



**Tuitoek v Kiberut (Environment and Land Appeal E002 of 2025)
[2025] KEELC 1235 (KLR) (11 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1235 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KABARNET
ENVIRONMENT AND LAND APPEAL E002 OF 2025**

**L WAITHAKA, J
MARCH 11, 2025**

BETWEEN

JONATHAN TUITOEK APPELLANT

AND

SIMON KIPSANG KIBERUT RESPONDENT

RULING

Introduction

1. This ruling is in respect of the Chamber Summons application, dated 7th January, 2025. Through the application, the appellant/ applicant *inter alia* seeks an order of temporary injunction to restrain the respondent from entering, wasting, constructing or otherwise dealing or in any way interfering with the appellant's possession and ownership of the parcel of land known as Baringo/Kapropita/1883 (the suit property) pending the hearing and determination of the appeal; stay of execution of order (b) in the judgment issued by the trial magistrate on 13th November 2024 in Kabarnet SPM ELC Case No E018 of 2021-*Jonathan Tuitoek v. Simon Kiberut*.
2. As can be discerned from the grounds on the face of the application and the affidavits sworn in support thereof (supporting affidavit sworn on 7th January 2025 and supplementary affidavit sworn on 28th January 2025), the application is premised on the grounds that the applicant was dissatisfied with the decision of the lower court; that the applicant filed an appeal to this court; that despite being aware of the appeal, the respondent has taken possession of the suit property and that unless the respondent is restrained by way of the orders sought, the appeal may be rendered nugatory.
3. The application is opposed through the affidavits of the respondent, replying and further replying affidavit sworn 21st January, 2025 and 7th February, 2025 respectively, on the grounds that the application is incurably defective and that the applicant has not made up a case for being granted the orders sought.



4. Pursuant to directions given by the court to the effect that the application be canvassed by way of written submissions, parties filed submissions, which I have read and considered.

Submissions

5. From the application, the response and the submissions filed by the parties, I find the issues for the court's determination to be: -
 - i. The legal propriety or otherwise of the application;
 - ii. Whether the appellant/applicant has made a case for being granted the orders sought;
 - iii. What orders should the court make?
6. Concerning the legal propriety of the application, the respondent points out that the application is brought through a chamber summons application under Order 40 Rules 1,2, 3, 4 and Order 22(1) of the Civil Procedure Rules as opposed to through a notice of motion application under Order 42 Rule 6(2) of the Civil Procedure Rules, which gives power to this court to hear applications for stay of execution pending appeals.
7. Based on the provisions of Order 42 Rule 6(2), the respondent submits that an application for stay of execution pending appeal must be made under Order 42 Rule 6 and not under Order 22 Rule 22(1) of the Civil Procedure Rules. He terms the application by the applicant incurably defective for having been brought under Order 22 Rule 22(1) of the Civil Procedure Rules.
8. The respondent further submits that there is no substantive application for stay of execution save for the chamber summons application for leave to be heard during the High Court vacation which has already been dispensed with.
9. Maintaining that the application is bad in law and incurably defective, the respondent submits that the application is incapable of being cured by invocation of the provisions of Article 159(d) of the Constitution.
10. According to the applicant, he satisfied the conditions of filing an application for stay of execution.
11. As to whether the applicant has made up a case for being granted the orders sought, the respondent submits that injunctive orders cannot issue because they were dispensed with by the lower court. It is the respondent's case that granting the injunctive orders sought would be tantamount to final determination of the appeal before it is heard.
12. The respondent further submits that under Order 42 Rule 6(2) of the Civil Procedure Rules, an application for injunction pending hearing and determination of appeal is alien.
13. Because Order 42 Rule 6(2) of the Civil Procedure Rules does not provide for issuance of an injunction pending appeal, the respondent submits that the prayer for injunction pending appeal sought by the appellant/applicant is unfounded and without basis.
14. The respondent further submits that the injunctive order sought by the applicant cannot issue because he has already satisfied the decree of the court and taken possession of the suit property and developed it.
15. As to whether the applicant has met the threshold for grant of an order of stay of execution, the respondent submits that he has not, as he has not offered security for performance of such obligation as might be binding on him at the conclusion of the appeal.



16. It is the respondent's case that he stands to suffer more loss and prejudice than the applicant if stay of execution is granted as he has substantially complied with the decree of the lower court.
17. Explaining that he has an arguable appeal, with high chances of success, the applicant urges the court to grant him the orders sought.

Analysis and Determination

18. The application before me being one for stay of execution pending appeal, the applicable section of the law is Order 42 Rule 6 of the *Civil Procedure Rules* which deals with stay pending appeal and not Order 22 Rule 22(1) of the *Civil Procedure Rules* which deals with stay of execution generally. Order 40 Rules 1, 2, 3 and 4 of the *Civil Procedure Rules* are also unavailable for the respondent as the law does not contemplate a situation where an injunction would issue pending an appeal.
19. The principles that undergird grant of an order of temporary injunction pending hearing and determination of a suit cannot issue in the circumstances of an appeal, given that there is a judgment on the merit, which judgment the unsuccessful party seeks to overturn. The argument by an appellant that the trial court erred by determining a case one way or the other or that the appeal is arguable cannot avail an appellant an order of temporary injunction. Simply put, an order of temporary injunction is alien in the case of an appeal.
20. The application provided for and contemplated for in law is an order of stay pending appeal as contemplated by law, in particular Order 42 Rule 6 of the *Civil Procedure Rules*.
21. The instant application having been brought under provisions of law that do not provide for stay pending appeal, I agree with the respondent that the application is incurably defective.
22. The defect in the application has been compounded by the applicant's failure to satisfy the conditions set in Order 42 Rule 6(2) of the *Civil Procedure Rules* which are: -
 - i. That substantial loss may result to the applicant unless the order is made,
 - ii. That the application has been made without unreasonable delay; and
 - iii. That such security as the Court orders for the due performance of such Decree or Order as may ultimately be binding on the applicant has been given.
23. Out of three conditions, the applicant only satisfied one, the one requiring the application to be filed without unreasonable delay. He failed to demonstrate that substantial loss may result if the order of stay is not granted, which is the cornerstone of an application for stay. Instead of focusing on that fundamental requirement, he largely dwelt on the contention that his appeal is arguable and with high chances of success.
24. On security, he deponed that it is not necessary in the circumstances of his case. That being the case, he has neither offered security as by law required nor expressed willingness to comply with such Decree or Order as may ultimately be binding on him.
25. For the foregoing reasons, I find and hold that the applicant has not made up a case for being granted the orders sought. Consequently, I dismiss the application with costs to the respondent.
26. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KABARNET THIS 11TH DAY OF MARCH, 2025

L. N. WAITHAKA



JUDGE

Ruling delivered virtually in the presence of;-

Ms. Barasa for the appellant/applicant

Mr. Chebii for the respondent

Court Assistant: Ian

