



REPUBLIC OF KENYA



**Barasa v Abongo & another (Environment & Land Case 5 of 2020)  
[2022] KEELC 12593 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12593 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 5 OF 2020  
BN OLAO, J  
SEPTEMBER 21, 2022**

**BETWEEN**

**WENSLEY BARASA ..... PLAINTIFF**

**AND**

**IMMACULATE AWINO ABONGO ..... 1<sup>ST</sup> DEFENDANT**

**SABASTIAN BUBIRU ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

(1) By a plaint dated February 10, 2020, Wensley Barasa (the plaintiff) impleaded Immaculate Awino Abongo and Sabastian Bubiru (the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively) seeking the following orders with respect to the land parcel No East Bukusu/south Kanduyi/5778 (the suit land): -

1. A declaration that the 2<sup>nd</sup> defendant is holding the title to the plot No East Bukusu/south Kanduyi/5778 in trust for the plaintiff and that the same be nullified or cancelled to effect transfer to the plaintiff by the Deputy Registrar: -
  - a. Eviction.
  - b. Any other relief this honourable court may deem fit to grant.
  - c. Costs and interest of the suit.

*Vide* a ruling delivered on June 26, 2020, this court struck out the suit against the 1<sup>st</sup> defendant for being *res – judicata*.

2. Subsequently, vide a judgment delivered on November 4, 2021, this court made the following disposal orders with respect to the suit land: -

1. A declaration is hereby issued that the 2<sup>nd</sup> defendant holds the title to the land parcel No East Bukusu/south Kanduyi/5778 in trust for the plaintiff.



2. That trust is hereby determined and the 2<sup>nd</sup> defendant shall within 30 days of this Judgment execute all the relevant documents to facilitate the transfer of the land parcel No East Bukusu/south Kanduyi /5778 in the name of the plaintiff.
3. In default of (2) above, the Deputy Registrar shall execute all such documents on behalf of the 2<sup>nd</sup> defendant.
4. The Land Registrar Bungoma shall rectify the register accordingly to reflect the plaintiff as the registered proprietor of the land parcel No East Bukusu/south Kanduyi/5778.
5. The 2<sup>nd</sup> defendant shall also vacate the land parcel No East Bukusu/ South Kanduyi/5778 and remove all his structures thereon within three (3) months of this Judgment failure to which he shall be evicted therefrom.
6. The 2<sup>nd</sup> defendant shall meet the plaintiff's costs.

A decree was extracted.

3. Aggrieved by that judgment, the 2<sup>nd</sup> defendant promptly filed a notice of appeal on November 10, 2021.
4. The 2<sup>nd</sup> defendant has now approached this court vide his notice of motion dated December 2, 2021 and predicated under the provisions of sections 3A and 63(e) of the [Civil Procedure Act](#) and Order 42 rule 6 of the [Civil Procedure Rules](#) seeking the following orders: -
  - a. Spent
  - b. Spent
  - c. That this honourable court be pleased to grant stay of execution of this court's decree and judgment in Bungoma Environment and Land Case No 5 of 2020 pending the hearing and determination of the appeal in the Court of Appeal.
  - d. That costs of this application be provided for.

The application is based on the grounds set out therein and supported by the 2<sup>nd</sup> defendant's affidavit dated December 2, 2021 to which is annexed the notice of appeal dated November 10, 2021.

5. The gist of the application is that the 2<sup>nd</sup> defendant is aggrieved by this court's judgment and intends to appeal. That he has filed a notice of appeal and also applied for certified copies of proceedings and judgment. That his appeal is arguable and has high chances of success and no prejudice will be visited upon the plaintiff which cannot be sufficiently compensated by an award of costs. Further, that the application has been brought in utmost good faith, without delay and in the interest of justice. That the 2<sup>nd</sup> defendant is also willing to furnish the court with security for the due performance of the decree.
6. The application is opposed and by his replying affidavit dated January 17, 2022, the plaintiff has averred, inter alia, that having purchased the suit land in 1987, he lived thereon for 20 years until his eviction when the 1<sup>st</sup> defendant filed BungomaELC Case No 93 of 2011. He appealed and his eviction was reversed. Since then, he has never set foot on the suit land and this application is only meant to deny him possession of the suit land. That there are no good grounds to grant the stay since the 2<sup>nd</sup> defendant never purchased the suit land and has nothing to lose and is only holding brief for the 1<sup>st</sup> defendant in this litigation.
7. The plaintiff also filed grounds of opposition describing the application as lacking merit as it does not meet the requirements of Order 42 rule 6 of the [Civil Procedure Rules](#). That no substantive appeal has



been filed in the Court of Appeal and the 2<sup>nd</sup> defendant has not demonstrated what substantial loss he will suffer since his title was cancelled by the Court of Appeal. That the 2<sup>nd</sup> defendant has not offered any security for costs of Kshs 660,300/= and all that this court did was to up – hold the findings of the Court of Appeal and allowing this application will amount to annulling what that court has already granted.

8. The application has been canvassed by way of written submissions. These have been filed both by Mr Makokha instructed by the firm of Makokha, Wattanga & Luyali Associates for the 2<sup>nd</sup> defendant and by Mr Sichangi instructed by the firm of J W Sichangi & Company Advocates for the plaintiff.
9. I have considered the application, the rival affidavits and grounds of opposition as well as the submissions by counsel.

Order 42 rule 6(1) and (2) of the [Civil Procedure Rules](#) provides that: -

6(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.”  
Emphasis mine.

It is clear from the above therefore that the 2<sup>nd</sup> defendant is required to satisfy the following conditions in order to be entitled to the grant of an order of stay of execution pending appeal: -

1. Show sufficient cause.
2. Demonstrate that he will suffer substantial loss unless the order is granted.
3. Offer security for the due performance of any decree or order as may ultimately be binding upon him.
4. Make the application without unreasonable delay.

In the circumstances of this case, the 2<sup>nd</sup> defendant has already filed a notice of appeal showing his intent to appeal the judgment dated November 4, 2021. That is sufficient cause.

10. The application was also filed on December 3, 2021 only a month after the delivery of the judgment sought to be appealed and the 2<sup>nd</sup> defendant has also averred in paragraph 9 of his supporting affidavit that he is willing to furnish the court with security for performance of the decree. He has therefore satisfied three (3) out of the four (4) conditions set out under Order 42 rule 6 of the [Civil Procedure Rules](#).



11. The 2<sup>nd</sup> defendant was however required to satisfy all the four (4) requirements under Order 42 rule 6 of the Civil Procedure Rules and not only some of them. And the requirement which he has not satisfied is what has been described as the cornerstone of such an application. Platt Ag JA (As he then was) put it as follows in the case of Kenya Shell Ltd V Kibiru 1986 KLR 410 at page 416: -

It is usually a good rule to see if Order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions, for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.” Emphasis mine.

In Macharia T/a Machira & Co Advocates .v. East African Standard (No 2) 2002 KLR 63 Kuloba J stated thus: -

In this kind of application for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars..... Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant stay.” Emphasis mine.

In Samvir Trustee Ltd .v. Guardian Bank Ltd 2007 eKLR, Warsame J (as he then was) stated that: -

It is my humble view that for the applicant to obtain a stay of execution, it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss.” Emphasis mine.

In ground VI of the notice of motion, the 2<sup>nd</sup> defendant has pleaded that: -

The 2<sup>nd</sup> defendant stands to suffer irreparable loss and damage if he is evicted from the suit property.”

Other than that mere assertion that he will “suffer irreparable loss and damage if he is evicted from the suit property,” the 2<sup>nd</sup> defendant has not gone further to demonstrate what nature of loss he will suffer and that it will be substantial. A court of law cannot act on mere conjecture and neither is it its duty to fill the gaps left by the party seeking this remedy.

12. The 2<sup>nd</sup> defendant has also alleged in ground V of the notice of motion that he “has an arguable appeal with overwhelming chances of success.” The intended appeal is against the judgment of this court. It is therefore unlikely that this same court will find the said appeal to have “overwhelming chances of success.” That can only be a consideration when this court is determining an application for stay of execution pending an appeal before it. In any event, and I say so with utmost caution, I don’t see what “overwhelming chances of success” the 2<sup>nd</sup> defendant’s appeal has bearing in mind that the dispute regarding the ownership of the suit land was determined by the Court of Appeal in favour of the plaintiff way back on September 28, 2017 in Civil Appeal No 115 of 2015. Indeed, all that this court has done in its Judgment is to reinforce the Court of Appeal’s judgment. In the circumstances, to grant the orders sought herein will amount to a mischievous attempt to circumvent the Court of Appeal judgment. I am not about to do that.



13. Finally, the power to order a stay of execution is discretionary. Such discretion must be exercised judiciously and on sound basis not on the whims of the court. I see no sound basis upon which to grant the orders sought.
14. The up – shot of all the above is that the notice of motion dated November 4, 2021 is devoid of merit. It is accordingly dismissed with costs.

**Boaz N. Olao.**

**J U D G E**

**21<sup>st</sup> September 2022.**

**RULING DATED, SIGNED AND DELIVERED AT BUNGOMA BY WAY OF ELECTRONIC MAIL THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2022.**

