



Mwongo v District Land Adjudication Officer Tigania West & 6 others (Environment & Land Petition 15 of 2019) [2022] KEELC 13648 (KLR) (19 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13648 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND PETITION 15 OF 2019**

CK NZILI, J

OCTOBER 19, 2022

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA**

BETWEEN

DAVID MUNGIRIA MWONGO PETITIONER

AND

**DISTRICT LAND ADJUDICATION OFFICER TIGANIA WEST 1ST
RESPONDENT**

LAND REGISTRAR TIGANIA/IGEMBE 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

ROSE MWENDWA MUGAMBI 4TH RESPONDENT

ISAIAH IGWATHU 5TH RESPONDENT

ELIAS MWENDA M'MINYORI 6TH RESPONDENT

STANLEY KAIBUNGA 7TH RESPONDENT

RULING

1. The court is asked to stay execution of the decree issued on June 22, 2022 pending the hearing and determination of the intended appeal.
2. The reasons for the application are set out on the face of the application and the supporting affidavits sworn by Stanley Kaibunga the 7th applicant for and on behalf of the 4th, 5th & 6th respondents on May 12, 2022 and July 20, 2022 respectively.



3. The application is opposed by the decree holder by the grounds of opposition dated July 14, 2022 and a replying affidavit sworn on July 14, 2022 by Stanley Mugambi Meeme. Mr Kieti for the 1st – 3rd respondents did not wish to oppose the application.
4. With leave of court parties agreed to canvass the application through written submissions dated August 2, 2022.
5. Order 42 rule 6 of the Civil Procedure Rules requires a party seeking for stay of execution pending appeal to demonstrate substantial loss, provide security for the due execution of the decree should the appeal fail and to file the application without undue delay. The court is also enjoined under section 1A & 1B of the Civil Procedure Act and article 159 of the Constitution to consider if it is in the interest of justice to grant the orders sought.
6. While considering order 42 rule 6 of the Civil Procedure Rules the court in RWW v EKW (2019) eKLR held that the purpose of stay pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising an undoubted right of appeal are safeguarded, the appeal if it succeeds is not rendered nugatory and that while doing so the court should also weigh his right against the success of a litigant who should not be deprived of the fruits of his judgment.
7. A party has to demonstrate substantial loss through tangible and cogent evidence other than merely stating that there is likely to be execution given execution is a legal process. The overriding objective of the court is to facilitate the just, expeditious, proportionate and affordable resolution of appeals.
8. Applying the above principles, the applicants herein filed this application on May 19, 2022 after the judgment was delivered on March 30, 2022 and before the decree was extracted on June 22, 2022.
9. Coming to the aspect of substantial loss the applicants state they have been on the subject land for over 12 years, with permanent buildings therein as per the attached photographs marked SK III (a) (b) & (c), In the supporting affidavit the applicants have attached annexures SK (10) (a) & (b) showing that the 7th applicant has been operating timber yard, and occurrence book extracts and reports marked SK (v), (vi) & (vii) showing a threatened eviction, damage to crops and removal of the fence by the respondent.
10. In the replying affidavit sworn by the respondent dated July 14, 2022 he stated he was the one in occupation of the land since time immemorial and that he was a landlord of Stanley Meeme. That the applicant Isaiah Igwathu used his powers to rent part of the land to a local church who put up a temporary structure which he has been objecting to and has been demolished and that the photographs marked SK (III) (a) & SK1 (a) & (b) shows a demolished church and a banana plantation belonging to him.
11. Further the respondent stated the photograph marked SK (III) (b) was a storey building belonging to George Mwitwa Igweta of LR No XXXX who is his neighbours hence the said photographs were misleading.
12. The respondent averred that after extracting the decree and serving it upon relevant authorities, he took vacant possession and started permanent and ongoing developments as per photographs attached as SKM (04). He therefore urged the court to find the application overtaken by events. He reiterated that the court could not stay an event from happening when it has already happened or taken place.
13. In a rejoinder, the applicants admitted the respondent's developments as per the photos but state that they were carried out after the July 9, 2022, by use of force and with hired goons who kept them at bay as they were destroying their developments.



14. The applicants have submitted it was not mandatory to make an application for stay during the delivery of the judgment and the failure to do so did not negate the right to make a formal application for stay.
15. The applicants submit the judgment declared subdivisions of LR No XXXX Uringu I into LR No's XXXX, XXXX, XXXX, XXXX in favour of the 4th-7th respondents invalid and illegal, which are occupied by the 4th-7th applicants herein as per the photos attached and they are now threatened with eviction, hence substantial loss and damage was imminent ,for the status quo will be altered if new buildings come up, alienation of the parcels was likely to affect some third parties which will complicate the matrix and be irremediable.
16. Reliance was placed on *Sarah N Sakwa v Elizabeth Wamwanyi t/a Namukhosi Ltd & another (2017) eKLR* on the proposition that the right of appeal is a constitutional right that actualizes the right to access justice, protection and benefit of the law.
17. It was submitted that if execution completed, the entire parcels will revert to Uringu 1 XXXX and allow the petitioner or respondent to do with the land the way it pleases him hence rendering the appeal nugatory and cause substantial loss to the application as held in *Joseph Kinyua & 2 others v Robert Kimathi (2020) eKLR & Christopher Njeru v Eugenio Njagi M'Chege (2019) eKLR*.
18. As concerns the alleged falsehoods on who among the parties was in occupation, the applicants submitted the respondent has come to court with unclean hands, lacks candor, does not deserve the court's discretion as held in *Evangeline Kanyua Mwiandi v Gilbert Kinyua (2020) eKLR* that whoever engaged in tactics aimed at frustrating the case through delaying tactics may not deserve stay orders.
19. On the issue of delay, the applicants submitted that at the time of delivery of the judgment, the court was away from the court station hence was unable to get the notice of appeal signed within the set timelines and the time was not unreasonable.
20. Regarding security, due to the circumstances of this case it was submitted that parties do not require security since if the appeal does not succeed the applicants would just vacate the land. Reliance was placed on *Okutuyi v Medical Practitioners & Dentist Board (2008) eKLR*.
21. On whether the notice of appeal was valid the applicants submitted those were issues to be raised at the appellate court but nevertheless stated it was good and valid given the court file was inaccessible until the court resumed duty which was beyond the applicants control.
22. The issue for the court's determination is whether the applicants have satisfied the requisite conditions to be entitled to stay of execution pending the hearing given the foregoing case law.
23. The effect of the judgment and decree dated June 22, 2022 was to invalidate land Parcel No's XXXX, XXXX, XXXX and XXXX, and the resultant subdivisions of Parcel No XXXX Uringu 1.
24. It is not in dispute that the applicants herein were issued with title deeds going by the answer to the petition dated December 14, 2020 and certificates of search attached to the list of documents for LR No Nyambene/Urinu/XXXX, XXXX & XXXX issued on July 7, 2017.
25. Copies of the title deed for the same were also attached to the replying affidavits by the 6th & 7th applicants affidavit sworn on August 13, 2019 in opposition to the application dated June 16, 2019 by the petitioner.
26. As regards who has been in occupation of the suit premises, whereas the applicants aver they are the ones on their suit parcels, the respondent avers he has all along been in occupation on his ancestral land



- and that the applicants are merely in occupation on paper or map and not on the ground except the alleged church now abandoned and appearing on the photographs attached.
27. Further, the respondent has categorically stated the photos attached are reflect buildings belonging to the applicants. In a rejoinder through a further affidavit, the applicants admit the respondent was in occupation after using force to gain entry with effect from July 9, 2022 and destroying their buildings which is now a complaint before the police.
 28. Looking at previous pleadings in this matter by the parties, an order of inhibition was issued on May 5, 2021, stopping any dealings over LR No's Nyambene/Uringu 1/XXXX, XXXX, XXXX & XXXX.
 29. The photographs attached by the applicants differ markedly with the ones previously produced by a further list dated Novemeber 12, 2021 making doubt in the mind of the court as to whether the two relate to the same subject matter.
 30. Therefore, due to the rival positions taken, the court is unable to establish with certainty for lack of tangible and cogent evidence what developments and loss or damage is likely to be occasioned by the individual applicants since none of them have given details and particulars of any specific developments in their respective titles to land.
 31. In my mind it is not enough to allege substantial loss and damage and fail to substantiate the same over and above the ordinary loss as held in *Charles Wabome Gethi v Angela Gethi (2008) eKLR* & *James Wangalwa & another v Agnes Naliaka Cheseto (2012) eKLR*.
 32. Coming to the issue of the implications of the changes likely to occur to the title deeds already invalidated and merger with LR No Nyambene Uringu 1/XXXX, as noted above, inhibition orders were imposed by the court.
 33. The applicants have not told this court if the Land Registrar has recalled the title deeds in their possession for cancellation and if not so, whether the petitioner has lodged the decree and or initiated the process of invalidating their title deeds.
 34. Further, since the applicants possess the title deeds, it cannot be true as submitted by counsel for the applicants that going by the holdings by Visram J in *Okutyi* {supra} and Yano J, in *Sakwa* (supra) security is not applicable in the circumstances of this case.
 35. The applicants are aware that they hold the title deeds now recalled in the judgment. One would have expected as a show of good gesture an offer to deposit the same with the court pending the hearing and determination of the intended appeal.
 36. In *Arun C Sharma v Ashana Rainkundalia t/a Raundalia & Co Advocates & 2 others (2014) eKLR* the court held a security is not aimed at punishing the applicant but to serve the purpose of binding the applicant to the due performance of such decree should the appeal fail since he was already a judgment debtor in relation to the respondent.
 37. In *Halal & another v Thorton & Turpin (1990) eKLR*, the Court of Appeal held that in making the orders of security the court ought not to place the plaintiff in a position in which should the appeal fail, it would be difficult for the plaintiff to realize the fruits of its litigation due to inadequacy of the security ordered.
 38. In this application, the applicants have not offered the security but state it was unnecessary. It is not for the court to impose the security but only after an offer of the same is offered as a sign of good faith and for the expeditious hearing on the appeal as held in *Foci Motorcycle Co. Ltd Ann Wangui & another (2018) eKLR*.



39. In *Samvir Trustee Ltd v Guardian Bank Ltd (2007) eKLR* the court held for a party to be entitled to stay it is not enough to put forward mere assertion of substantial loss and that there must be empirical or documentary evidence to support such contention.
40. In this application the court cannot consider the assertions on their face value without adequate and proper evidence of the substantial loss.
41. The applicants have also not shown their readiness and commitment to offer security for consideration by this court so as to balance if it is necessary to deny the respondent from enjoying the fruits of their judgment.
42. On the last issue of delay courts have held the circumstances of each case were conditional must be looked at since even a 14 days delay may be inordinate.
43. In this matter the reasons proffered by the two applicants are that they were awaiting the notice of appeal to be signed and the court was out of the station and could not access the court file.
44. The judgment was delivered in the presence of the applicant's counsel on record. It may be true that there was some laxity on the part of the applicants until the decree was extracted and served on the relevant government agencies. Later on, the respondent moved to take over the suit premises. Be that as it may my finding is that there was no inordinate delay in filing the application.
45. Lastly, looking at the circumstances of this application the last hurdle for the applicant to meet is whether it is in the interest of justice to grant the orders of stay.
46. The applicants have admitted that the respondent has already taken possession of the suit premises. In *RWW v EKW (2019) ek* the Court of Appeal held that the court has to balance the interest of the applicants with those of the respondents.
47. Counsel for the applicants has said the respondent does not deserve court's discretion going by the decision in *Evangeline Kanyua Mwiandi* (supra) for such a striking resemblance. Having gone through the record of this file there is no evidence that the respondent fits such a description of a party who has delayed his suit and has been out to steal a match against the applicants. All the parties in this matter have been conducting themselves in a manner not suggestive that they lack condor.
48. All in all, the court finds it is in the wider interest of justice to disallow the application. It is therefore dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 19TH DAY OF OCTOBER, 2022

In presence of:

C/A: Kananu

Thuranira for Ondari for respondent

Mr. Kieti for 1st-3rd respondents

Murango Mwenda for applicant

HON. C.K. NZILI

ELC JUDGE

