



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Odhiambo v Ogalo & 2 others (Environment and Land Case Civil Suit
E043 of 2022) [2024] KEELC 3707 (KLR) (8 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3707 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E043 OF 2022**

JA MOGENI, J

MAY 8, 2024

BETWEEN

JOAN OWIRA ODHIAMBO PLAINTIFF

AND

JANE ABOGE OGALO 1ST DEFENDANT

BENSON ODHIAMBO ORIEDO 2ND DEFENDANT

NAIROBI CITY COUNTY GOVERNMENT 3RD DEFENDANT

RULING

1. By an Amended Notice of Motion dated,30/01/2024 the Applicant sought for the following orders: -
 1. Spent.
 - 1A. That the Honorable Court be pleased to grant leave to the firm of Prof Albert Mumma & Company Advocates to come on record for the 1st and 2nd Defendants/Applicants in the place of Kinuthia Kahindi & Co. Advocates
 - 1B. That pending the inter-partes hearing and determination of this application the Honorable Court be pleased to grant a stay of execution of its judgment and Decree delivered on 12th October, 2023;
 2. That the Honorable Court be pleased to issue an order of stay of there be a Stay of Execution of the Judgment and Decree of this court delivered and issued on 12th October 2023 pending the hearing and determination of the intended appeal against the said Judgment and Decree
 3. That the Honorable Court be pleased to issue any other or further orders as the Honorable Court may deem fit to grant;
 4. That the costs of and incidental to this application abide the result of the intended appeal.



2. The application is based on the grounds thereof and the Supporting Affidavit sworn by JANE ABOGE OGOLA on 30/11/2023. The application is premised on ten GROUNDS stated on the face of the application and the Supporting Affidavit of the 1st Defendant/Applicant. She has averred that Judgment was entered in favor of the Plaintiff/Respondent on 12/10/2023, and the 1st 2nd Defendant/Applicant being dissatisfied, preferred an Appeal. That the Plaintiff/Respondent may execute the judgment as there is no Stay Order, actions which will cause the applicant to suffer substantial loss. The Applicant further contends that the Appeal has reasonable chances of success and should stay not be granted, the same will be rendered nugatory. The Applicant depones that she is ready and willing to abide by any directions on security that will be issued by this court.
3. In response to the application, the Plaintiff/Respondent filed Grounds of Opposition . The Respondent opposes the application on the basis that there was a delay in filing the instant application and which delay has not been explained. That the Applicant only filed the application because they have an interest in wanting to continue collection rent from the suit premises where they are not owners at all.
4. It was the respondent's contention that the applicant/defendant is in contempt of this Honorable Court and deserves no audience before this court. Further that the application is defective and that this is unnecessary litigation delaying the plaintiff/1st respondent the fruits of the judgment and right to property. That the application should be dismissed with costs.
5. Parties elected to dispense with the application by way of written submissions. The Applicant submitted that he is the registered owner of the suit property, being a bona fide purchaser for value. That at the time of purchase, there was no overriding interest registered on the property. That should execution issue, he will suffer substantial loss. It is further his submissions that the application was brought without undue delay and he is ready to deposit title to the suit property as security. Reliance was placed on the Charles Kariuki Njuri vs Francis Kimaru Rware (suing as Administrator of Estate of Rwara Kimaru alias Benson Rwara Kimaru(Deceased) [2020] eKLR.
6. The Plaintiff/Respondent in his submissions dated 25/02/2024 urged this court to consider the conditions for granting stay as laid down in Order 42 rule 6 stating the conditions are conjunctive and not disjunctive. That this application was brought late because the applicants even made some tenants to pay rent upfront to include the month of January 2024.
7. The Plaintiff/Respondent has submitted extensively on the issue of contempt urging the court to consider the decisions in the cases of Teachers Service Commission vs Kenya National Union of Teachers, Petition No. 23 of 2013, R vs County Chief Officer Finance & Economic Planning, Nairobi City County, Ex-Parte Stanley Muturi [2018] Eklr, Mawani vs Mawani [1977]KLR 159 and the case of Caliph Limited vs Barbel Sharma & Another [2015] Eklr. In the case of Caliph Limited Vs Barbel Sharma & Another (supra). The court emphasized that he come to equity must come with clean hands and must also do equity .
8. Further the Respondent submitted that the Applicant has not demonstrated clean hands by his action and also has continued acting in contempt of the court order of 12/10/2023. On substantial loss, the Respondent submitted that the Applicant has not demonstrated the loss they will suffer. That the Applicant has also not provided security as is required by Order 42 rule 6 (2)(b). It is further the Respondent's submissions that the undue delay in filing the application has not been explained. He urged the Court to dismiss the application.
9. Based on the evidence on record, the Plaintiff/Respondent instituted the suit against the three defendants claiming to be the widow of the registered proprietor of PLOT C6-219 situate in Kayole



- Nairobi County. She obtained letters of the administration for the deceased Joseph O. Jaoko. That in 2019 the 1st and 2nd defendant trespassed on the suit property and constructed a building despite being alerted that the plaintiff was the rightful owners.
10. At the conclusion of the hearing the court issued orders for permanent removal of the building and structures on the suit property and compensation for loss of use and exemplary damages to the plaintiff/respondent.
 11. Being dissatisfied with the Judgment, the 1st and 2nd Defendants/Applicants have preferred an Appeal and lodged a Notice of Appeal on the 25/10/2023. The effect of the judgment was that the 1st and 2nd defendants/applicants were required to remove the permanent buildings from the suit property. The 1st & 2nd defendants/applicants then sought the instant application to arrest execution of the Decree which has not commenced.
 12. Considering the written submissions and authorities cited by parties, the issues for determination are;
 - i. Whether the application meets the threshold for grant of stay?
 - ii. Who should pay costs for the application?
 13. It is trite that no Appeal can operate as stay hence an application for stay shall be made to court by the desiring parties. The principles for grant of stay are well laid down in Order 42 rule 6(ii) which provides:
 - i. 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.
 14. The Supreme Court in Application No 5 of 2014 Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR held that the applicant must satisfy court that (i) the appeal or intended appeal is arguable and not frivolous; and that (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory. The principles were also echoed in the Court of Appeal Case of Butt v Rent Restriction Tribunal [1982] KLR 417
 15. The foregoing provision enunciates three conditions for granting of stay to wit, substantial loss on the part of the applicant, application is made without delay and the applicant to furnish such security as will be directed by the Court. Being an Appeal, the Court ought to also consider the principles laid down in the Gatirau Peter Case, the Appeal will be rendered nugatory.
 16. On whether the application is timely and/ or brought without undue delay, the impugned Decree was made on 12/10/2023 and the instant application was filed on 31/01/2024. That is about three months after the judgment. The applicant filed a Notice of Appeal on 25/10/2023 but did not file any application for stay. As noted above, an Appeal can never operate as stay. What amounts to inordinate delay differs from case to case. Borrowing from Nairobi HCC No. 32 of 2010, Utalii Transport Company Limited & 3 Others v NIC Bank Limited & another [2014] eKLR, the Court in considering what amounted to inordinate delay had this to say “Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which



leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable” This Court associates itself fully with the above findings.

17. Once the Court delivers judgment, there is always an existing uncertainty as to what time execution can issue as a result therefore; an aggrieved party is required to take immediate action to avoid execution by staying the orders of Court. It is trite that Court orders cannot be issued in vain. I agree with the finding of the Court in Eldoret ELC No. 200 of 2012 Jaber Mohsen Ali & another v Priscillah Boit & another [2014] eKLR where it was held that a delay even for a day is delay.
18. In the above stated case, the applicant filed an application for stay pending an Appeal and the Court considered that a delay of four days was inordinate.
19. The Applicant did not submitted on the issue of delay for three months. No reason has been advanced for the said delay. From the Court records, save for filing of a Notice of Appeal, the applicant also requested for copies of certified proceedings and Judgment on 25/10/2023. Invariably such request is inevitable when preparing records of Appeal. Thus the request could not hinder the filing of the instant application. Time begun running when the Judgment was entered and nothing stopped it, time only stops running within the provisions of Order 50 Rule 4, or as directed by court, this was not the case.
20. The Court of Appeal in Nakuru Civil Appeal No. 1/2007;- William K. Too v Simion K. Langat [2007] Eklr, refused to interfere with the ruling of the High Court, where the learned judge found that an unexplained delay of forty two days was inordinate. Even if this Court was to invoke the provisions of Article 159(2) (d), of *the Constitution*, such disregard on the rules of procedure cannot be ignored. The provision is not a panacea for the abuse of court process. Land is an emotive issue in Kenya and litigating parties ought to judicially and expeditiously adjudicate on them.
21. On the second limb of substantial loss, Plat GA J as he then was in Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR held “Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondent/plaintiff should be kept out of their money”
22. Further in James Wangalwa & Another vs Agnes Naliaka Cheseto{2012}, the court found that substantial loss is what has to be prevented by preserving the status quo because such loss would render an appeal nugatory. It is therefore not enough to suggest that the Applicant will suffer loss. This Court has not been furnished with evidence as to the loss that will be suffered and the injury that will occasion the Applicant. If anything the 1st & 2nd defendants/applicants are alleging a loss of Kesh 2,240,880 gross annual income and value of the suit property as market rate of Kesh 20,000,000 yet the court has already pronounced itself on the ownership of the suit property. Further apart from the allegation there is no evidence produced to support the claim of the gross annual income. The applicants have attached three sheets depicting payment of rent for November, December 2023 and January 2024. This is not adequate in explaining the gross annual income of Ksh 2,240,880.
23. The 1st and 2nd defendants/applicants submits that they were allotted the suit property by the 3rd defendant after it was repossessed from the plaintiff/respondent. These were issues that were dealt with by the court in paragraphs 61, 62 & 63. of its Judgment and cannot now form the basis upon which this court will draw substantial loss. This court does not see what it ought to prevent. The mere assertion of substantial loss without substantiating cannot be the reason this court will infer substantial loss. If the subject matter of the suit was at risk, this court would have been otherwise persuaded. (See Nairobi Civ No. 612 of 1996 Machira t/a Machira & Co Advocates v East African Standard [2002] eKLR)
24. Preserving the subject matter of the intended Appeal is important as not to render an Appeal nugatory. The onus is on the Applicant to demonstrate that the Appeal will be rendered nugatory. The Court



of Appeal in Nairobi Civil 211 of 2016 Shah Munge & Partners Ltd v National Social Security Fund Board of Trustees & 3 others [2018] eKLR when considering whether to allow an application for injunction and stay pending appeal looked at the definition of “nugatory” as was defined in Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232 The court opined that nugatory has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling, essentially one which is of little or no legal consequence

25. As to whether the Appeal will be rendered nugatory this varies from case to case and it depends on what is to be stayed. In the instant case, the issue at hand is land. The evidence before the court is that there are tenants on the suit property neither the plaintiff nor the applicants are in actual occupation of the suit property. The Applicant is by law mandated to demonstrate how the Appeal will be rendered nugatory. There is an attached Notice of Appeal and this Court cannot determine whether the Appeal will be a success or not, as doing so will amount to sitting on its Appeal. That being the case, the Applicant has failed to demonstrate how his Appeal will be rendered nugatory should it succeed. (see Nairobi CoA Appeal No. 189 of 2001 David Morton Silverstein v Atsango Chesoni [2002] eKLR)
26. Having found that the Applicant has not demonstrated any substantial loss or that the Appeal will be rendered nugatory, an order for Security for cost cannot issue.
27. Justice Kuloba R as he then was in Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63 when dismissing an application for stay had this to say This means that in whatever we do in the civil courts, we must, so far as is practicable, ensure that the parties fight it out on level ground on equal footing, attempt to minimize and save costs, ensure expeditious and fair disposal of the case in hand, allotting to every case an appropriate share of judicial resources as account is taken of the need to allot those resources to other cases, and the way a case is dealt with must be proportionate to (a) the amount of money involved, (b) the importance of the case, (c) the complexity of the issues, and (d) the financial position of the respective parties. In the exercise of any power under any rule, or in its interpretation, we must strive to give effect to this overriding objective; and it is the duty of the parties to help the court in the furtherance of the overriding objective to yield justice and fairness.
28. This Court concurs with the above holding of the Court. The 1st and 2nd defendants/applicant’s conduct towards the process of doing justice is against the spirit of overriding objectives on the just and expeditious disposal of matters. To this end, the Applicant has not met the requisite principles for grant of Stay Order and as such the application is unmerited.
29. I will not address the claim raised by the plaintiff/respondent of contempt of court since no formal application has been filed. The plaintiff/respondent is at liberty to file a formal complaint of contempt which this court can address substantially after the parties are served and given time to respond.
30. On who should pay costs, section 27 of the *Civil Procedure Act* gives this Court discretion to award costs. Also costs follow the events. While that is the case, the court will be guided by inter-alia the conduct of the parties towards the suit and the subject matter of the suit (See Nyeri Civil No. 17 of 2014 Cecilia Karuru Ngayu v Barclays Bank of Kenya & another.
31. For the above reasons, the Plaintiff/Respondent is entitled to costs.

Disposal Orders

32. Having carefully considered the Amended Notice of Motion Application dated 30/01/2024, the Court finds that apart from prayer 1A where the applicant has prayed that the law firm of Prof Albert Mumma & Company Advocates comes on record for the 1st and 2nd defendants, the other prayers of



the Amended Notice of Motion are not merited and therefore the Amended Motion is dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF MAY 2024.

.....

MOGENI J

JUDGE

In the virtual presence of:-

Mr. Ochieng holding brief for Pro. Mumma for 1st & 2nd Defendant/Applicant

Mr. Orondo for 1st Respondent

Ms. Odhiambo holding brief for Mr. Bake for 3rd Respondent/defendant

Ms. Caroline Sagina: Court Assistant

.....

MOGENI J

JUDGE

RULING FOR ELC SUIT NO. E043 OF 2022	0
--------------------------------------	---

