



REPUBLIC OF KENYA



**Serem & 3 others v Tamalel (Environment and Land Appeal
28 of 2021) [2024] KEELC 4505 (KLR) (3 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4505 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL 28 OF 2021**

JM ONYANGO, J

JUNE 3, 2024

BETWEEN

PATRICK SEREM 1ST APPELLANT
JOSEPH SEREM 2ND APPELLANT
KIMAIYO LETTING 3RD APPELLANT
JULIUS KORIR 4TH APPELLANT

AND

**MARY CHEPKEMBOI TAMALEL ALIAS TAMALINY
CHEPKOMBOI RESPONDENT**

RULING

1. Before this court is a Notice of Motion dated 21st September 2023 where the Defendant/Applicant seeks the following orders. That the honourable court be pleased to issue a temporary stay of execution of the judgment and orders of the Honourable Magistrate delivered on 17th June 2021 pending hearing and determination of the application inter-parties. Secondly, that a temporary stay of execution be granted pending hearing and determination of the appeal herein. Thirdly, that the honourable court be pleased to issue a stay of execution restraining the Respondents, her agents and or servants from evicting the Applicants, his agents or servants from charging, selling subdividing, transferring and/or executing the decree issued by the court or otherwise interfering with the whole parcel of land known as Mafuta Settlement Scheme Plot No.87 in any way that will change and/or alter the Appellant's rights pending the hearing and determination of the appeal.
2. The application is stated to be brought under Articles 50 and 159 of *the Constitution*, Sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act* and Order 42 Rule 6 (1-4) of the *Civil Procedure Rules*.



3. The application is premised on the grounds set out on its face and the Supporting Affidavit of Patrick Serem. In the said Affidavit he deponed that he has been a resident of the suit property with his late mother since 1975. That the suit property was allocated to his mother by the Settlement Fund Trustee. Prior to this, a letter of temporary occupation by the Settlement Fund Trustees was issued to her. He states that he now resides on the suit property with his family. He is aggrieved with the judgment delivered on 17th June 2021 which awarded the Respondent the whole suit property which rendered him landless and destitute. He has since filed an Appeal after applying for a certified copy of the proceedings. That a temporary order of stay of execution of the judgment and decree delivered on 17th June 2021 was issued pending hearing and determination of the application by the honourable magistrate but the same was subsequently dismissed.
4. He depones that on 23rd August 2023, the court issued an order to the OCS Ziwa Police Station to ensure the decree issued in favour of the Respondent is enforced. That the execution of the decree will lead to the Applicant being landless. He therefore prays for a stay of execution of the Court's Decree as they pursue the appeal and that the status quo be maintained. It is their case that the Record of Appeal is not ready as they have not been supplied with the certified copies of the proceedings despite their request in July 2021. It is their case that the balance of convenience tilts in their favour.
5. In response to the application a Replying Affidavit sworn by Mary Tamalel and filed on 18th October 2023 states that the application is an abuse of the court process aimed at misdirecting the court to give the orders sought. She deponed that she is the registered owner of the suit property and she has annexed copy of the title deed to the property. She states that the Applicant is inordinately late in bringing this application as the judgment was delivered on 17th June 2021. She also refutes claims that the Applicant has been in occupation of the suit property and states that he has been engaging in illegal cultivation of the same. She asserts that a permanent injunction has already been issued against him for trespassing into the suit property. That the Appeal does not raise triable issues and has no chance of succeeding. That there is nothing to stay as he is currently not in occupation of the suit property and the Appeal will not be rendered nugatory if the application is denied. She adds that the status quo prevailing is that the Applicants are not on the land and have made several attempts to re-enter the land. she avers that application seeking stay dated 2nd August 2021 was dismissed and it was not until the Respondent tried to enforce the Decree, that the application herein was filed. It is the Respondent's contention that the application does not meet the conditions for the grant of a stay.
6. The Applicant swore a Further Affidavit on 18th January 2024 where he reiterated that the suit parcel was allocated to his mother in 1975. He avers that the Plaintiff only sought for a permanent injunction and not a declaration of ownership. It is his contention that the Respondent cannot claim to have executed the decree as there is no court order directing the Land Settlement Officer to issue a title to the Plaintiff. That they filed their Memorandum of Appeal on 19th July 2021 when judgment was delivered on 17th June 2021. He avers that the title deed owned by the Respondent was issued on 17th April 2023 while the judgment did not require the Land Registrar to issue a title deed to the Plaintiff/Respondent. He avers that the records at the Land Office show that the Applicant's mother paid her loan to the Settlement Fund Trustees and therefore her title deed cannot have been issued to the Respondent without a court order. It is the Respondent's case that the trial court erred in law and in fact by granting the Respondent prayers which were not sought in the Plaint. He avers that the certified copies of the proceedings were applied for timeously but were not supplied until December 2023. It is the Respondent's case that they have been desirous of prosecuting the matter. He maintains that they have resided on the suit property with their mother since 1975 and that they have no other land to move to.



Submissions

7. The Applicant filed his submissions on 19th January 2024. He submits that the court has jurisdiction to grant the orders sought under Order 42 rule 6 of the [Civil Procedure Rules](#). The Applicant started by giving a background of the case. He submitted that there are three issues for determination;
 - i. Whether substantial loss may result to the Applicant unless the order was made.
 - ii. Whether the application has been made without unreasonable delay
 - iii. Whether the Applicant is willing to furnish security for costs.
8. On the first issue, counsel for the Applicant submits that eviction will lead to substantial loss as the Applicants have been in occupation of the suit property since 1975. He relied on the case of Nairobi High Court Miscellaneous Civil Application No. 419 of 2011 [Osero & Company Advocates v Easy Properties Limited & New Ocean Transport Co. Limited v M.A Bayusuf Sons](#). He further submits that the grant or refusal of an order of such nature is made in the exercise of the court's discretion. He cited Bungoma High Court Misc. Application No. 42 of 2011 James [Wangalwa and Another v Agnes Naliaka Chesoto](#) (2012)eKLR. On the question of the court's discretion, he relied on the case of [Butt v Rent Restriction Tribunal](#) (1982) KLR 417.
9. On the second issue, he submitted that the application was made without delay given that the file was missing at some point and it resurfaced when the Respondent was taxing their Bill of Costs in June 2023. Thereafter the Appellants moved the court vide the current application.
10. On the third issue regarding security for costs, the counsel urged the court to ignore the issue of costs as this is not a monetary claim. On whether the appeal is meritorious the Applicant submitted that in applications for stay pending appeal the court dealing with the appeal is more suited to assess the merits of the appeal. To buttress this point he relied on the case of [Kenya Power & Lighting Company Limited v Rose Anyango and Higrise enterprises](#) Siaya High Court Misc. Application No. 29 of 2020.
11. The Respondent filed her submissions on 14th December 2023. Counsel for the Respondent begins by giving a background of the case and identifies two issues for determination. The first one is whether the Applicant has satisfactorily discharged the conditions for the grant of stay of execution of the Decree pending appeal and the second one is who should bear the costs.
12. On the first issue, the Counsel submitted that a stay of execution order is discretionary and when granting the order, the court must balance the interests of the Applicant and the successful litigant. He relied on the cases of [Butt v. Rent Restriction Tribunal](#) (1982) KLR 417 & [RWW v EKW](#) (2019) eKLR. It is his submission that the Applicants have not discharged their burden under Order 42 Rule 6 of the [Civil Procedure Rules](#) and that the Applicants have never been in occupation of the suit property but they have been illegally cultivating the same. He submitted that the Applicants have no rights over the suit property as they were prohibited from trespassing upon the suit property on 23rd August 2023. It is his further submission that it is misleading to aver that execution of the decree will lead to eviction of the Applicants.
13. On the question of delay counsel submits that the application was filed after a delay of two years after judgment was delivered. To buttress this point, he relied on the cases of [Arun C Sharma v. Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others](#) (2014) EKLR, [Mohammed Salim t/a Choice Butchery v Nasserpuria Memon Jamat](#) (2013) EKLR.
14. It is his submission that the application is vexatious, frivolous and an abuse of the court process and that it ought to be dismissed with costs to the Respondent.



Analysis And Determination

15. I have considered the application, the Replying Affidavit and the submissions made in respect thereof. The sole issue for determination is whether the Appellants/Applicants have made a case for the grant of the orders sought.
16. The law on the grant of an order of stay of execution is settled. An Applicant must satisfy the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules. These are: -
 - a. That substantial loss may result unless the order is made
 - b. The application must be filed without undue delay and
 - c. The Applicant must furnish such security as the court may order for the due performance of such decree or order as may ultimately be binding on him.
17. This court is also guided by the principles cited in Civil Appeal No.107 of 2015, Masisi Mwita Vs Damaris Wanjiku Njeri (2016) EKLRL, where the Court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another..Vs...Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that: -

“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely;- Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.
18. In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo...Vs...Straman EA Ltd (2013) as follows: -

“In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory.”

These twin principles go hand in hand and failure to prove one dislodges the other”
19. In the case of RWW v EKW [2019] eKLR, the court held;

“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. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary.”
20. On substantial loss, the Applicants have submitted that they are in danger of being evicted if the stay is not granted and that they will be landless and destitute as they have been in occupation of the suit property since 1975. The Respondent refutes these claims and maintains that the 1st Applicant has been trespassing and cultivating the suit parcel and has not been in occupation thereof. I must refer



to the decree issued after perusal of the court record to determine whether the Applicants were in occupation of the suit property. The said decree states as follows:-

“It is hereby decreed and ordered that:

- a. Judgment is entered for the plaintiff against the defendant as prayed in the plaint in that a permanent injunction do and is hereby issued against the defendants’ restraining them from trespassing, selling, cultivating, leasing or in any other way whatsoever interfering with or any act which is inconsistent with the Plaintiff’s ownership of all that parcel of land known as Plot no. 87 Mafuta Settlement scheme measuring 5 acres.
- b. The defence and counterclaim are hereby dismissed.
- c. Cost of the suit be borne by the 1st Defendant.”

21. A perusal of the court record shows that the 1st Appellant’s claim of ownership and the claim that he inherited the suit parcel from his mother was dismissed.
22. This court notes that the Applicant herein was therefore not in occupation of the suit property as no eviction orders were issued against him. The judgment reveals that the land was leased to the mother of the Applicant for cultivation purposes thus there is no indication of permanent settlement on the land. The court cannot ignore the fact that there are recent photographs attached to the Further Affidavit depicting some dwelling structures. However, the court is of the view that the same may have been put up after the Decree was issued thus prompting the application dated 9th June 2023 by the Respondent citing trespass and interference with the suit property by the Applicant. The said Application was granted in the Respondent’s favour. The Applicant was found to be in contempt and the authorities were directed to ensure that the Decree was enforced. What this means is that there has been no permanent settlement since 1975 for the Applicant to claim that substantial loss will result if they are evicted from the suit property. The court therefore, finds that the Applicant has failed to satisfy this limb.
23. The second limb relates to delay in filing the application. Judgment was delivered on 17th June 2021. A Memorandum of Appeal was filed on 19th July 2021. Both parties have admitted that a similar application for stay of execution was filed in the trial court dated 2nd August 2021. The said application was eventually dismissed. The current application for stay is dated 21st September 2023, slightly over two years after judgment was delivered.
24. The reasons for the delay as explained by the Applicant is that their first application for stay was dismissed on 24th February, 2022 and that the file went missing for a considerable length of time thereafter, making it difficult for them to prepare a Record of Appeal. The court notes that the Applicants had all the time between 17th June 2021 and 24th February 2022 when they allegedly had access to the court file before it went missing. They ought to have filed the application in this court if indeed they were aggrieved by the dismissal of the application in the lower court. They could also have filed a Record of Appeal as they awaited the proceedings after which they could have filed a Supplementary Record of Appeal. However, the Applicants were not keen on exploring this option. The actions by the Applicant seem to be an afterthought as they only acted after the Respondent sought to enforce the Decree. It is my considered view that the application is ploy to stop the Respondent from enjoying the fruits of her judgment. The court will not be used to aid an indolent litigant and perpetuate an injustice.



25. With regards to the requirement for security, the Applicants have not expressed willingness to furnish security for costs. As a matter of fact, they have urged the court to ignore the issue of security for costs as this is a non-monetary claim. Security for costs is one of the pre-requisites for stay and the court cannot ignore it or wish it away. Since the Applicant has not expressed his willingness to furnish security for costs he has deliberately failed to comply with one of the conditions for stay.
26. In view of the foregoing it is my finding that the application does not meet the threshold envisaged under Order 42 Rule 6 of the Civil Procedure Rules. The application is therefore not merited and it is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF JUNE, 2024.

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J. M. ONYANGO

JUDGE

In the presence of;

MR. Gitonga for Mr. Murgor for the Applicants

Mr. Mwaniki for the Respondents

Court Assistant: Brian

