



Ong’udi v Gor Construction & Hardware Limited & another (Environment & Land Case 0034 of 2022) [2022] KEELC 15185 (KLR) (6 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15185 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 0034 OF 2022
SO OKONG’O, J
DECEMBER 6, 2022**

BETWEEN

EDITH ALUOCH ONG’UDI APPLICANT

AND

GOR CONSTRUCTION & HARDWARE LIMITED 1ST RESPONDENT

ONG’UDI OKUMU HEZEKIAH 2ND RESPONDENT

RULING

1. On November 4, 2021, the applicant filed an application in Kisumu Chief Magistrate’s Court ELC No 25 of 2017, Gor Construction & Hardware Limited v Ong’udi Okumu Hezekia (hereinafter referred to only as “the lower court suit”) seeking orders that; the applicant be joined in the suit as a party and that the judgment that had been delivered by the lower court in favour of the 1st respondent herein against the 2nd respondent herein on June 26, 2019 be reviewed and set aside. The applicant’s application in the lower court was heard and dismissed by the court on March 11, 2022.
2. The applicant was dissatisfied with the said decision of the lower court and filed an appeal to this court on April 12, 2022 namely, ELCA No 20 of 2022 through a memorandum of appeal dated March 31, 2022.
3. The applicant’s appeal was struck out with costs on November 8, 2022 for having been filed out of time. On November 10, 2022 soon after the striking of the said appeal, the applicant filed a notice of motion dated November 10, 2022 in the present miscellaneous application seeking; a temporary stay of the proceedings in the lower court suit pending the hearing of the application inter-partes, extension of time within which to file an appeal against the ruling of the lower court made on March 11, 2022 aforesaid and stay of proceedings in the lower court pending the hearing and determination of the applicant’s intended appeal to this court.



4. The applicant's application dated November 10, 2022 was placed before Asati J on November 14, 2022 who certified the same as urgent and listed it for hearing inter-partes on November 22, 2022. Asati J. did not grant to the applicant any interim order. When the application came up before the judge on November 22, 2022, the matter did not take off since the applicant had not served the 2nd respondent. The application was stood over to January 19, 2023 for hearing. On the same date; namely November 22, 2022, the applicant filed yet another application herein by way of notice of motion dated November 18, 2022 seeking among other orders; a temporary stay of execution of the ruling that was delivered by the lower court in the lower court suit on November 16, 2022 pending the hearing of the application inter-partes, an order stopping the court administrator from signing any document or instruments relating to Title No Kisumu/Karateng/1282 on behalf of the 2nd respondent, stay of execution of the ruling that was delivered by the lower court in the lower court suit on November 16, 2022 pending the hearing of the intended appeal by the applicant to this court against the same and an order stopping the court administrator from signing any document or instruments relating to Title No Kisumu/Karateng/1282 (hereinafter referred to only as "the suit property") on behalf of the 2nd respondent pending the hearing and determination of the said intended appeal to this court.
5. The applicant's application dated November 18, 2022 was placed before Asati J on November 23, 2022. Asati J noted that there was no appeal against the ruling made by the lower court on November 16, 2022 upon which the application could be anchored but nevertheless certified the application as urgent and directed that the same be heard before me on December 5, 2022 since she was proceeding on leave. Asati J did not grant any interim order to the applicant.
6. On the same day that the applicant filed the application dated November 18, 2022 herein seeking a stay of the ruling and orders of the lower court made on November 16, 2022, the applicant filed a similar application in the lower court. In the application filed in the lower court suit, the applicant sought the same orders of stay of execution that she had sought before this court in the said application dated November 18, 2022. On November 24, 2022, the lower court granted to the applicant a temporary stay of the orders of the lower court made on November 16, 2022 until December 15, 2022.
7. The applicant's application before me dated November 18, 2022 has been brought on the grounds that by a judgment delivered by the lower court on June 26, 2019, the lower court compelled the 2nd respondent to transfer the suit property to the 1st respondent. The applicant has contended that as the wife of the 2nd respondent she has an interest in the suit property as it is matrimonial property. The applicant has contended that she sought to be joined in the lower court suit as an interested party but her application was dismissed on March 11, 2022. The applicant has averred that she filed the present miscellaneous application in which she sought through her notice of motion dated November 10, 2022 stay of proceedings in the lower court suit. The applicant has averred that this court did not stay the said proceedings and on November 16, 2022, the lower court delivered a ruling in which it compelled the 2nd respondent to transfer the suit property which measures 5.6 ha. to the 1st respondent on or before November 22, 2022 in default of which the court administrator would be at liberty to sign all the documents and instruments necessary to effect the transfer of the said portion of the suit property to the 1st respondent. The applicant has averred that unless the orders sought are granted, the applicant and her family would suffer irreparable injury which cannot be compensated in damages.
8. When the applicant's application dated November 18, 2022 came up for hearing before this court on December 5, 2022 as directed by Asati J, the applicant's advocate relied entirely on the applicant's affidavit in support of the application. The applicant's advocate admitted that the applicant had filed a similar application that was pending before the lower court and that in fact, the lower court had



granted to the applicant a temporary stay of execution that was in force until December 15, 2022 when the court will deliver a ruling on the matter.

9. The applicant's application dated November 18, 2022 is opposed by the 1st respondent through notice of preliminary objection dated December 5, 2022 and replying affidavit of 1st respondent sworn on December 5, 2022. In his notice of preliminary objection, the 1st respondent has contended among others that the applicant having filed a similar application before the lower court which is pending determination, the present application for stay is *sub judice*. The 1st respondent has contended further that the applicant had filed an appeal against the decision of the lower court declining to join her in the lower court suit which appeal was dismissed on November 8, 2022. The 1st respondent has contended further that the applicant has no *locus standi* to appeal against the orders of November 16, 2022 since she is not a party to that suit. In his replying affidavit, the 1st respondent has given the history of the dispute between the parties and has contended that the applicant is engaged in forum shopping. The 1st respondent has contended that the applicant is not entitled to the equitable reliefs sought in the application. The 1st respondent has contended that the orders sought if granted would be highly prejudicial to the 1st respondent. During the hearing of the application, the 1st respondent's advocate submitted that the applicant's application is an abuse of the process of the court. The 1st respondent's advocate submitted that the applicant cannot be permitted to move two (2) courts for similar orders.
10. I have considered the applicant's application together with the affidavits filed in support thereof. I have also considered the 1st respondent's notice of preliminary objection together with his replying affidavit filed in opposition to the application. Finally, I have considered the submissions by the advocates for the parties. The following is my view on the matter: The applicant's application was brought under order 42 rule 6 of the [Civil Procedure Rules](#) which provides as follows:

[Order 42, rule 6] Stay in case of appeal.

- 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 subrule (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 subrule (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.



- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

11. A stay of execution under order 42 rule 6 of the *Civil Procedure Rules* is only granted pending appeal. A party seeking a stay under the said rule must demonstrate that he has either filed an appeal or he intends to appeal and has taken steps necessary in pursuit of such intended appeal. The applicant has sought a stay of execution of the ruling and orders made by the lower court on November 16, 2022. There is no evidence before the court showing that the applicant has appealed or intends to appeal against the said ruling and orders. In the absence of such evidence, the stay sought cannot be granted. Again, under order 42 rules 6 of the *Civil Procedure Rules*, both the court appealed from and the court appealed to have power to grant a stay pending appeal. A party dissatisfied with the decision of the lower court and intends to appeal against the same to this court can apply for a stay of the lower court decision to the lower court and whether the stay is granted or not, can make another application for stay to this court as an appellate court. The powers of the lower court and this court to grant a stay pending appeal cannot however be invoked simultaneously. A party who has moved the court appealed from for a stay must wait until that court makes a determination on his application before moving the court appealed to for similar orders. I am also of the persuasion that a party who has moved the court appealed to for a stay of execution of the decision of the court appealed from cannot again move the court appealed from for a stay while the application to the court appealed to is pending determination. Nothing however stops a party who has filed an application for a stay in the court appealed to from withdrawing such application and filing the same in the court appealed from.
12. In the present case, the applicant had filed an application herein on November 22, 2022 seeking an order for stay of execution of the orders of the lower court made on November 16, 2022. That is the application which is the subject of this ruling. The applicant on the same date filed a similar application for stay in the lower court and managed to get a temporary stay that she was not granted by this court. Instead of withdrawing the present application after moving to the lower court, getting the said temporary order of stay and having her application for stay in the lower court fixed for ruling on December 15, 2022, the applicant still came to this court and put up an argument that she could pursue the stay applications before this court and in the lower court at the same time and that there was nothing wrong with her filing an application for stay before this court and the lower at the same time. I am in agreement with the 1st respondent that it amounts to an abuse of the process of the court for the applicant to pursue stay application in two courts at the same time.
13. On the merit of the application, I am again not persuaded that a case has been made for the grant of an order of stay. The applicant has not demonstrated that she stands to suffer substantial loss unless the stay sought is granted. The applicant has made a mere assertion that the suit property is a matrimonial property. No evidence has been placed before the court in proof of this claim. In the absence of proof of substantial loss, a stay cannot be granted. In her affidavit in support of the application, the applicant had contended that unless the orders sought are granted, her intended appeal would be rendered nugatory. The question is; which appeal? As mentioned earlier, the applicant has neither appealed nor expressed intention to appeal against the ruling of the lower court made on November 16, 2022. Instead of rushing to the lower court, the applicant should have taken a cue from Asati J. when she



stated as follows on November 23, 2022 when the applicant's application dated November 18, 2022 was placed before her for directions:

"I find no evidence of existence of an appeal."

14. From this statement, the applicant should have realized that without an appeal or intended appeal against the orders of the lower court made on November 16, 2022, there was no way the said orders could be stayed.
15. In the final analysis and for the foregoing reasons, I find no merit in the notice of motion application dated November 18, 2022. The application is dismissed with costs to the 1st respondent.

DELIVERED AND DATED AT KISUMU THIS 6TH DAY OF DECEMBER, 2022.

S OKONG'O

JUDGE

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

N/A for the appellant

Mr Sala for the 1st respondent

N/A for the 2nd respondent

Ms J Omondi-Court Assistant

