



**Bor v Chebusit (Environment and Land Appeal E001 of 2020)
[2022] KEELC 14444 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14444 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND APPEAL E001 OF 2020
MC OUNDO, J
OCTOBER 27, 2022**

BETWEEN

JOSEPH KIPROTICH BOR APPLICANT

AND

TABUTANY CHEPKOECH CHEBUSIT RESPONDENT

RULING

1. Before me for determination is an Application via a Notice of Motion dated February 18, 2020 brought under the provisions of Order 51 Rule 1, Order 42 Rule 6 of the *Civil Procedure Rules*, Sections 1A, 1B, 3, 3A and 63 (e) of the *Civil Procedure Act*, and all other enabling provisions of the law where the Applicant seeks for Orders of stay of execution of the judgement dated the February 10, 2022, pending the hearing and determination of their intended Appeal.
2. The Application is supported by the grounds set on its face as well as on the sworn affidavit of Joseph Kiprotich Bor the Applicant herein, sworn on the February 18, 2022.
3. The said Application was opposed *vide* the Respondent's Replying Affidavit dated and sworn on the March 17, 2022 in which the Respondent sought for the said Application be dismissed with costs as the Applicant is yet to comply with the trial court orders of September 21, 2021. That the Applicant has been intolerant towards the court orders and staying of execution will be encouraging the illegality. That the Application does not meet the threshold for grant of the said orders as envisaged under the provisions of Order 42 Rule 6(2) of the *Civil Procedure Rules*.
4. By consent, directions were taken on March 23, 2022 to canvass the Application by way of written submission.



The Applicant's submissions.**

5. The Applicant's submission was to the effect that upon pronouncement of the judgment on February 10, 2022 that the Applicant be evicted from the suit land, they had expeditiously filed a Notice of Appeal to the Court of Appeal on an equal date. That the Applicant had an arguable appeal with high chances of success and if stay was not granted, the Appeal would be rendered nugatory and the Applicant would suffer irreparable loss and damage since they had been in occupation of the suit property since 1971. That the Respondent would not suffer any prejudice if stay of execution of the judgment were to be granted. That the Record of Appeal had already been lodged and parties were awaiting the court's directions as to the hearing.
6. That the Application was compliant with the provisions of Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules* and that they were alive to the holding by the Court of Appeal in the case of *Butt vs. Rent Restriction Tribunal* [1979] eKLR which had set out the principles to be considered on an Application such as this.
7. That the goal of an Application for stay of execution was to protect the interest of the Appellant whilst exercising his right of appeal, by preserving the subject matter in question. That the court ought to ensure that this right is not taken because he could not be compensated by an award of costs. That were the orders of stay of execution in the present circumstance not issued, the Applicant stood to suffer loss as the execution would lead to demolition of his matrimonial home.
8. That substantial loss did not mean normal and ordinary loss which every judgment debtor is subject to when he loses a case. That in this case the Applicant would be evicted from his matrimonial home which would then be demolished. This was not a normal and ordinary loss but the substantial loss that could not be compensated with an award of damages.
9. That the intended Appeal was arguable to the effect that the trial judge had erred in law and in fact in failing to acknowledge the Applicant's long occupation and use of the land and the fact that there had been created a constructive trust which was an overriding interest recognized by the law. That the court had also failed to make a finding that the Respondent's suit was statutorily time barred thus there was a miscarriage of justice. Reliance was placed on the decided case in *Kenya Airports Authority vs Mitu Bell Welfare Society and Another* [2014] eKLR.
10. The Applicant further submitted that were the orders so sought not granted, his Appeal would be rendered nugatory as he would be evicted from his matrimonial home which would then be demolished. That it was an invite to the court to ensure that in the intervening period, the apprehended harm did not take place so that the Appeal would not be rendered an academic exercise and valueless. Reliance was placed on the decided case in *Githunguri vs Jimba Credit Corp Limited* [1988] KLR 838
11. The Applicant submitted that his Application was filed without undue delay and that he was willing to furnish security and abide by the conditions and/or directions that the court would impose. The Applicant sought for his Application to be allowed with the orders as prayed.

The Respondent's submissions.

12. The Respondent, in opposition to the Applicant's Application framed their issues for determination as follows;
 - i. Whether the Applicant has met the threshold for grant of stay of execution pending Appeal.
 - ii. Whether the Appellant/Applicant has an arguable case with a high chances of success.



- iii. Who should bear the costs of the Application?
13. On the first issue for determination, the Respondent submitted that the Applicant's Application had not complied with the provisions of Order 42 Rule 6(2) of the *Civil Procedure Rules*.
 14. That the Applicant had not demonstrated the substantial loss he would suffer keeping in mind that his title had been revoked by the trial court and confirmed by the judgment of this court sitting as the first Appellate Court. That the Respondent was now the absolute and indefeasible owner of the suit parcel of land pursuant to the provisions of Section 26 of the *Land Registration Act*. That were the Appeal to succeed, the Applicants would not suffer any substantial loss as the registration of the Respondent as proprietor of the suit land could easily be reversed. That no evidence had been brought forth by the Applicant that his residence was in danger of being demolished and therefore the court could not make orders based on guess work. Reliance was placed on the decided case in *Emily Tesot & 2 others vs David Kiptarus Ruto & 2 others* Kitale ELC No. 152 of 2007.
 15. The Respondent further submitted that the Application was not filed without undue delay and it was not until the Respondent sought to execute the judgment of the court, that the Applicant woke up from slumber and filed the present Application. That Counsel for the Applicant was present in court when judgment was delivered and never sought for stay of execution. That the current Application was an afterthought.
 16. On the third limb on the issue of security for due performance of the Decree, it was the Respondent's submission that the Applicant had not furnished any security for the same.
 17. The Respondent further submitted that the Applicant's appeal had no chance of success for reasons that the Applicant did not dispute that his title was fraudulently obtained. His registration was subsequently struck out by the trial court and upheld by this court sitting as an Appellate Court of the first instance.
 18. On the issue of costs, the Respondent submitted that provisions of Section 27(1) of the *Civil Procedure Act* were clear, that the Application had no merit and the same ought to be dismissed with costs.

Determination.

19. I have considered the Applicant's Application for stay of execution of this court's judgement dated the February 10, 2022 pending the hearing and determination of his intended Appeal. I have also considered the authorities, as well as the reasons given for and against the said Application.
20. The Applicant contends that he would suffer substantial loss if stay is not granted because he had been in possession and occupation of the suit premises since 1971 and that his matrimonial home was therefore likely to be demolished by the Respondent were he to be evicted therefrom. That his Appeal had overwhelming chances of success and would be rendered nugatory were the orders for stay of execution thus not granted.
21. The Respondent on the other hand has contended that the Applicant's Application had not complied with the provisions of Order 42 Rule 6(2) of the *Civil Procedure Rules* and neither had he demonstrated that his Appeal had overwhelming chances of success keeping in mind that his title had been revoked by the trial court and confirmed by the judgment of this court sitting as the first Appellate Court.



22. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the *Civil Procedure Rules* which stipulates as follows:

“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 subrule (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.”

23. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the *Civil Procedure Rules* to which :

- i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
- ii. The Application is brought without undue delay and
- iii. 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.

24. I find issues for determination arising therein namely:

- i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
- ii. What orders this Court should make

25. I have considered the submission of both the Applicant and the Respondent. For the Applicant to succeed in the present Application the onus was on him to satisfy the conditions as set down under order 42 Rule 6 of the *Civil Procedure Rules*. Indeed the purpose of stay of execution is to preserve the substratum of the case. In the case of *Consolidated Marine. vs. Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi), the Court held that:-

“The purpose of the Application for stay of execution pending Appeal is to preserve the subject matter in dispute so that the right of the Appellant who is exercising his undoubted right of Appeal are safeguarded and the Appeal if successful is not rendered nugatory”.

26. The Applicant’s contention is that if the stay orders were not granted, he stood to suffer substantial loss in that his matrimonial home was at a risk of being demolished wherein he would be evicted. I have



considered the Applicant's submissions vis a vis the Respondent's submission and find that there is no iota of evidence herein forwarded that suggest that the impugned home is at risk of being demolished or that the Respondent intends to alienate the said suit premises beyond the reach of the Applicant in one way or another.

27. I am also alive to the nature of the orders sought by the Applicant. Stay of execution order is by its very nature discretionary and equitable. I find that indeed as was held in the case of *Charles Wabome Getbi vs. Angela Wairimu Getbi* [2008] eKLR, that it was not enough for the Applicant to state that he lived on the suit land from 1971 and that he would suffer substantial loss. It was obligated of him to go further and show the substantial loss that he stood to suffer if the Respondent executed the decree keeping in mind that he had not proved ownership of the suit land.
28. The Court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the Appeal so that his Appeal is not rendered nugatory and the interest of the Respondent who is also seeking to enjoy the fruits of her judgment. In other words the Court should not only consider the interest of the Applicant but has also to consider, in all fairness, the interest of the Respondent who has been denied the fruits of her Judgment.
29. Indeed it was held by Kuloba, J in *Machira T/A Machira & Co Advocates vs. East African Standard* (No 2) [2002] KLR 63 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 judgment 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”.
30. On the second condition, I find that it was not in dispute that the impugned judgment was delivered on the February 10, 2022 wherein the present Application was filed on the February 22, 2022, I thus find that the said Application is brought without undue delay.
31. The Provisions of Order 42 Rule 6(2)(b) of the *Civil Procedure Rules* also stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. The Applicant has not furnished any security but has pledged to furnish any such security, as the court may direct, for due performance.
32. Lastly, the Applicant has pleaded that he has an arguable Appeal which has a high chance of success. It is important to point out that an arguable Appeal is not one that will necessarily succeed but one which raises triable issues. For the Applicant to succeed on an Application for stay of execution based on this line of argument, he must demonstrate that he has an arguable Appeal. The Applicant has not filed and/or annexed his Memorandum of Appeal which would have been of assistance in discerning whether or not his intended Appeal was arguable. It is thus trite that the merits of his intended Appeal cannot therefore be discerned from his affidavit and the court cannot go out on a fishing expedition in discerning the decision he intends to appeal against and whether or not it was arguable. Indeed the decision by the Court of Appeal in *Mwangi v Nyali Golf & Country Club* (Civil Application



E080 of 2021) [2022] KECA 455 (KLR) (18 March 2022) (Ruling) was that due to the lack of an annexed Memorandum of Appeal, the Applicant had not demonstrated any arguable ground and had therefore not satisfied the first limb of ‘arguability’. Indeed in the event that the Applicant succeeds in his intended Appeal, then he shall be allowed occupation on the disputed land and his Appeal would not be rendered nugatory.

33. The grant of stay remains a discretionary order that must also take into account the fact that the Court ought not to make a practice of denying a successful litigant the fruits of their judgment. I find no merit in the orders as prayed and proceed to dismiss the Application dated the February 18, 2022 with costs.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 27TH DAY OF OCTOBER 2022

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

