



Rutto & 2 others v Wambui Rotich & another (Environment & Land Case 442 of 2015) [2022] KEELC 12626 (KLR) (23 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12626 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 442 OF 2015
SM KIBUNJA, J
SEPTEMBER 23, 2022**

BETWEEN

KIPKOECH RUTTO ERIC 1ST PLAINTIFF

KIPTALLAM SANG RUTTO 2ND PLAINTIFF

ALICE JEPCHUMBA CHERUIYOT 3RD PLAINTIFF

AND

KEZZIAH WAMBUI ROTICH 1ST DEFENDANT

SAMWEL MACHARIA 2ND DEFENDANT

RULING

1. The 1st defendant, Kezzia Wambui Rotich, *vide* the application dated the October 17, 2019 and filed on the January 22, 2020 seeks for the following orders;
 - a. “Spent.
 - b. There be a stay of execution herein or any consequential orders pending the hearing and determination of this application inter-parties.
 - c. There be a stay of execution herein or any consequential orders pending the hearing and determination of this appeal.
 - d. Costs of this application be provided for.”

The application is premised on the five (5) grounds on its face and supported by the affidavit sworn by Kezzia Wambui Rotich, the 1st defendant, on the October 31, 2019. It is her case that being aggrieved by the decision of the court dated the October 17, 2019 and delivered on the October 24, 2019, she filed an appeal a to the Court of Appeal, which appeal has high chances of success. That she will suffer irreparable loss and damage if stay is not issued. That the plaintiffs will not in any way be prejudiced if



the application is granted, and that she is willing to abide by any condition that the court may impose as security.

2. The application is opposed by the plaintiffs through the replying affidavit, sworn by Kipkoech Rutto Erick, the 1st plaintiff. It is their case that this suit was filed in 2015, and judgement delivered on the October 17, 2019. That though the notice of appeal was filed on November 1, 2019, the court is unable to determine whether the intended appeal is with merit as no appeal has been filed. That further, the notice of appeal was in contravention of rules 74 and 75 of the [Court of Appeal Rules](#), as it was filed outside the 14 days statutorily prescribed. That the plaintiffs will suffer prejudice if the application is granted. That the application is baseless, devoid of merit, has not met the threshold for grant of stay orders and should be dismissed with costs.
3. The court issued directions on filing and exchanging submissions on the May 11, 2020, and the learned counsel for the 1st defendant filed their submissions dated the September 21, 2020. The submissions dated the February 23, 2021 and filed on the February 24, 2021 on behalf of the plaintiffs was struck out among other documents, through the court's ruling of May 18, 2022.
4. The following are the issues for the court's determinations:
 - a. Whether the 1st defendant's application has merit the threshold for the granting of an order of stay of execution pending appeal.
 - b. Who pays the costs of the application.
5. The court has carefully considered the grounds on the application, affidavit evidence, submissions by the 1st defendant's counsel, the superior courts decisions cited, the record and come to the following findings:
 - a. The issues for determination in an application for stay of execution pending appeal are as provided for under order 42 rule 6 of the [Civil Procedure Rules](#), 2010 which provide 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 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 of stay shall be made under sub rule (1) unless-
 - a) The court is satisfied that substantia loss may result to the applicant unless the order is made and 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 ultimate/y be binding on him has been given by the applicant."



The purpose of stay pending appeal is to preserve the substratum of the case, especially in land matters where the character of the suit property may be changed while the appeal is pending. The applicant must establish that they will suffer substantial loss if the order of stay is not granted. In the case of *RWW vs EKW* [2019] eKLR, the court captured the purpose of stay of execution order pending appeal, 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 the stay however, must balance the interests of the appellant with those of the Respondent.”

The order for stay is a discretionary one that should be issued judiciously, as was the holding in the case of *Halal & Another vs Thornton & Turpin* [1963] Ltd [1990] eKLR the Court of Appeal held that:

“... thus the superior court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must of course, be made without unreasonable delay.”

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted, as was held in the case of *Hassan Guyo Wakalo vs Straman EA Ltd* (2013) as follows:

“In addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory.”

These two principles go hand in hand and failure to prove one dislodges the other.

- b. Equally important to the court when an application of stay is made is the need to balance the conflicting rights of the applicant to appeal, and that of the successful litigant to enjoy the fruits of the judgment, as was the holding in the case of *Machira t/a Machira & Co Advocates Vs East African Standard* (No 2) [2002] KLR 63 which held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”



The pertinent question to be answered here is whether the 1st defendant has satisfied the conditions for the grant of stay of execution pending appeal. The answer to the question will be found by analyzing the conditions set out above, and comparing them with the facts presented by the parties herein.

- c. On the issue of delay in filing the instant application, the judgement that the 1st defendant seeks to impugn at the appeal is dated the October 17, 2019 and delivered on the October 24, 2019. That further, the instant application for stay though dated the October 17, 2019, was filed on the January 22, 2020 which was after a period of almost three (3) months. That upon perusing the record and noting that the 1st defendant had to file an application dated the December 13, 2019, vide Eldoret ELC Misc Applic No 55 of 2019, to reconstruct the original record after it went missing, the court finds the delay to be excusable, understandable and not prejudicial to the plaintiffs.
 - d. On the issue of substantial loss, the 1st defendant has submitted that she has been in occupation of that suit land, and is apprehensive that she will be evicted, put out in the cold, with nowhere to move to. For that, she stated that she would suffer substantial loss if the execution was not stayed. That though the plaintiffs opposed the application through the replying affidavit referred to above, neither of the two sides presented any evidence to support their position on the issue of the loss. That as the 1st defendant has been in occupation of the suit land, and could be removed if eviction proceeded, then that will unarguably subject her to substantial loss, unless the stay order is granted. The balance of convenience therefore, favours the 1st defendant's quest.
 - e. That in addition, the 1st defendant has demonstrated her desire to file an appeal through the filed notice of appeal that has been attached to the affidavit. The record confirms that the said notice dated the October 31, 2019 was filed on the October 31, 2019 under receipt number A0372142 of the same date. The plaintiffs' claim at paragraph 11 of the replying affidavit that "the notice of appeal was file (sic) outside the 14 days statutory requirements" has no basis as it was indeed filed on the seventh (7) day after the delivery of the judgement. That in any case, if the 1st defendant does not pursue the intended appeal, the plaintiffs are not without recourse as the law provides remedial measures in the event that she fails to prosecute her appeal.
 - f. In the application, the 1st defendant has at paragraph 7 of the supporting affidavit expressed her readiness to "abide by any condition the honourable court may impose as condition for stay." The after considering the perilous nature of the eviction orders issued against the 1st defendant, and balancing the same with the rights of the plaintiffs to enjoy the fruits of their judgement, the court finds justice will be served best by granting the prayer for stay, on the condition that the 1st defendant provides security for the due performance of the decree in the terms to be set here below.
 - g. That notwithstanding the provisions of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, the costs of the application to abide the outcome of the appeal.
6. Flowing from the foregoing the court finds and orders as follows:
- a. That there be a stay of execution of the judgement dated the October 17, 2019 and delivered on the October 24, 2019 pending the hearing and determination of the appeal, on condition that the 1st defendant do deposit with a financial institution to be agreed, the sum of Kenya Shillings Five Hundred Thousand, (Kshs 500,000/-), in an interest earning account in the names of counsel for the parties as security for the due performance of the decree within sixty (60) days from the date of this ruling.



- b. That should the 1st defendant fail to abide by the above stated condition within the timeline given, the stay of execution order to be taken to have automatically lapsed.
- c. The costs of the application to 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;

PLAINTIFFS: ... Absent

DEFENDANTS: ... Absent

COUNSEL: Mr. Rotich for Kibii for Defendant

COURT ASSISTANT: ONIALA

S. M. Kibunja, J.

Environment & Land Court - Eldoret

