



REPUBLIC OF KENYA



KENYA LAW
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**Hinga & 2 others v Tirop (Environment & Land Case 260 of 2014)
[2022] KEELC 15205 (KLR) (6 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15205 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 260 OF 2014**

**JM ONYANGO, J
DECEMBER 6, 2022**

BETWEEN

JOSEPH HINGA 1ST PLAINTIFF

JACINTA GATHONI 2ND PLAINTIFF

ISAAC KARIUKI 3RD PLAINTIFF

AND

JOHN TIROP DEFENDANT

RULING

1. By a notice of motion dated May 6, 2022, the applicant filed an application for stay of execution pending appeal as well as an order of injunction restraining the respondent from evicting, demolishing, encroaching, surveying, sub-dividing, selling, disposing of, charging, or in any manner whatsoever, interfering with the suit land pending the hearing and determination of the intended appeal.
2. The application is hinged on the grounds set out in the notice of motion and the applicant's supporting affidavit sworn on the May 6, 2022.
3. It is resisted by the respondents through the replying affidavit sworn by Joseph Hinga, the 1st respondent on his own behalf and on behalf of the 2nd and 3rd respondents.
4. The court directed that the application be prosecuted by way of written submissions and both parties filed their submissions.

Issues For Determination

5. The singular issue for determination is whether the applicant has met the conditions for stay pending appeal.



Analysis And Determination

6. The law on stay pending appeal is governed by the provisions of order 42 rule 6 of the [Civil Procedure Rules](#) which provides 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.

(3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given.

7. The principles that guide the courts in granting an order of stay pending appeal are now well settled.

“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.

8. The first one is that the applicant must demonstrate that he shall suffer substantial loss unless a stay of execution is granted. In the instant case, the applicant has deponed at paragraph 9 of the supporting affidavit that he shall suffer substantial loss unless the application is allowed as he has been in possession of the suit land with his family since 1994 and he has constructed a house thereon. Considering the length of time the applicant and his family have occupied the suit land, eviction therefrom before the appeal is heard would undoubtedly result in substantial loss.

9. The second condition is that the application must be made without unreasonable delay. In the instant case, the application was made soon after the period of 90 days within which the applicant was ordered



to vacate had expired. In my view there was no unreasonable as the applicant was given a grace period of 90 days which elapsed 7 days before the application was filed.

10. The third condition is that the applicant must be ready to furnish security for the performance of the decree. Although the applicants have not demonstrated their willingness to furnish security for costs, this does not preclude the court from imposing suitable terms with regard to the same.
11. In my view the applicant has met the conditions for stay and I am inclined to grant the same on condition that the applicant deposits the sum of Kshs 100,000/= in court as security for costs within 30 days, failing which the order for stay shall automatically lapse.
12. Having granted an order for stay, I do not find it necessary to delve into the prayer for injunction.
13. For the foregoing reasons, I find that the application has merit and I grant it and make the following orders:
 - a. A stay of execution of the judgment delivered on March 2, 2022 is hereby granted pending appeal on condition that the applicant deposits the sum of Kshs 100,000/= in court as security for costs within 30 days, failing which the order for stay shall automatically lapse.
 - b. The costs of the application shall be borne by the applicant.

DATED SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 6TH DAY OF DECEMBER, 2022.

J.M ONYANGO

JUDGE

