



Koisamu & another v Tuukuo & 3 others (Environment & Land Case 22 of 2017) [2022] KEELC 12666 (KLR) (27 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12666 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 22 OF 2017
CG MBOGO, J
SEPTEMBER 27, 2022**

BETWEEN

SITOTI SINTIMAYO KOISAMU 1ST RESPONDENT

KILESI SINTIMAYO KOISAMU 2ND RESPONDENT

AND

SAKINYA OLE TUUKUO 1ST APPLICANT

DAVID KISERA TUUKUO 2ND APPLICANT

MBATINGA OLE TUUKUO 3RD APPLICANT

KAROE OLE TUUKUO 4TH APPLICANT

RULING

1. Before this court for determination is notice of motion application dated January 13, 2022 expressed to be brought under order 42 rule 6 (1), (2),(3) and order 50 rule 6 of the [Civil Procedure Rules](#) and section 79G, section 1A,1B,3 and 3A of the [Civil Procedure Act](#) seeking the following orders:-
 1. Spent.
 2. Spent.
 3. That there be a stay of execution of the decree arising from the judgment of the Honourable Mohamed Kullow delivered on the November 15, 2021 in Narok ELC Case No 22 of 2017 and all consequential orders and or proceedings herein pending the hearing and determination of the 1st,2nd,3rd and 4th applicant's appeal herein.
 4. That this honourable court be pleased to issue such other and further orders that it may deem fit in the interest of justice.



5. That costs of this application be provided.
2. The application is premised on the grounds inter alia that judgment in this matter was delivered on November 8, 2021 and the respondents upon obtaining a decree proceeded to execute the same by moving the office of the district surveyor who has now issued notices for ground visit for purposes of surveying and have the suit land partitioned in execution of the decree.
3. The application is supported by the affidavit of David Kisero Tuukuo, the 2nd applicant herein sworn on even date. The 2nd applicant deposed that judgment in this matter was delivered in favour of the respondents as against him and his co-applicants and being aggrieved with the said judgment, they filed and served the notice of appeal as they intend to prosecute their application for stay pending hearing and determination of the appeal. Further, that there is need to have the suit property preserved in its current state and that it is within their right to have this application heard.
4. The 2nd applicant further deposed that the respondents proceeded to extract a decree and they received a notice from the district surveyor who intended to conduct a ground visit on January 17, 2022 in execution of the decree. Further that they were never served with any notice to appear in court to show cause why the decree passed should not be executed and therefore they were taken by surprise and if the orders sought are not granted, they would be greatly prejudiced.
5. The application is opposed by the replying affidavit of the 1st respondent sworn on January 28, 2022. The 1st respondent deposed that the application is fatally defective for the reason that execution of court order and judgment is a matter arising from court judgment and they are entitled to the court order since the judgment was not issued in vain. The 1st respondent further deposed that in granting the orders sought, the applicants would prolong the suffering they have undergone in the hands of the applicants. Further that there is neither arguable grounds of appeal nor a draft memorandum of appeal and the applicants have not pleaded any arguable ground of appeal which may be rendered nugatory if stay is not granted. Also, there will be no irreparable loss or damage which will be suffered by the applicants since the order does not evict or deprive the applicants parcels of land where they occupy and the judgment if implemented will not alter the current status of the parties. As such, the application herein does not meet the threshold for grant of stay pending appeal.
6. The 2nd applicant filed a supplementary affidavit sworn on June 17, 2022. The 2nd applicant deposed that enforcing the judgment of this court will render their appeal nugatory and will be an academic exercise and he believes that their appeal has good chances of success, is merited and has been made without undue delay. Further, that they stand to suffer irreparable loss as they will be compelled to satisfy the decree which includes cancellation of the title which action may be irreversible if the appeal succeeds. The 2nd applicant further deposed that they are willing to comply with any conditions that this court may impose to meet the ends of justice.
7. The applicants filed written submissions dated July 13, 2022. The applicants raised one issue for determination which is whether the applicants have satisfied and or met the conditions for grant of stay of execution pending appeal. The applicants submitted that the application is merited and should be allowed for the reason that they filed a notice of appeal within the timelines as per rule 75 of the *Court of Appeal Rules* and that the draft memorandum of appeal annexed to the 2nd applicant's supplementary affidavit raises fundamental issues of law and facts and it is only fair that they be afforded an opportunity to be heard and it will only be possible if the stay orders herein are granted. The applicants relied on the case of Bungoma Misc Appl No 42 of 2011 *James Wangalwa & Another v Agnes Naliaka Cheseto* and submitted that it is the obligation of the court to preserve the subject of



- the suit which is inherent in the administration of justice. The applicants relied on the case of *Erinford Properties v Chesire* [1974] 2 ALL ER 448.
8. The applicants further submitted that the instant application was filed without delay and within reasonable timelines. The applicants relied on the case of *RWW v EKW* [2019] eKLR. The applicant further submitted that they are the registered owners of the suit property and the orders issued in the judgment if executed will cause great prejudice to the applicants and they are willing to provide such reasonable security as the court may deem fit. The applicants relied on the case of *Mukuma v Abuoga* (1988) KLR 645.
 9. The respondents filed written submissions dated 25th February, 2022. The respondents raised two issues for determination which are whether the applicants will suffer irreparable loss or damage if the judgment delivered by the court is executed and whether the applicants have any arguable ground of appeal which may be rendered nugatory if stay is not granted.
 10. On the first issue the respondents submitted that there is no substantial loss that will be occasioned in the event the orders sought are not granted as the judgment is not monetary and neither does it interfere with the applicants' occupation of the suit property. The respondents relied on the case of *Malcom Bell v Daniel Toroitich Arap Moi & another* [2005] eKLR and *James Wangalwa & another v Agnes Naliaka Cheseto* in Misc Appl No 42 of 2011 [2012] eKLR.
 11. On the second issue, the respondents submitted that arguability of the case does not mean that the appeal or intended appeal must be one that ought to succeed rather one that raises a serious question of law or a reasonable argument deserving consideration by the court. The respondents placed reliance on the case of *Dennis Mogambi Mang'are v Attorney General & 3 others* Civil Application No Nai 265 of 2011 (UR 175/2011) and *Julius Wabinya Kang'ethe & another v Mubia Muchiri Ng'ang'a* [2017] eKLR and further submitted that the applicants have not demonstrated arguable grounds to warrant the granting of the orders of stay of execution.
 12. I have carefully analysed and considered the application, the replies thereof and the written submissions filed by both parties and the issue for determination is whether the applicant has met the threshold to warrant grant of the orders of stay of execution pending appeal.
 13. The conditions to be met before stay is granted are provided under order 42 rule 6(2) of the *Civil Procedure Rules* as follows:
 - “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.”
 14. The Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how a court should exercise discretion and held that:
 - “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.



2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The court in exercising its powers under order xli rule 4(2)(b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
15. If a party meets the threshold for grant of stay orders then the court would give such orders. It should be noted that the fact that a party has a strong ground of appeal is not in itself a ticket to getting a stay order as was held in the case of *Carter & Sons Ltd v Deposit Protection Fund Board & Two Others* – Civil Appeal No 291 of 1997, at Page 4 as follows:
- “... the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay... the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would result from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”
16. The applicants have stated that they have an arguable appeal which will be rendered nugatory if the stay orders are not granted. For an order of stay to be granted the applicant must meet the threshold as stipulated under order 42 rule 6 of the *Civil Procedure Rules*. This court has the discretion to order stay of execution of its order or decree if the three conditions are met namely, sufficient cause, substantial loss would ensue from a refusal to grant stay, that the applicant must furnish security and the application must be made without unreasonable delay.
17. On the issue of substantial loss, an applicant must establish that he or she will suffer substantial loss if the order is not granted. Mere allegation that a party will suffer substantial loss without substantiation is not enough. In the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, where the court held that “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 rule 6 of the CPR. This is so because execution is a lawful process.”
18. The applicant must go further and demonstrate what substantial loss he or she is likely to suffer. This matter involves land and the applicants averred that with the imminent execution of the judgment of the court, then they stand to suffer irreparably. The applicants did not substantiate the loss that they are likely to suffer if the stay order is not granted. In fact, the issue of substantial loss was only raised in the 2nd applicant's supplementary affidavit which was in response to the 1st respondent's replying



affidavit who had raised serious issues of absence of a draft memorandum of appeal in the application. The averment that the applicants stand to suffer irreparably is a mere apprehension that the respondent might deal with the suit property in a manner likely not to favour them.

19. The applicants have not stated what action the respondents have taken that is detrimental to them, save to state that they were served with a notice from the director of survey. I have read the judgment delivered by my brother Justice Mohammed Noor Kullow on November 8, 2021 and order ii. was to the effect that the suit land be divided in equal shares between the plaintiffs and defendants. The respondent then took it upon themselves to initiate the process of implementing the said orders which in my view is quite in order. In the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, the court observed as follows:- “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 rule 6 of the CPR. This is so because execution is a lawful process.”
20. Also, I do note that the applicants may certainly seem to be in occupation of part of the suit property since they have not pleaded imminent eviction or deprivation of their use and or occupation of the suit property. I find that the applicants have not proved that they will suffer any substantial loss if the execution is not stayed.
21. Arising from the above, I find that the notice of motion dated January 13, 2022 lacks merit and the same is dismissed with costs to the respondents. Prayer 2 of the said notice of motion application granted by this court on January 17, 2022 is hereby vacated. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 27TH DAY OF SEPTEMBER, 2022.

HON. C.G. MBOGO

JUDGE

27/9/2022

In the presence of:

CA:Chuma

