**Masoud aka Awadh Mas v Sketty (Legal representative of the Estate of Nassor Ali Nahdy) (Environment and Land Appeal E002 of 2024) [2024] KEELC 5200 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5200 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**

**ENVIRONMENT AND LAND APPEAL E002 OF 2024**

**EK MAKORI, J**

**JULY 10, 2024**

**BETWEEN**

**AWARD MASOUD AKA AWADH MAS ..... APPLICANT**

**AND**

**MUNIR MOHAMED SKETTY (LEGAL REPRESENTATIVE OF THE ESTATE OF NASSOR ALI NAHDY) ..... RESPONDENT**

**RULING**

1. The application seeks a stay of execution pending appeal.

2. The applicant argues that the judgment of the Subordinate Court is not self-executing. They point to a High Court judgment in Mombasa (Yano J.) that settled the land ownership issue and a Court of Appeal ruling that directed the maintenance of the status quo until the Appeal is determined. This, they contend, prevents the respondent from executing a judgment against the appellant, as it would be a contempt of the Court of Appeal's ruling.

3. According to the applicant, the respondent cannot execute a judgment against the appellant as that would amount to contempt of the ruling that the Court of Appeal issued.

4. The applicant further avers that It is a settled principle of law that the decisions of the Superior Courts bind Subordinate Courts. Where there is a conflict between the decision of the Subordinate Court and the Superior Court, the decision of the Superior Court supersedes. In the instant circumstances, the Subordinate Court was bound by the High Court judgment and ruling from the High Court. It was under a legal duty not to depart from them without valid reasons through the doctrine of precedence and stare decisis, which it failed to do. This Court, on its part, is bound by the ruling of the Court of Appeal, which has directed that the status quo be maintained pending the determination of the Appeal.

5. The respondent avers that the status quo on the suit land is that the applicant was found to have been in illegal occupation and/ or trespassing on the suit land. It is not enough for the applicant to state that he would suffer substantial loss; it is incumbent on him to prove specific details and particulars of the loss. There is no evidence that the applicant and his family cultivated seasonal crops on the suit land for their subsistence, nor is there evidence of an imminent threat to the effect that the respondent would be likely to expose the suit land to adverse dealings. See the decision in *Charles Wahome Gethi v Angela Wairimu Gethi* [2008] eKLR, holding that it is not enough for the applicants to say that they live or reside on the suit land and will suffer substantial loss. The applicants must go further and show the substantial loss that they stand to suffer if the respondent executes the decree in the suit against them.

6. I frame the issues for this Court's determination as being whether to grant a stay of execution and who should bear the costs of the current application.

7. Counsels cited various judicial authorities in this realm for the guidance of this Court.

8. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates as follows:

> "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.
>
> No order for stay of execution shall be made under sub rule (1) unless—
>
> the Court is satisfied that substantial loss may result to the 1st Applicant unless the order is made and that the application has been made without unreasonable delay; and 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.

9. The judgment of the Lower Court was delivered on the 19th of December, 2023, and the Memorandum of Appeal was filed with the Court on the 19th of January 2024. The Court does not consider this to be an inordinate delay.

10. On irreparable damage or loss, the subject matter is land; in *Machira t/a Machira & Co. Advocates v East African Standard (No 2)* [2002] KLR 63, the Court of Appeal considered what amounts to substantial loss and held that:

> "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."

11. What amounts to substantial loss was further illustrated by the Court of Appeal in the case of *Mukuma v Abuoga* [1988] KLR 645; the Court held:

> " Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory."

12. In ELC matters, the Court is usually concerned with preserving the suit's substratum pending appeal. In this case, it has been shown that the applicant has no title to the suit property. It was decreed to belong to a 3rd party by Yano J. An appeal was preferred status quo was ordered by the Court of Appeal, which exists. The Lower Court considered this point when arriving at its decision.

13. I do not see what to preserve pending appeal. I also do not think I will discuss the issue of security for costs. The instant application is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 10TH DAY OF JULY 2024.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Ms. Wanjiku, for the Respondent

Happy: Court Assistant

In the Absence of:

Mr. Mwawasi for the Applicant