



Bor (Suing on behalf of the estate of Philip Kibor (Deceased)) v Kaguru (Environment & Land Case 359 of 2015) [2022] KEELC 15223 (KLR) (6 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15223 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 359 OF 2015
JM ONYANGO, J
DECEMBER 6, 2022**

BETWEEN

**SOSTEN KIPSONGOK BOR PLAINTIFF
SUING ON BEHALF OF THE ESTATE OF PHILIP KIBOR (DECEASED)**

AND

DAVID WAITHAKA KAGURU DEFENDANT

RULING

1. The defendant moved the court *vide* a notice of motion dated July 4, 2022 seeking an order of stay of execution pending appeal under order 42 rule 6 (1) and (2) of the *Civil Procedure Rules*. The application is premised on the grounds stated on the face thereof and the applicant's supporting affidavit sworn on 4th July and a supplementary affidavit sworn on September 19, 2022.
2. The application is opposed by the plaintiff through his grounds of opposition dated August 22, 2022 and his replying affidavit sworn on even date in which he depones that the applicant has not met the threshold of exec for grant of an order for stay of execution pending appeal as envisaged under order 42 rules 1 and 2 of the *Civil Procedure Rules*.
3. The application was canvassed by way of written submissions and both parties filed their submissions.

Issues For Determination

4. The only issue for determination is whether the applicant has met the conditions for stay pending appeal.



Analysis and Determination

5. The principles that guide the court in the exercise of its discretion to grant a stay of execution are now well settled. The substantive provision for grant of stay pending appeal is to be found under order 42 rule 6 of the [Civil Procedure Rules](#).

Order 42 rule 6 provides in part as follows: -

6.

- (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 order 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 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. In the case of [MOM Amin Transporters Limited & Another v Alexander Ndung'u Mbugua & 2 Others \[2017\] eKLR](#) the court held that all the three conditions had to be met and satisfied simultaneously in order for the court to exercise its discretion and grant a stay of execution. The court stated as follows:-

“ 13. In the cases of [Kiplagat Kotut v Rose Jebor Kipngok \[2015\] eKLR](#), [Kenya Commercial Bank Limited v Sun City Properties Limited & 5 Others \[2012\] eKLR](#) and [Kenya Shell Limited v Kibiru \(Supra\)](#), the common thread was that a stay of execution will not be granted unless the conditions in order 42 rule 6 of the [Civil Procedure Rules](#) are satisfied.

7. Furthermore, in the case of [Equity Bank Limited v Taiga Adams Company Limited \[2006\] eKLR](#) Mutungi J stated as follows:

“ It is not enough to satisfy 1 or 2 of the requirements under 42 rule 6. All of the requirements must be met for the court to grant orders of stay pending appeal”.



8. In the instant suit the 1st applicant has mentioned in his affidavit that if a stay of execution is not granted, they will be displaced from their home thus they will suffer substantial loss and prejudice and their appeal will be rendered nugatory. In the case of Wangalawa & Another v Agnes Naliaka Cheseto (2012) eKLR the court observed as follows:

“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. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N v Chesoni (2002) 1KLR867 and also in the case of Mukuma v Abuoga quoted above. The last case referring to the exercise of discretion by the High Court and Court of Appeal in the granting of stay of execution, under order 42 of the CPR and rule 5 (2) (b) of the Court of Appeal Rules respectively, emphasized the centrality of substantial loss thus:

“...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.”

9. Substantial loss has been defined to be the kind of a loss that is assessed by the totality of the consequences awaiting the applicant if stay is not granted. In Dawie Chebutal Rotich & 2 Others v Emirates Airlines, Civil Case No 368 of 2001, Mutunga J defined substantial loss as follows:

“.....is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum”

10. In the instant case the applicant has stated that he is in occupation of the suit property since 1977 and if he is evicted, the substratum of the appeal shall be destroyed and the appeal shall be rendered nugatory, not to mention that the applicant would suffer substantial loss.

11. The respondent has not controverted the applicant’s averment with regard to occupation of the suit property. It is therefore not in dispute that if the application is not granted, the appeal shall be rendered nugatory.

12. The application was filed in July before the expiry of the stay order issued after delivery of judgment and therefore it was filed without any undue delay.

13. Although the applicant did not offer any security for costs, he averred that he would not part with possession before the appeal is heard and determined.

14. All in all, I am persuaded that the applicant has satisfied the conditions laid down in order 42 rules 1 and 2 of the Civil Procedure Rules. Consequently, I grant the application condition that the applicant deposits Kshs 100,000 in court as security for costs within 30 days failing, which the order for stay shall automatically lapse.

15. The costs of the application shall be borne by the applicant.

DATED AT ELDORET THIS 6TH DAY OF DECEMBER 2022

J M ONYANGO

JUDGE

