



REPUBLIC OF KENYA



**Okore v Okore & another (Environment & Land Case 126 of 2014)
[2022] KEELC 15056 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15056 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 126 OF 2014
A OMBWAYO, J
NOVEMBER 24, 2022**

BETWEEN

JOSEPH MBOYA OKORE PLAINTIFF

AND

GORDON OLUOCH OLIMA 1ST DEFENDANT

MONICA ATIENO MORO 2ND DEFENDANT

JUDGMENT

1. The defendants/applicants herein filed a notice of motion application dated May 12, 2022 pursuant to sections 1A, 1B, 3, 3A of the [Civil Procedure Act](#) and order 42 rule 6 and order 51 rule 1 of the [Civil Procedure Rules](#) seeking orders that:
 1. That this application be certified urgent and it be heard *ex parte* in the first instance.
 2. That pending the hearing and determination of this application, this honourable court be pleased to issue an order of stay of execution of the Judgment dated March 24, 2022.
 3. That pending the hearing and determination of the appeal filed herein this honourable court be pleased to issue an order of stay of execution of the Judgment dated March 24, 2022.
 4. That costs of this application be provided for.
2. The application was based on grounds that the applicant is the registered owner and sole proprietor of land parcel number kisumu/manyatta“B”/91. That on July 5, 2014, the 1st applicant entered into a sale agreement with the 2nd applicant for the sale of the suit parcel and upon completion of payment, the land was registered in the name of the 1st applicant on January 13, 2015.
3. It is averred that the applicant being wholly aggrieved and dissatisfied with the Judgment/order delivered on March 24, 2022, he filed an appeal as against the said decision. That unless stay is granted,



the suit parcel will be transferred into the name of the respondent and this will render the appeal nugatory.

4. The applicants stated that he is willing and ready to offer a reasonable security pending the hearing and determination of this application and he is ready to abide by the conditions that this court may direct. That it would be just and prudent to grant the orders sought until the appeal is heard and determined.
5. The application was supported by the affidavit of Gordon Oluoch Olima which affidavit relied on the grounds set in the application. This matter was placed before me and i directed that the respondent to file a reply within 7 days and parties to file and exchange written submissions. I have perused the file and do confirm that parties failed to comply with the directions given by the court.

Analysis and Determination

Order 42 rule 6 of the [Civil Procedure Rules](#) stipulates: -

- “ 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 orders 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 1st 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.
6. This court is therefore tasked to consider whether the defendants/applicants have met the conditions set out in order 42 rule 6 of the [Civil Procedure Rules](#). On whether substantial loss may result to the defendants/applicants unless stay is granted, the purpose of stay of execution is to preserve the substratum of the case.
7. In the case of consolidated [Marine v 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”.
8. In the case of [RWW v EKW](#) [2019] eKLR , the court held that;

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who



should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellant with those of the respondent.”

9. The status quo of this suit is land parcel number Kisumu/manyatta ‘B’/91 which the 1st defendant/ applicant contends that he would suffer substantial loss if stay is not granted owing to the fact that this court directed the district land registrar to alter the register to reflect the name of the plaintiff/ respondent as the registered owner of the suit parcel.

10. Substantial loss was clearly defined in the case of Mukuma v Abuoga [1988] KLR 645 where their lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

11. Pursuant to the Judgment delivered on March 24, 2022, this court ordered that the plaintiff had met the requirements for the declaration of extinction of the registered proprietor’s rights or interests in the suit property and declared the said interests be registered in the name of the plaintiff. the court further ordered that the names of the defendants be deleted from the register and in its place the plaintiff’s name be registered as the owner and proprietor of the suit parcel. this court is of the view that the interests of the defendants/applicants need to be considered as he seeks to preserve the status quo pending the hearing and determination of the appeal so that the appeal is not rendered nugatory. This court also needs to consider the interest of the plaintiff/respondent who is seeking to enjoy the fruits of his Judgment.

12. I have established that the 1st defendant /applicant has failed to show the substantial loss that he would suffer if the order of stay is not granted as no sufficient reason has been given to enable the court grant the orders sought.

13. On the condition of whether the application is brought without undue delay, it is clear that judgment in this matter was delivered on March 24, 2022 and the instant application was filed on May 12, 2022 which is 47 days later after delivery of the Judgment. This court is of the view that the application was filed after the statutory period of filing stay of execution pending appeal had lapsed.

14. On the issue of whether there should be security, the defendants/applicants have stated that they are willing to provide security as shall be directed by the court. In the case of Aron C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates the court held that:

“The purpose of the security needed under order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. it is not to punish the judgment debtor ... civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

15. The Court of Appeal in Butt v Rent Restriction Tribunal [1982] KLR 417 gave guidance on how discretion should be exercised as follows:



1. “The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The court in exercising its powers under order xli rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
16. I am guided by the above case and do find the defendants/ applicants has not met the threshold set out under order 42 rule 6 and therefore do find that the application lacks merit and is hereby dismissed with costs to the plaintiff/respondent.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 24TH DAY OF NOVEMBER 2022.

A.O OMBWAYO

JUDGE

