



**Kibos v Kirui (Environment & Land Case E051 of 2021)
[2022] KEELC 12577 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12577 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E051 OF 2021
SM KIBUNJA, J
SEPTEMBER 23, 2022**

BETWEEN

WILSON KIPROP KIBOS APPELLANT

AND

FRANCIS KIGEN KIRUI RESPONDENT

RULING

1. Vide the Notice of Motion dated the 25th April, 2022 the Appellant moved this Court seeking for the following orders;
 1. “Service of the Application be dispensed with in the first instance.
 2. Pending the hearing inter partes and the determination of the application an order of Injunction do issue to restrain the Respondent from obtaining title deed to land reference Kiplombe/Kiplombe Block 10 (Growel) 16 and or evicting the Appellant from thereon and or demolishing the Appellant’s structures thereon or in any way dealing with reference Kiplombe/Kiplombe Block 10 (Growel) 16.
 3. Pending the hearing and the determination of the appeal an order of Injunction do issue to restrain the Respondent from obtaining title deed to land reference Kiplombe/Kiplombe Block 10 (Growel) 16 and or evicting the Appellant from thereon and or demolishing the Appellant’s structures thereon or in any way dealing with reference Kiplombe/Kiplombe Block 10 (Growel) 16.
 4. Costs of the application be in the appeal.”
2. The application is premised on the nine (9) grounds on the face of it and supported by the affidavit of Wilson Kiprop Kibet, the Appellant, sworn on the 25th April, 2022. The Appellant’s case is that an appeal has been filed against the lower court’s decision in Eldoret Chief Magistrate Court Land



Case Number 169 of 2018, and there is danger of the decree being executed during the pendency of the appeal. Further, the subordinate Court's decree allowed the Respondent to obtain title to the suit property, evict the Appellant from the land and demolish the structures thereon. He averred that he lives on the said property with his family and enforcement of the decree will render him destitute, as the lower court had dismissed an application seeking stay of execution. That in the absence of a stay order, the appeal may be rendered nugatory, as the decree will be enforced. That the appeal raises arguable grounds and the Appellant stands to suffer irreparable loss. That the appellant is willing to provide security if required.

3. The application is opposed by the Respondent through the replying affidavit sworn on the 25th May, 2022 in which he among others deposed that; the application is fatally defective and an abuse of the court process as it had been filed by counsel not properly on record; that a preliminary objection would be taken out in limine to have it struck out; that the application, as well as that filed in the lower Court, were filed after inordinate delay; that even after the present application was filed, the appellant did not cause the same to be served until 19th May, 2022 barely 5 days to the hearing date; that as the counter claim had been dismissed, the Court cannot stay a negative order; that the Memorandum of Appeal is yet to be served upon the Respondent; that the Appellant does not reside on the suit property and is misleading the Court on oath; that the Respondent has since taken possession of the property, title has already been issued to him and hence there is nothing capable of being stayed; that the recovery of costs awarded to him cannot be stayed; and that the appeal does not raise arguable grounds of appeal.
4. The court issued directions on filing and exchanging submissions on the 26th May, 2022. The learned counsel for the Appellant and Respondents filed their submissions dated the 3rd June, 2022 and 10th June, 2022 respectively, that are as summarized here below.
 - a. The Appellant submitted that the lower Court decision was made on 8th October, 2021 and the appeal was filed on 3rd November, 2021 which was within the 30 days allowable to pursue an appeal. That this application was filed three (3) days after the lower Court dismissed the initial application for stay, and therefore timeously. He submitted that he would suffer substantial loss if the order sought was not granted. Finally, the Appellant submitted that he was willing to provide for the due performance of the decree as shall be required by the Court.
 - b. The Respondent submitted that the Appellant has not met the conditions that are required under Order 42 Rule 6 of the *Civil Procedure Rules* for grant of stay. The Respondent relied on the cases of *Selestica Limited v Gold Rock Development Limited* (2015) eKLR as well as *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR which decisions spoke to the conditions required to be satisfied by an applicant in an application such as this. That in case the court was inclined to grant the application, the Appellant should be ordered to deposit the sum of Kshs. 2,000,000/- in Court within 30 days.
5. The following are the issues for the court's determinations;
 - a. Whether the Appellant has met the threshold for issuance of an order of stay of execution pending determination of the appeal.
 - b. Who pays the costs.
6. The court has carefully considered the grounds on the application, affidavit evidence by both parties, submissions by the learned counsel, superior courts decisions cited thereon, and come to the following findings:



- a. To start with, though the Respondent had at paragraph 3 of his replying affidavit indicated he was to file a Preliminary Objection challenging the application on the basis of improper representation of the Appellant by counsel who was not properly on record, none has been filed to date. Further, no submissions were made in support of that deposition and the court will take it that it was abandoned. I will therefore not make any determination on that issue.
- b. The applicable provision of law in applications for stay pending appeal is Order 42 Rule 6 of the *Civil Procedure Rules* 2010, that provides 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.”

From the above provision, it is clear that an applicant must satisfy this Honourable Court that there exists a sufficient cause to grant a stay. An intended appeal is not an automated ground for grant of stay of execution of the Judgment. The applicant must also satisfy the court that he/she/it will suffer substantial loss if the order is not granted; and that he is willing to give such security for the due performance of the decree or order as the court may order.
- c. The Appellant has submitted that he has indeed demonstrated that substantial loss will occasion if the orders sought are not granted, as he will be evicted from his property resulting to suffering. On his part the Respondent contended that the Appellant does not reside on the suit property, and that execution had already occurred and there was therefore nothing to stay. That he was already in occupation of the said property and title had been processed. Further, he had fenced the land and was planning to cultivate it. However, none of the two parties tendered evidence in the form of say, copies or photographs to confirm or disapprove that the title documents have been processed, or who was indeed in possession of the suit land. The court therefore comes to the conclusion that the Appellant who had the burden of proof, has failed to prove that he will suffer substantial loss if the order of stay is not granted.
- d. Other than the Appellant claiming that he risks being evicted from the suit property, he has not shown how execution of the Judgment will result to him suffering substantial loss. It is not sufficient for the Appellant to only



depose and or state in the submissions that eviction will result to substantial loss without tendering prove or particulars of such loss. In the case of Charles Wahome Gethi v Angela Wairimu Gethi [2008] eKLR, the Court of Appeal held that;

“... 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 executes the decree in this suit against them.”

- e. The Appellant had at ground (h) of the application and paragraph 12 of the supporting affidavit shown his readiness and willingness to provide security for the due performance of the decree. In the case of Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR, the court held that:

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of Judgment. 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. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

Even though no security has been deposited with the court, the readiness expressed by the Appellant herein to provide security if required to do so is sufficient.

- f. The record shows that the Memorandum of Appeal dated the 28th October, 2021 was filed on the 3rd November, 2021. The decree attached to the supporting affidavit confirms that the lower court’s judgment, subject matter of the appeal was delivered on the 8th October, 2021. Ground (c) of the application and paragraph 10 of the supporting affidavit discloses that an application for stay had been filed in the lower court, but was dismissed before the instant application was filed. Though the Respondent had contended through his submissions that there was inordinate delay in filing this application, the foregoing shows otherwise. The application was filed on the 26th April, 2022 which was about five (5) days after a similar application was dismissed by the trial court.
- g. That though the Appellant has shown that the application was filed timeously, and is ready to provide security for the due performance of the decree, the fact that he has failed to show the nature of the substantial loss that he is likely to suffer if the stay order is not issued, means his application is for dismissal, as he has failed to meet the threshold for the order to be issued.
- h. That on the issue of costs, the court is of the view that the same abide the outcome of the appeal.

7. From the foregoing the court finds and orders as follows;



- a) That the Appellant's notice of motion dated the 25th April, 2022 is without merit and is hereby dismissed.
- b) That the costs abide the outcome of the appeal.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 23rd DAY OF SEPTEMBER, 2022

S. M. Kibunja,J.

Environment & Land Court - Eldoret

IN THE VIRTUAL PRESENCE OF;

APPELLANT: Absent

RESPONDENT: Absent

COUNSEL: Ms. Kimeli for Respondents

COURT ASSISTANT: ONIALA

S. M. Kibunja,J.

Environment & Land Court - Eldoret

