



REPUBLIC OF KENYA



**Mukoleli v Wasike & 2 others (Environment & Land Case  
62 of 2018) [2022] KEELC 14668 (KLR) (31 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14668 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 62 OF 2018  
EC CHERONO, J  
OCTOBER 31, 2022**

**BETWEEN**

**JAMES BARASA MUKOLELI ..... APPLICANT**

**AND**

**DAVID LUSWETI WASIKE ..... 1<sup>ST</sup> RESPONDENT**

**REUBEN MANYONGE MABONGA ..... 2<sup>ND</sup> RESPONDENT**

**CONCEPTA NASIMIYU WEFWAFWA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction**

1. By a notice of motion application dated September 19, 2022 brought under certificate of urgency, the 2<sup>nd</sup> defendant/applicant seeks the following orders;
  - a. (Spent)
  - b. That it pleases the honourable court to grant stay of execution of the decree herein pending hearing inter-partes of this application
  - c. That there be a stay of execution of the decree herein pending hearing and determination of the Court of Appeal case No 4 of 2022 at Kisumu
  - d. That costs be in the cause
2. The application is supported by the affidavit of the applicant as well as grounds apparent on the face of the said application.



### **Applicant's Summary of Facts**

3. In his affidavit, the 2<sup>nd</sup> respondent/applicant deposed that he was adjudged by this honourable court to transfer 4 acres of land to the respondent herein from his portion of land which decision aggrieved him and has lodged an appeal to the Court of Appeal at Kisumu being CA No 4 of 2022. He stated that his moveable properties and that of his son were proclaimed and attached by Timpech Auctioneers on September 14, 2022, in execution of the decree herein.
4. He further stated that given the nature of the dispute if the demarcation and attachment are not stayed, he will suffer substantial loss of eviction, loss of property and all his investments on the suit land yet he is a retired teacher.
5. The applicant also stated that if the stay of execution order is not granted and his intended appeal becomes successful, the same will be rendered nugatory and academic.
6. He stated that he has given a proposal to settle the taxed costs in installments of Kshs 20,000/ per month as security in pursuit of his appeal. He averred that the respondent will not suffer prejudice or hardship if the orders sought are granted. He attached a copy of the notice of appeal and the proclamation.

### **Respondent's Summary of Facts**

7. The application is opposed by the respondent vide a replying affidavit sworn on October 12, 2022. According to the respondent, the impugned judgment was delivered on December 9, 2021 and on December 15, 2021, the applicant served him with a notice of appeal. The respondent stated that the application by the applicant is brought in bad faith and that that applicant is guilty of laches as the application is brought after inordinate delay. The respondent further contends that he is entitled to the enjoyment of the fruits of his judgment and that execution towards the transfer of 4 of the suit land to him has not commenced yet.

### **Legal Analysis and Decision.**

8. Order 42 rule 6 (2) [\*CPR\*](#) provides the grounds upon which an applicant must meet before an application for stay pending appeal can be granted. The order provides thus;
  - "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 as such decree or order as may ultimately be binding on him has been given by the applicant."
9. What can be gleaned from order the provisions order 42 rule 6 (2) is that before an application for stay is granted, such an application must be brought without unreasonable delay. The second condition is that the applicant will suffer substantial loss unless the application is granted and finally, the applicant must give such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
10. From proceedings and the supporting affidavit, the impugned judgment was delivered by this honourable court on December 9, 2021 while the application herein was filed on September 19, 2022. It took the applicant a whopping 9 months from the delivery of the judgment to bring the application.



The applicant has not given any explanation for the delay. In the absence of any reasonable explanation, I find this application has been brought with unreasonable delay.

11. On the second ground, the applicant stated that his moveable properties have been proclaimed and attached and if the demarcation and attachments are not stayed, he will suffer substantial loss of evictions, loss of property and all his investments on the suit land. Substantial loss has been defined by the superior courts to mean that loss the applicant would suffer if the application is disallowed and the applicant subsequently becomes successful in the appeal. The courts are required to balance between the rights of the respondent to enjoy the fruits of his judgment and that of the intended appellant which is yet to crystalize. The superior courts have given guidelines on the application of the three grounds for stay pending appeal. In money decree, the applicant must demonstrate that the respondent is a person of straw and would not pay the decretal sum if the appeal succeeds. In case of an immoveable property, the applicant must demonstrate that the respondent would dispose of, sale charge, or alienate the same to third parties thereby rendering the intended appeal nugatory.
12. The applicant has not made any allegations to the effect that the respondent is likely to alienate the four acres which is the subject of this application before the intended appeal is heard and determined. That is the only way the intended appeal would be rendered nugatory. Execution of a decree or order is a lawful process and cannot amount to substantial loss unless caused by other factors or state of affairs incidental thereto. That is what F Gikonyo J described in the case of *Geoffrey Muriungi & another- v- John Rukunga M'imonyo suing as legal representative of the estate of Kinoti Simon Rukunga (Deceased)* (2016) eKLR where he held as follows;

"----the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as "reducing the successful appellant into a pious explorer in the judicial process". The said state of affairs is what is referred to as "substantial loss" within the jurisprudence in the High Court, or " rendering the appeal nugatory" within the judicial precincts of the Court of Appeal; and that is the loss which is sought to be prevented by an order for stay of execution pending appeal."
13. I agree with the reasoning by the learned judge in the decision above that execution, which is a lawful process, cannot amount to substantial loss in itself. The applicant must go further and show the state of affairs that will cause substantial loss unless stay of execution is not granted. Put it differently, if execution is allowed to proceed and the respondent is issued a certificate of title in respect to the 4 acres adjudged by the court and holds it until the intended appeal is heard and determined, substantial loss would not arise.
14. In view of the aforementioned reasons, I find the notice of motion application dated September 19, 2022 lacking merit and the same is hereby dismissed with costs.

It is so ordered

**READ, SIGNED AND DELIVERED VIRTUALLY THIS 31ST OCTOBER, 2022**

**HON. E.C. CHERONO**

**ELC JUDG**

In the presence of;

**Mr. Maloba H/B Sichangi for 2nd defendant**

**2nd defendant---absent**



plaintiff/advocate---absent

