



Akinyi & another (Suing as the Legal Administrators of the Estate of Paul Otieno Genga - Deceased) v Genga (Sued as the Legal Administrator of the Estate of Cosma Otieno Genga) & 3 others (Environment & Land Case 43 of 2021) [2022] KEELC 14473 (KLR) (31 October 2022) (Ruling)

Neutral citation: [2022] KEELC 14473 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 43 OF 2021**

GMA ONGONDO, J

OCTOBER 31, 2022

BETWEEN

ROSE AKINYI & LENY WANJALA GENGA (SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF PAUL OTIENO GENGA - DECEASED) APPLICANT

AND

FIDELIS OTIENO GENGA (SUED AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF COSMA OTIENO GENGA) 1ST RESPONDENT

DISTRICT LAND REGISTRAR MIGORI DISTRICT 2ND RESPONDENT

DISTRICT LAND SURVEYOR, MIGORI DISTRICT 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. By a notice of motion dated April 23, 2022 and duly filed on April 26, 2022 (The application herein) through the firm of Brian Mboya and Company Advocates, the two applicants are seeking the following orders;
 - a. That, this honourable court be pleased to stay execution of the judgment dated January 31, 2022 pending hearing and determination of appeal.
 - b. That the cost of this application be provided for.
 - c. That any other/further relief that this honourable court may deem fit and proper to grant in the circumstances.



2. The application is anchored on an affidavit of eight paragraphs sworn on even date by the applicant/1st defendant, Fidelis Otieno Genga together with a notice of appeal (FOG-1) and Migori County surveyor's letter dated April 6, 2022 (FOG-2) accompanying the affidavit and grounds (a) to (f) set out on it's face. In a nutshell, the applicant's complaint is that he has filed the said notice following this court's judgment delivered on January 31, 2022. That by the aforesaid letter, the respondents/plaintiffs are on the verge of executing the judgment against the applicants hence, provoking this application.
3. By a replying affidavit of thirteen paragraphs sworn on July 21, 2022 by Rose Akinyi Genga by the 1st respondent through the firm of Nyambati and Company Advocates, the respondents, opposed the application. She deposed that the land registrar, upon obtaining this court's decree, proceeded and nullified the illegally registered titles of the subject matter of appeal in compliance with this court's orders. That thus, the judgment was executed accordingly. That this court is functus officio and the matter has been overtaken by events.
4. The 1st respondent further deposed in part that the application has been delayed inordinately having been presented six months after the delivery of the judgment. That the applicants will not suffer any prejudice or loss if the orders sought herein are declined by this court.
5. The application was heard by way of written submissions further to this court's directions of April 27, 2022; see order 52 rule 16 of the [*Civil Procedure Rules, 2010*](#).
6. Accordingly, learned counsel for the applicants filed submissions dated July 18, 2022 on July 19, 2022 providing brief background facts of the application and identified a single issue for determination namely whether the applicants deserve the orders sought in the application. Counsel discussed the issue in favour of the applicants and relied on order 42 rule 6 (2) of the Civil Procedure Rules, 2010 as well as authorities including the case of Butt-vs-Rent Restriction Tribunal (1979) KLR and RWW-vs-EKW (2009) eKLR, to buttress the submissions.
7. On the other hand, learned counsel for the respondents filed submissions dated July 21, 2022 on even date giving the background of this matter and argued that the respondents have made strides towards the realization of this court's judgment which has been executed save for costs. That this court is functus officio and that six months' delay is inordinate. Counsel relied on order 42 rule 6 (2) (supra) and [*Kenya Shell Ltd-vs-Benjamin Kibiru \(1986\) KLR 410*](#) at page 416 regarding evidence of substantial loss hence, urged this court to disallow the application.
8. In light of the entire application, the response thereto and the parties' respective submissions, the issues for determination are as contained under order 42 rule 6 (2) (supra) in respect of the cumulative conditions for grant of stay of execution namely;
 - a. That substantial loss may result to applicant unless the order is made.
 - b. That the application has been made without unreasonable delay.
 - c. That such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
9. On first condition, the applicants asserted that they are likely to suffer loss in view of the letter (FOG-02). In the case of Kenya Shell Ltd (supra), it was noted that an applicant must prove substantial loss which is the cornerstone of the court's jurisdiction for granting a stay of orders. That is what has to be prevented.



10. In the instant application, whereas it is alleged that judgment may be executed, the respondent was emphatic that judgment has been executed save for costs. So, likely substantial loss has not been proved at all.
11. As regards delay, I bear in mind order 50 rules 1, 2, 5, 6, 7 and 8 of the Civil Procedure Rules, 2010 in relation to the date of delivery of judgment and the application. The respondents submitted that eight months' delay is inordinate in the circumstances.
12. In the case of *Andrew Kiplangat Chemaringo-vs-Paul Kipkorir Kibet (2018) eKLR*, the Court of Appeal held that an applicant has to give a plausible and satisfactory explanation for the delay in order to attract orders sought in an application; see also *Raphael Musila Mutiso and 3 others-vs-Joseph Ndava Nthuka and another (2019) eKLR* on delay for even a day without any explanation.
13. Concerning security, no party is exempt from depositing the same in court but it is at the absolute discretion of the court; see *Doshi Iron Mongers Ltd-vs-Kenya Revenue Authority and another (2020) eKLR*.
14. Plainly, an appeal is deemed duly filed herein as per the notice of appeal (FOG-1) and as stipulated in order 42 rule 6 (4) (supra. In Butt case (supra), it was noted that stay of execution is within the discretion of the court and depends on particular circumstances for and against the same.
15. This court has the mandate to grant interim preservation orders which include the stay execution sought in the application as envisaged under section 13 (7) (a) of the *Environment and Land Court Act, 2015 (2011)*. In the case of *Board of Governors, Moi High School, Kabarak and another-vs-Malcolm Bell (2013) eKLR*, the Supreme Court of Kenya held that stay of execution is tailored to safeguarding the character and integrity of the subject matter of appeal pending the resolution of contested issues. Therefore, the applicant is at liberty to move the Court of Appeal appropriately.
16. Besides, in the case of *Malindi Law Society-vs-Law Society of Kenya, Nairobi Branch and 5 others (2017) eKLR*, it was held that stay of existing orders cannot be a matter of course. It rests upon genuine conditions, grounds, merit and dispatch. In the obtaining circumstances, the applicant has not demonstrated substantial loss and the inordinate delay in mounting the application, is not explained at all. So the application is unmeritorious.
17. Wherefore, the application dated April 23, 2022 and duly filed on April 26, 2022, is hereby disallowed with costs to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT HOMA BAY THIS 31ST DAY OF OCTOBER, 2022.

G.M.A ONG'ONDO

JUDGE

Present;

- a. Applicant-Present. No appearance for him.
- b. Respondents –Present. No appearance for them
- c. Okello and Fiona, court assistants.

