



**Asenwa v Keino (Environment & Land Case 195 of 2013)  
[2024] KEELC 6630 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6630 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 195 OF 2013  
JM ONYANGO, J  
OCTOBER 9, 2024**

**BETWEEN**

**GABRIEL KIPKERING ASENWA ..... PLAINTIFF**

**AND**

**JOEL KIPROTICH KEINO ..... DEFENDANT**

**RULING**

1. What is before me for determination is the Plaintiffs' Notice of Motion dated 10<sup>th</sup> June 2021 seeking the following orders:
  - i. Spent
  - ii. That the firm of Wafula Wawire & Co Advocates be allowed to come on record for the Judgment Debtor herein.
  - iii. That this Honourable Court be pleased to order a stay of execution of the judgment /Decree entered against the Judgment Debtor by the Honourable trial Court on 9<sup>th</sup> April 2021 pending the hearing and determination of this application.
  - iv. That it is in the interest of justice that the application be heard expeditiously and the orders sought be granted as a matter of urgency.
  - v. That the costs of this application be borne by the Defendants.
2. The application is based on the grounds set out on the face of the Notice of Motion and the Applicant's Supporting Affidavit sworn on the 10<sup>th</sup> June 2021. In the said affidavit he depones that the suit herein proceeded for hearing and judgment was delivered on 22<sup>nd</sup> July 2020 in favour of the Defendant. That he then filed a Notice of Appeal against the said judgment. He thereafter applied for a certified copy of the decree and proceedings. The Decree was issued on 9<sup>th</sup> April, 2021 but eh proceedings have not



yet been provided. He depones that he fears that the Plaintiff may proceed with execution against him to his detriment.

3. The application is opposed by the Respondent through his Replying Affidavit sworn on 6<sup>th</sup> October, 2021 in which he depones that the application is merely intended to prevent him from enjoying the fruits of his judgment after both parties were heard on merit.
4. He further depones that the application is made in bad faith. That a negative order cannot be stayed and the Applicant is bent on invoking the sympathy of this court. He adds that the it is in the interest of justice that the application be disallowed.
5. The application was canvassed by way of written submissions and both parties filed their submissions which I have carefully read and considered.

### **Applicant's Submissions**

6. In his submissions dated 24<sup>th</sup> January, 2024, Mr. Tarigo learned counsel for the Applicant submitted that the judgment delivered against the Applicant was not a negative order as the court ordered the Applicant to transfer the suit property to the Respondent. He relied on the case of *National Transport and Safety Authority v Samper Tours and Travels* (2022) eKLR.
7. On whether a stay should be granted, counsel relied on the case of *Ena Investment Limited v Bernard Ochau Mose & others* (2022) eKLR for the proposition that the discretionary power to grant a stay must not be exercised capriciously or whimsically, but must be exercised in a way that does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the appeal overturn the trial court's decision.
8. He argued that there was a danger that if execution was not stayed, the subject matter could be extinguished through sale or transfer. He therefore urged the court to grant the stay pending appeal.

### **Respondent's Submissions**

9. On the other hand, Mrs. Isiaho, learned counsel for the Respondent submitted that the application was an afterthought as the Applicant only moved the court to avert an impending execution and defeat or delay justice.
10. She contended that even though the Applicant alleges that he filed a Notice of Appeal, the same had not been annexed to his Supporting Affidavit nor had he stated what steps he had taken to have the appeal heard. She wondered what the Applicant was seeking to stay as his case had been dismissed thus resulting in a negative order.
11. It was counsel's further contention that the Applicant had failed to satisfy the conditions for stay of execution pending appeal as provided in Order 42 Rule 6 of the Civil Procedure Rules. Notably, he had failed to demonstrate that he would suffer substantial loss; that he had filed the application without undue delay and that he was willing to furnish security for costs. She relied on the case of *Siegfried Busch v MCKK* (2013) eKLR where the court held as follows:

“A superior court to which an application has been made must recognize and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment”



12. In any event, she submits that the Applicant has not expressly stated that he is seeking a stay pending appeal as the prayers sought only indicate that he seeks “a stay of the judgment /Decree entered against the Judgment Debtor by the Honourable trial Court on 9<sup>th</sup> April 2021 pending the hearing and determination of this application”.

### **Analysis and Determination**

13. Having considered the application, Replying Affidavit and the parties rival submissions as well as the authorities cited to me and the relevant law, the only issues for determination are:
- i. Whether the judgment delivered on 22<sup>nd</sup> July, 2020 resulted in a negative order which was not capable of being stayed.
  - ii. Whether the Applicant should be granted a stay of execution pending appeal.
14. With regard to the first issue, I have had occasion to peruse the judgment of by brother Justice Stephen Kibunja delivered on 22<sup>nd</sup> July, 2020. In the said judgment, he dismissed the Plaintiff’s claim where he had sought a declaration that the Defendant had breached the sale agreement and an order for the defendant to render vacant possession of the suit property. The court further entered judgment for the Defendant on his Counterclaim and declared that the Plaintiff had breached the sale agreement by failing to apply for the consent of the Land Control Board despite having been paid the purchase price in full. The court further directed the Plaintiff to execute all the necessary documents to effect the sub-division and transfer of 13.5 acres of the suit property to the Defendant within 6 months failing which the Deputy registrar would be authorized to execute the said documents on his behalf.
15. It is clear that the dismissal of the Plaintiff’s case is a negative order which is incapable of staying. However the decision on the counterclaim is a positive order as it compels the Plaintiff to sign the necessary documents to effect the sub-division and transfer of 13.5 acres to the Defendant. This aspect of the decision is capable of being stayed.
16. Having said that, I now have to determine whether the Applicant has met the conditions for stay of execution. I must first point out that the application was poorly drafted as it is not clear what kind of stay the Applicant is seeking as the application is brought under Order 51 of the *Civil Procedure Rules* and section 3A of the *Civil Procedure Act* which have no bearing on the orders sought on the Notice of Motion. However, in light of Article 159 2(d), I will not dwell on the technical shortcomings as it is apparent that the applicant ought to have specifically sought a stay pending appeal.
17. That being the case, I will proceed to determine if the Applicant has met the conditions for stay pending appeal.
18. Order 42 Rule 6 of the *Civil Procedure Rules* sets out the principles that should guide the court in considering an application for stay pending appeal. The said provision stipulates as follows:
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.
  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.
3. Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
  4. For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

With regard to substantial loss, the court in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the court observed as follows:

“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.”

19. In the instant case, the Applicant has not demonstrated what loss he will suffer if a stay is not granted. All he mentions is that he has filed a Notice of Appeal. He has therefore not met this condition.
20. On the second condition which talks about delay, the application was filed on 10<sup>th</sup> June, 2021 almost a year after the judgment was delivered. No explanation has been offered for this inordinate delay, making it difficult for this court to exercise its discretion in the Applicant’s favour.
21. Lastly, with regard to the third condition which touches on the need to furnish security for costs, the Applicant is once again silent on whether he is willing to furnish security.
22. All in all, the Applicant has made no effort to convince this court that he deserves the order of stay of execution. In the circumstances, I find absolutely no merit in his application and I dismiss it with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 9<sup>TH</sup> DAY OF OCTOBER 2024.**

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**J.M ONYANGO**

**JUDGE**

In the presence of;

Ms. Isiaho for the Defendant/Respondent

Miss Kanda for the Plaintiff/Applicant

Court Assistant: Brian

