Kedoki & another v Nchoe (Environment and Land Appeal E004 of 2025) [2025] KEELC 5012 (KLR) (3 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5012 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT AND LAND APPEAL E004 OF 2025

LN GACHERU, J

JULY 3, 2025

BETWEEN

KIOKONG KEDOKI ..... 1ST APPELLANT

RAPHAEL ALEX KEDOKI ..... 2ND APPELLANT

AND

STEPHEN LAPIYION OLE NCHOE ..... RESPONDENT

RULING

1. The Matter for determination is the Appellants/ Applicants Application dated 25th February 2025, wherein the Applicants have sought for the following orders; -

    i. That the court be pleased to issue an order of stay of execution of the judgement of the trial court in Narok CMCELC No 127 of 2018, which judgement was delivered on 11th February 2025, which ordered for eviction of the Appellants/ Applicants from plot No. 455, situate at Ntulele of Narok County and or maintenance of the status quo pending the hearing and determination of the Appeal;

    ii. That costs of the Application be provided for.

2. The instant Application is premised on the following grounds;

    1. That the 1st Appellant/Applicant is the rightful allottee and owner of that land parcel known as Plot No.455 situated at Ntulele of Narok County having been allotted the same in the year 2002.

    2. That Vide Narok Chief Magistrate's Court Civil (E.L.C) Case No.127 of 2018, the Respondent has claimed ownership of the said plot and Judgement has been delivered in the Respondent's Favour.

3. That the said Judgment did not consider the evidence adduced showing the 1st Appellant/ Applicant as rightful allottee and owner of Plot No.455, situated at Ntulele of Narok County.

4. That there is real danger that if the Orders of stay of execution and/or maintenance of status quo are granted, there is real threat to the 1st Appellant/Applicant being evicted from land he has rightfully occupied for years and had the same developed.

5. That the 1st Appellant/Applicant will suffer substantial loss and his appeal rendered nugatory.

6. That unless this court urgently intervenes and grants the orders as prayed, the instant application and appeal will be rendered nugatory.

3. Further, the Application is anchored on the Supporting Affidavit of Kioking Kedoki, the 1st Appellant/ Applicant herein, who averred that he is an allottee of plot No. 455, which is situated in Ntulele area, and sometime in 2018, the Respondent herein filed Narok CMCELC No.127 of 2018, claiming ownership of the said plot.

4. He also averred that despite having all the requisite documents to prove that the said plot was rightfully allotted to him, and that he was in occupation, the trial court vide its Judgment of 11th Feb 2025, found and held that the suit plot belonged to the Respondent, which was in disregard of the evidence tendered before the said trial court.

5. He also averred that the Appellants are aggrieved by the said Judgement, and have lodged an Appeal, and are apprehensive that the Respondent may proceed and evict them from the suit land. Further, that if the Respondent will proceed and execute the Judgement, the Appellants/Applicants will suffer substantial loss, as they have been in occupation of the suit land, and have developed the said plot.

6. He also claimed that the Respondent will not suffer any prejudice if the orders sought are granted, and it is only fair and just that the orders sought herein are granted, in order to protect the Appellants/ Applicants' inalienable constitutional right to own property.

7. The Application is opposed through the Replying Affidavit of Stephen Lapiyon Ole Nchoe, who averred that indeed a Judgement was entered in his favour, in the above referred case, but a decree is yet to be issued. He also denied that the Appellants/Applicants are the allottees of the suit land, and further averred that the Appellants have been trespassing onto his suit property, and are thus violating his right to property, which violation greatly prejudices him.

8. The Respondent further claimed that since no Decree has been issued, there is no danger of execution, and the instant Application is premature. It was his further averments that the Appeal herein has no chance of success as the Letter of allotment was determined not to be authentic.

9. Further, the Respondent averred that the Appellants/ Applicants have not met the criteria for stay of execution as provided by the law. He urged the court to dismiss the instant Application with costs.

10. The Application was canvassed through written submissions. The Appellants/ Applicant filed their written submissions through Nyabochwa & Oyori Law Advocates, and submitted that they have been in occupation of the suit land, and they have developed it. Further that the Judgement appealed against did not consider the evidence adduced, which showed the 1st Applicant as the rightful owner of the suit property.

11. Further, the Appellants/Applicants submitted that they stand to suffer loss, and there is real danger that if the orders of stay is not granted, and the appeal which has high chances of success is allowed,

then the said appeal might be rendered nugatory. Further, that the application was filed timeously an it is in the interest of justice that the application is allowed.

12. The Applicants urged the court to allow the application and relied on various decided cases being; Tropical Commodities Suppliers Ltd & others vs International Credit Bank Ltd(in liquidation) 2004] 2 EA 331; RWW vs EKW(2019) eklr; Butt vs Rent Restriction Tribunal (1979] KE CA 22(KLR); Wilson vs Church (N02) 12 Ch D [1879] 454 at page 459, where the court held;

> " It is the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory."

13. The Respondent filed his submissions dated 28th April 2025, and set out on issue for determination being; whether the stay of execution application herein should be allowed.

14. The Respondent submitted that the stay of execution application herein should be dismissed as there is no substantial loss that the Appellants /Applicants May suffer, as there is no decree that has been issued to allow execution to commence, and thus the application is premature.

15. The Respondent relied on Order 42 Rule 6, of the Civil Procedure Rules, which states; -

> " Stay in case of appeal [Order 42, rule 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.
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> 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.

16. Further, the Respondent relied on the case of Butt vs Rent Restriction Tribunal(supra); Lenya Shell vs Benjamin Karuga Kibiru 7 Another(1986) eklr, and James Wagalwa & Another vs Agnes Naliaka Chesoto(2012) eklr, where the court held; -

> " The fact that the Applicant has lodged an appeal or is dissatisfied with the decision does not constitute substantial loss... The applicant must establish other factors which show that

execution will create a state of affairs that will irreparably affect or negate the essential core of the applicant's case in the appeal."

17. The Respondent further submitted that the Appellants occupation of the suit land was based on an inauthentic allotment letter, and if stay is granted, the respondent will suffer violation of his constitutional property rights, loss of use, and economic loss and therefore the balance of convenience tilt in his favour. Reliance was sought in the case of Nguruman Ltd vs Jan Bonde Nielsen & 2 others (2014) elkr, where the court stated;-

> " The court, in exercising its discretion, must weigh the respective hardship likely to be caused to either party."

18. Therefore, the Respondent urged the court to dismiss the instant application with costs.

19. The above is the argument in favour of, and against the instant Application. The court has carefully considered the pleadings herein, the rival written submissions and the relevant provisions of law and finds the issue for determination is whether the application herein is merited.

20. There is no doubt that the trial court did deliver a judgment on 25th February 2025, and issued orders in favour of the Respondent herein; wherein the said trial court directed the eviction of the Appellants from the suit property, and the Respondent as the plaintiff thereon was declared to be the rightful owner of the suit land.

21. The Appellants were aggrieved by the said judgement and preferred an Appeal vide a memo of Appeal dated 25th February 2025, wherein they urged the court to set aside the said judgement of then trial court, and substitute it with an order that the said suit property belongs to the 1st Appellant.

22. The said Application is opposed by the Respondent, and thus this ruling. The legal framework for dealing with stay of execution is Order 42 Rule 6 of the *Civil Procedure Act*. it is evident that filing of an Appeal is not an automatic stay of execution. The applicant has to satisfy the conditions for stay of execution as provided in Order 42 Rule 6(2) of the Civil Procedure Rules.

23. Courts have various held that the fact that the applicant has lodged an appeal or is dissatisfied with the decision of the trial court does not warrant stay of execution. See the case ofCarter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997, the court held that; -

> " the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. ...the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay."

24. The purpose of stay of execution pending Appeal is to preserve the subject matter in dispute, so that the rights of the appellant are safeguarded, and the Appeal is not rendered nugatory in the event it succeeds. See the case of RWW v EKW [2019] eklr;

> " The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who

should not be deprived of the fruits of his/her judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs."

25. The threshold for grant stay of execution were set out in the case of Butt vs Rent Restriction Tribunal (1979) KLR, where the Court of Appeal held as follows;

> " The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
>
> Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
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> Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
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> Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse."

26. For the Applicants herein to succeed in the instant Application, the needed to prove that they will incur substantial loss unless the stay is granted. Substantial loss in the context of a stay of execution means the irreparable harm or damage that an applicant for a stay would suffer if the judgment against him is to be executed before the appeal is heard and determined. The said loss is not just about financial loss, but a loss that would significantly impact the applicant's ability to pursue the Appeal effectively, and which loss would render the appeal useless if stay is not granted or the status quo maintained.

27. In the case of Tropical Commodities Suppliers Ltd and Others vs. International Credit Bank Limited (in liquidation) (2004) E.A. LR 331, substantial loss was defined as follows:-

> " ...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal..."

28. It is evident that the trial court did order for the eviction of the Appellants from the suit land. The Appellants have averred that they are in occupation of the suit land, wherein they have developed the same. The Respondent did not deny that the 1st Appellant is in occupation and/ or has developed the suit property. He alleged that the Appellants are trespassers. On their part, the Appellants averred that the trial court erred in both law and facts and failing to upheld the overwhelming evidence adduced by the Appellants that they own the suit land.

29. Further,In the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eklr, the Court expressed itself as hereunder:

> " No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR.

This is so because execution is a lawful process. 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 ... 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."

30. The court herein is called to balance the right of the Respondent who has a judgement in his favour, and who should be allowed to enjoy the fruits of his judgement, and the right of the Appellants/Applicants who have filed an Appeal, and have right of preservation of the suit property pending the determination of the Appeal, so that the said Appeal is not rendered nugatory or an academic exercise. See the case of Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007 KLR, b where the court stated;

> " .....The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement."

31. The Respondent has not alluded to the fact that he is in occupation of the suit property. The 1st Appellant alleged that he is in occupation, and that is the reason the trial court issued an eviction order. In the event the 1st Appellant is evicted from the suit property, and later his Appeal succeeds, then he will have suffered substantial loss, because with eviction, the Respondent will have right to deal with the property as he wishes and disposing the same is one of such right, or even demolishing the developments thereon. The Appellants have satisfied the condition of suffering substantial loss in the event stay is not granted.

32. On whether the Application was filed without unreasonable delay, it is evident that the impugned Judgement was delivered on 11th February 2025, and this Application for stay was filed on 25th February 2025, which was within a period of 14 days, and also within the 30 Days appeal window. Though the Respondent averred that there is no decree that has been extracted, and thus the Application is premature, if the Applicants are to wait until the decree is issued, they might be caught up in the unreasonable delay, which will mean that they have failed to satisfy the above stated condition. The Appellants/Applicants are within their right to file the instant application even before the decree is drawn, so as to fulfil the condition of the application is filed without undue delay.

33. On such security as the court may order for the due performance of such decree, or order, the court finds that the Appellants/ Applicants did not offer such security. However, the court had discretion to order deposit of such security for the due performance of such decree or order as may be ultimately binding.

34. The purpose of security for due performance is to ensure that if the Appeal fails, the winning party (the Respondent) can still be compensated for their losses and the decree can be executed. Further, it is evident that the court has discretion in determining the type and amount of security required. See the case of Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd [2019] eKLR.

35. In the case of Mwaura Karuga t/a Limit Enterprises –vs- Kenya Bus Services Ltd & 4 others [2015] Eklr, the Court held that;

> " ... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ''ultimately be binding' are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the

presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick."

36. For the above reasons, the court directs the Appellants/ Applicants to deposit a security of ksh 200, 000/= in court for due performance of such decree or order that might be binding to them. The said deposit to be done within the next 15 days from the date hereof. Failure to comply with this condition of deposit of security, the stay orders will automatically lapse.

37. Ultimately, the court finds and holds that the Appellants Applicants have satisfied the conditions for grant of stay of execution, with a condition that they do deposit ksh 200, 000/= as security for due performance of such decree or order that may be binding to them within the next 15 days from the date hereof. Failure of which the stay orders will lapse automatically.

38. On the issue of costs, since this is an interlocutory Application pending Appeal, the court directs that costs be in the cause.

39. Application dated 25th February 2025, is allowed conditionally in terms of prayer No. b, with costs being in the cause.

40. Further, the Appellants to file a bound copy of the Record of Appeal within the next 14 Days from the date hereof, and this Appeal to be set down for hearing expeditiously.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAROK THIS 3RD DAY OF JULY 2025.

L. GACHERU

JUDGE

Delivered online in the presence of

Elijah Meyoki – Court Assistant

Mr Oyori for the Appellants/Applicants

N/A for the Respondent