



**Fondo v Abdi (Environment & Land Case 45 of 2014)
[2022] KEELC 4805 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4805 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 45 OF 2014
JO OLOLA, J
SEPTEMBER 22, 2022**

BETWEEN

KADHENGI KALAMA FONDO APPLICANT

AND

SANGABA YUSUF ABDI RESPONDENT

RULING

1. By the notice of motion dated February 25, 2021, Sangaba Yusuf Abdi (the defendant) prays for a conservatory order for status quo to issue pending the hearing and determination of the intended appeal. In addition, the defendant has urged the court to issue a temporary injunction restraining the plaintiff/respondent from developing, wasting, damaging, selling or advertising and/or offering for sale the parcel of land known as Mtondia settlement plot No 218 pending the hearing and determination of the intended appeal.
2. The application is supported by an affidavit sworn by the defendant and is based on the grounds:
 - (i) That the plaintiff moved this court seeking to rescind a sale agreement for the sale of the suit property and judgment was delivered in his favour on January 29, 2021;
 - (ii) The defendant being dissatisfied with the said judgment has lodged an appeal which is pending before the court of appeal;
 - (iii) That on the strength of the said judgment, the plaintiff is likely to sub-divide, sell and/or transfer the suit property to unsuspecting third parties thereby rendering the appeal nugatory;
 - (iv) That unless the orders sought herein are granted the defendant is likely to suffer irreparable harm and/or loss;
 - (v) That no prejudice will be suffered by the plaintiff if this application is allowed; and



- (vi) That it is therefore just and equitable in the circumstances of this case that the orders sought be granted.
3. Kadhengi Kalama Fondo (the plaintiff/respondent) is opposed to the orders sought herein. In a replying affidavit sworn on April 19, 2021 and filed herein on April 21, 2021, the plaintiff avers that the defendant's application does not meet the threshold required for the grant of a stay of execution orders.
 4. The plaintiff avers that the defendant's rights over the suit premises were extinguished after the delivery of the judgment and that he has gravely failed to demonstrate the substantial loss that he is likely to suffer if the orders sought are not granted. The plaintiff denies that he has threatened to sell the property asserting that he is yet to obtain a decree to enable him execute the judgment.
 5. The plaintiff further avers that the draft memorandum of appeal attached by the defendant does not raise any arguable grounds of appeal. He asserts that in the event this court is inclined to grant the orders of stay, the defendant should be ordered to deposit the sum of Kshs 2,000,000/- as security.
 6. I have carefully perused and considered the application as well as the response thereto. I have similarly considered the rival submissions placed before me by the learned advocates representing the parties herein.
 7. As was stated by the court in *RWW v EKW* (2019) eKLR:

“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 interest of the applicant with those of the respondent.”
 8. By the judgment delivered herein on January 29, 2021, this court allowed the plaintiff/respondent to rescind the agreement of sale dated December 1, 1999. By that agreement the two parties had entered into a contract wherein the defendant/applicant was to purchase three (3) acres of land to be excised by the plaintiff from all that parcel of land known as Mtondia settlement plot No 218.
 9. The net effect of the said judgment is that the three (3) acres of land would revert to the plaintiff who may be at liberty to deal with the same in the manner he pleases once the decree herein is extracted. The plaintiff has not denied that he may dispose of the land. Instead it is his case that he has not threatened to sell the land as he was yet to extract the decree herein. There is therefore the likelihood of the suit property being wasted and/or alienated thereby rendering the appeal nugatory.
 10. According to the plaintiff, where this court was minded to grant an order of stay, the court should require the defendant/applicant to deposit security in the sum of Kshs 2,000,000/-. As the defendant points out in her supplementary affidavit filed herein on May 17, 2021 however, the purchase price for the suit property was Kshs 165,000/- and even taking into account the period since the agreement was signed in 1999, it would appear the sum of Kshs 2,000,000/- is a bit on the higher side.
 11. In the circumstances herein, I hereby grant a stay of execution of the judgment and decree herein on condition that the defendant/applicant shall within 45 days from the date hereof deposit in court the sum of Kshs 300,000/- as security for costs. In default this application shall stand dismissed with costs.



12. The costs of this application shall be in the appeal.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 22ND SEPTEMBER, 2022.

In the presence of:

No appearance for the Plaintiff

No appearance for the Defendant

Court assistant - Kendi

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J. O. Olola

JUDGE

