5. The application was supported by the affidavit of the defendant who stated he was aggrieved by the said judgment and decree and instructed his advocates to prefer an appeal against it and his advocates have lodged an appeal and have requested for a date from the court for the said appeal to be set down for hearing. That the delay in seeking the stay orders and lodging the appeal was caused by his illness as well as his financial situation grew dire as he had taken loans to develop the suit property and was not able to approach his advocates with instructions to lodge an Appeal.
6. He stated that as soon as he recovered and his financial situation picked up, he immediately approached his advocates on record and instructed them to lodge an appeal against the judgment and decree. That the plaintiff is keen on executing the judgment and decree vide a letter addressed to his advocates and he stands to suffer substantial loss should the Plaintiff be allowed to execute the said judgment and decree as the same would result in destruction of the costly developments done on the suit property. This court directed that the matter to proceed by way of written submissions. I have perused the file and do confirm that the plaintiff herein failed to file his replying affidavit and parties also failed to file their submissions.

Analysis and Determination

7. Judgment and decree in this matter was issued on November 16, 2019 where the defendant herein was compelled to pull down the building erected on the plaintiff's property. The said orders were to be complied within six months from the said judgment.
8. This court has noted that the defendant herein was aggrieved by the said orders and lodged an appeal against the judgment and decree. The appeal was filed in August 2021 and the same was filed out of time as provided by the law. The defendant has also filed the instant application seeking for orders of stay of execution pending appeal against the judgment and decree dated November 15, 2019 on September 7, 2021.

Order 42 rule 6 of the [Civil Procedure Rules](#) stipulates: -

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 orders 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 1st 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."



9. In the case of *RWW v EKW* [2019] eKLR, the court held that;

"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 the stay however, must balance the interests of the appellant with those of the respondent."

10. I have considered the application and the above case law and I am of the view that the application lacks merit as it does not meet the threshold set out in order 42 rule 6 of the *Civil Procedure Rules* as there is delay in filing the same which is not properly explained and the same is dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30th DAY OF SEPTEMBER, 2022

ANTONY OMBWAYO

JUDGE

This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020

