



**Patel v Kenya Railway Corporation & 2 others (Environment & Land Petition
E006 of 2021) [2022] KEELC 14995 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14995 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND PETITION E006 OF 2021
A OMBWAYO, J
NOVEMBER 24, 2022**

BETWEEN

BABUBHAI CHAGANBHAI PATEL APPLICANT

AND

KENYA RAILWAY CORPORATION 1ST RESPONDENT

NEW KISUMU DISTRICT COOPERATIVE UNION LTD 2ND RESPONDENT

NATIONAL LAND COMMISSION 3RD RESPONDENT

RULING

1. Babubhai Chaganbhai Patel hereinafter referred to as the applicant has come to court *vide* notice of motion dated July 20, 2022 seeking orders that there be a stay of execution of the judgment dated July 15, 2022 and decree issued by this honorable court pending the hearing and determination of the intended appeal and that the costs of this application be provided for.
2. The application is based on the facts that judgment in this matter was delivered on July 15, 2022 wherein the applicant's petition was dismissed with costs to the cross-petitioner and the 1st respondent's cross-petition allowed.
3. This honorable court further made a declaration that the 1st respondent is the rightful owner of land parcel No Kisumu municipality block 3/121 and issued an order compelling the 3rd respondent to cancel the certificate of lease held by the applicant and 2nd respondent and register the 1st respondent as the proprietor.
4. The applicant was also ordered to vacate the suit parcel of land upon being served with adequate notices by the 1st respondent and the relevant government stakeholders to enable the 1st respondent proceed with demolitions on the said parcel of land for purposes of rehabilitation of the Kisumu port.



5. The applicant being aggrieved by the whole decision of this honorable court preferred an appeal to the court of appeal.
6. The applicant believes that he has an arguable appeal with high probability of success. The applicant has made massive investments on the suit parcel of land that runs to hundreds of millions of shillings. Unless restrained by this court, the 1st respondent will proceed with the execution process.
7. The applicant is now apprehensive that if the 1st respondent proceeds to execute the said judgment, the intended act will be detrimental to him as he stands to lose his livelihood which loss may not be compensated should the appeal be successful. According to the applicant, If the orders sought herein are not granted in the interim, this application and the applicant's intended appeal will be rendered nugatory.
8. The applicant is willing to comply with any direction which this honorable court may make to expedite the hearing of the intended appeal.
9. The applicant contends that this application has been made without unreasonable delay hence the application ought to be granted in the interest of equity and justice.
10. The 1st respondent filed a replying affidavit whose gist is that the applicant failed to demonstrate substantive loss he shall suffer should the orders sought not be granted. Moreover, that the applicant has failed demonstrate any prejudice he is likely to suffer and that in converse, the respondent will suffer prejudice.
11. The respondent further states that know that vide plan of KUR & H FR No 43/53 and maps, the suit land Kisumu municipality block3/121 falls within the first respondents' industrial parcels and that the allegedly demolished wall had encroached on a railway diamond compromising safety and train operations between the new Kisumu station and the port line. The respondent attached copies of FR No 43/53, maps classical model of safety triangle at level crossing and the level crossing engineering manual)
12. According to the deponent, the first respondents are entitled by law under the [Kenya Railways Act](#) Cap/ 397 to construct and maintain among other accommodations, railway level crossing on both public and private roads in the manner described both in the Act and the Railways and Harbours Engineering Manual Volume 1 (1962) a copy of an extract from the said manual and a graphic illustration of a visibility diamond were annexed herein. That at the said crossing, there is a mandatory legal requirement of the maintenance of what is called the visibility diamond stretching 300 feet on each of the four directions along the diagonals of the crossing. The law prohibits any construction or erection of any structures and even growth of any plants growing beyond 9 inches within the visibility diamond. The aim of this legal requirement is to maintain a distance standard visibility that will enable a motorist, when he is at least 300 feet from the crossing, to see the leading component of the train when it is also at least 300 feet from the crossing and equally the locomotive driver.
13. That the alleged suit property despite being the first respondents' industrial parcel, the premises and wall were within a visibility diamond" on a rail/road level crossing add that if indeed the petitioner acquired title to such land and went ahead to erect a storeyed building without the approval of the first respondents' managing director then the said act were both illegal and created a danger to the general public, motorist and even the locomotives using the level crossing .
14. According to the deponent, if any structures are erected on the said "visibility diamond" without the approval of the managing director, the first respondent would be entitled to have such structures removed which endanger safety at the level crossing and the petitioners would not be entitled to any



compensation. That the suit parcel falls on the right-hand side of Busia road and accessible from Sabuni road though on the ground, the suit parcel had direct access from class B1 which is 60m wide and on the upper side it neighbours the new Kisumu passenger terminus which is under construction.

15. The respondent argues that the applicant has failed to demonstrate the substantive loss to be suffered if stay of execution is not granted. The respondent contends further that the order sought cannot be granted as the court is functus officio. Lastly that the applicant has not demonstrated the willingness to offer security for costs.

order 42 rule 6 provides:-

- (2) The minister may, by notice in the gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as he may direct.

16. Judgment was entered on July 15, 2022 and the application made 7 days thereafter hence there is no inordinate delay in bringing this application. Inordinate delay can be described as exceeding reasonable limits. The law does not stipulate the time limit for filing such application and therefore the court has to deduce delay on the circumstances of the case.

17. On substantial loss, I do find that the applicant has not demonstrated in the affidavit what substantial loss he is likely to suffer. Substantial loss is defined as what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

18. In *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, it was observed that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

19. On security, I do find that the applicant has not offered any security to entitle him obtain a stay of execution pending appeal.

20. The upshot of the absence is that the application is dismissed with costs.

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

A O OMBWAYO

JUDGE

