



REPUBLIC OF KENYA



**KENYA LAW**  
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**Achieng v Odongo & 2 others (Environment and Land Appeal  
E019 of 2022) [2022] KEELC 14793 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14793 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL E019 OF 2022  
AY KOROSS, J  
NOVEMBER 17, 2022**

**BETWEEN**

**YUNIA A ACHIENG ..... APPELLANT**

**AND**

**MICHAEL NDEDA ODONGO ..... 1<sup>ST</sup> RESPONDENT**

**MUSA AJUMA ..... 2<sup>ND</sup> RESPONDENT**

**DORIS OKORE OWUOR ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The application that is the subject of this ruling is a notice of motion application by the appellant against the respondents dated June 20, 2022. The motion has been moved pursuant to the provisions of sections 1A, 1B and 3A of the *Civil Procedure Act* and orders 22 rule 22, 42 rule 6 and 51 rule 6 of the *Civil Procedure Rules*. She sought the following reliefs;
  - a. Spent;
  - b. Spent;
  - c. The honourable court be pleased to issue orders for stay of execution of the decree and/or judgment dated June 9, 2022 delivered by Bondo ELC Case No 36 of 2021; and
  - d. Costs be provided for.
2. The motion is based on the grounds set out on its face and on the supporting affidavit of the appellant Yunia A Achieng dated June 20, 2022.
3. The appellant contended that the trial court ordered the respondents to be registered as the proprietors of North Sakwa/Nyawita/1662 (hereinafter referred to as ‘the suit property’) for allegedly being adverse possessors. It ordered permanent injunctive orders against the appellant. The suit property is



registered in her name and her claim for trespass had been dismissed by the trial court. She was aggrieved by this judgment. It was the appellant's position that if stay of execution was not granted, she stood to suffer substantial and irreparable loss thus rendering the appeal nugatory.

4. As directed by the court, the appellant's Counsel Mr Ochieng filed his written submissions dated July 22, 2022. Counsel submitted that pursuant to the provisions of order 42 rule 6 of the Civil Procedure Rules, this court had jurisdiction to grant orders of stay of execution pending appeal. Counsel relied on the case of Kiplagat Kotut v Rose Jebor Kipngok [2015] eKLR which cited with approval the decision of Kenya Commercial Bank Limited v Sun City Properties Limited & 5 others [2012] eKLR that stated as follows;

“In an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced. ... In a bid to balance the two competing interests, the courts usually make an order for suitable security for the due performance of the decree as the parties wait for the outcome of the appeal. I do not see, why the same should not be applicable in this case.”

5. Counsel contended that it was evident from the memorandum of appeal that the appellant had an arguable appeal and if stay was not granted, there was high likelihood the respondents would execute the judgement and dispose of the suit property to the appellant's detriment. Counsel relied on the Court of Appeal decision of Mukuma v Abuoga [1988] KLR 645 where the court expressed itself thus;

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

6. It was Counsel's submission that the respondents had not established that they would be capable of compensating the appellant in the event the suit property was disposed of and the appeal succeeded.
7. Despite service of the motion, the respondents did not participate in these proceedings. Although the motion is unopposed, this court has to determine it on its own merits.
8. Having considered the pleadings and submissions, this court is of the considered view that the only issue falling for determination is whether the motion is merited.
9. My invitation to intervene on behalf of the appellant was invoked by the provisions of order 42 rule 6 (2) of the Civil Procedure Rules which provides as follows:

“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 of such decree or order as may ultimately be binding on him has been given by the applicant.”  
Emphasis added.

10. By this rule (*ibid*), an applicant who seeks stay of execution pending appeal has to satisfy that;(i) she will suffer substantial loss (ii)she has moved the court without unreasonable delay and (iii)furnish security for due performance. These principles are now an old hat and were settled in the case Butt v Rent Restriction Tribunal [1982] KLR 417.



11. The trial court rendered judgment on June 9, 2022 and the instant motion was filed on June 23, 2022; it was timeous. Counsel submitted the appellant was willing to furnish security.
12. From the record, the issue obtaining before the trial court was on ownership of the suit property. The appellant allegedly held title while the respondents were allegedly adverse possessors. Indeed, if the respondents were left to execute the decree, they may deal with the suit property in a manner that would be difficult to countermand. I am satisfied as submitted by Mr Ochieng that if the suit property is not preserved pending appeal, the appellant would suffer substantial loss. In my considered opinion, the appellant has met all the ingredients of order 42 rule 6 (2) (supra). See *Kiplagat Kotut v Rose Jebor Kipngok* (supra) and *Mukuma v Abuoga* (supra)
13. I agree with Mr Ochieng that the purpose of stay pending appeal is to preserve the substratum of the case. Preservation in land matters is paramount and such donated powers have to be exercised with judicious discretion. See *RWW v EKW* [2019] eKLR, where the court stated thus:

“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.”
14. As submitted by the Counsel, it is not the purview of this court to go into the merits of the appeal in order to establish if stay should be granted. See *Safaricom Sacco Limited versus Stephen Chorio Kiai & another* [2019] eKLR. This court has scrutinized the memorandum of appeal and in my humble opinion, it raises arguable grounds.
15. Ultimately, it is my finding the motion is merited and I hereby allow it. Costs shall abide the outcome of the appeal. The appellant shall deposit Kshs 200,000/= in an interest earning joint account in the names of the advocates for the parties on record or in the alternative, deposit in court a letter of guarantee from a reputable financial institution for the said amount of Kshs 200,000/= within a period of 30 days from the date hereof in default of which the respondents shall be at liberty to execute the decree of the trial court. Additionally, pending the determination of the appeal, the appellant is hereby restricted from transacting on the suit property or interfering with its register. The appellant shall file and serve the record of appeal within 30 days from the date hereof. This matter shall be mentioned on January 17, 2023 to confirm compliance and issue further directions.

**DELIVERED AND DATED AT SIAYA THIS 17<sup>TH</sup> DAY OF NOVEMBER 2022.**

**HON. A. Y. KOROSS**

**JUDGE**

**17/11/2022**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:**

N/A for the appellant

1<sup>st</sup> and 2<sup>nd</sup> respondents acting in person - present

Court assistant: Ishmael Orwa

