



**Orgut v Chepkonga (Environment & Land Case 124 of 2018)
[2022] KEELC 15202 (KLR) (8 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15202 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 124 OF 2018
EO OBAGA, J
DECEMBER 8, 2022**

BETWEEN

NELSON ORGUT PLAINTIFF

AND

RICHARD CHEPKONGA DEFENDANT

RULING

1. This is a ruling in respect of notice of motion dated September 1, 2022 in which the defendant/applicant seeks stay of execution of the judgment which was given on August 8, 2022 pending hearing and determination of an appeal he has preferred to the Court of Appeal.
2. The applicant contends that he has filed a notice of appeal dated August 15, 2022 challenging the entire judgment delivered on August 8, 2022. The applicant further contends that the import of the judgment is to evict him from a property which he has lived in since 2014 and that the plaintiff/respondent was granted mesne profits of Kshs 3,000,000/= which is a colossal sum.
3. The applicant further states that the suit property is the only place he calls home and that if he were evicted from the same, he will be rendered destitute. The applicant states that when he purchased the suit property, it was swampy. He fenced it and embarked on putting on it soil until it became arable. He then constructed his house on it and started cultivating maize.
4. The applicant states that a director of Elgeyo Border Investment Company who sold the land to him passed on and a new director came in and sold the land to the respondent. He states that if he is evicted, his houses will be pulled down and therefore he will suffer irreparable loss.
5. The respondent opposed the applicant's application based on a replying affidavit sworn on September 12, 2022. The respondent contends that the applicant's application is an abuse of the process of court, is misconceived and bad in law.



6. The respondent further contends that the applicant has not demonstrated substantial loss which he will suffer should stay of execution not be granted and that in any case, there is no competent appeal filed against the impugned judgment.
7. The respondent states that the applicant has lied when he claims that he had erected buildings on the suit property when during hearing of the suit, he confirmed that he had no development on the suit property. The respondent further states that he caused a valuation to be carried on the suit property which valuation report confirms that there are no buildings erected thereon. There is only maize growing on the land.
8. The respondent further states that part of the judgment issued was a declaratory one and the other part is for mesne profits which even if paid will be refunded as the respondent is a man of means who is a businessman in Eldoret town.
9. I have carefully considered the applicant's application as well as the opposition to the same by the respondent. Though the applicant was granted leave to file a further affidavit, there is no further affidavit which was filed and if any was filed it is not in the court file. This is the same case with submissions which are not in the file if any were filed. I have also considered the respondents' submissions. The only issue for determination in this application is whether the applicant has met the threshold for grant of stay of execution pending appeal.
10. Order 42 of the *Civil Procedure Rules* stipulates conditions which have to be fulfilled before stay of execution can be granted. Firstly, the application must be brought without unreasonable delay. Secondly, the applicant must demonstrate that he will suffer substantial loss should stay not be granted. Thirdly, there must be security given as may ultimately be binding upon the applicant on the decree.
11. In the instant case, the impugned judgment was delivered on August 8, 2022. The application under review was filed on September 1, 2022. The application was therefore filed after a period of 24 days. I do find that the application was filed within a reasonable time in the circumstances.
12. Has the applicant demonstrated that he will suffer substantial loss. According to the applicant, his contention is that he spent a lot of money in making the suit property which was swampy arable. He stated that he constructed on the suit property where he has been staying since 2014 and that if he were evicted his only home will be affected.
13. The applicant was not being candid. There are no buildings on the suit property. During the hearing he confirmed in his evidence in chief that there were no structures on the suit property. The respondent valued the suit property shortly before judgment was delivered. The report states that there were no developments on it except maize which was being grown on it. The applicant was therefore lying that he had put up a house which he called his only home.
14. In the case of *Machira t/a Machira & Co Advocates – vs- East African Standard* No 2 (2002) 2 KLR 63, substantial loss was defined as follows:-

“It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do. If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party



proceed further with what may still be remaining to be done or in execution of an award or decree or order, before disposal of the applicant's business (eg appeal or intended appeal)"

15. Demonstration of substantial loss is the cornerstone for grant of stay pending appeal. As the applicant has failed to demonstrate substantial loss, there is no ground why the respondent should not be allowed to enjoy the fruits of his judgment.
16. There is no evidence shown that the respondent is intent on selling the suit property. Equally there is no evidence that if the applicant pays the Kshs 3,000,000/= as ordered, he will not be able to get it back should the appeal succeed. The respondent has stated that he is a businessman in Eldoret town and is capable of refunding the Kshs 3,000,000/= should the appeal succeed.
17. As the applicant has failed to demonstrate substantial loss, I find that his application is devoid of merit. The same is dismissed with costs to the respondent. The stay orders which had been granted on September 2, 2022 and subsequently extended are hereby discharged.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 8TH DAY OF DECEMBER, 2022.

E. O. OBAGA

JUDGE

In the virtual presence of;

Ms. Munji for Mr. Nyamweya for Defendant/Applicant.

Ms. Kesei for Plaintiff/Respondent.

Court Assistant –Albert

E. O. OBAGA

JUDGE

8TH DECEMBER, 2022.

