



REPUBLIC OF KENYA



KENYA LAW
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**Bwire & another v Siwa (Environment and Land Appeal
E015 of 2024) [2024] KEELC 6752 (KLR) (15 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6752 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL E015 OF 2024**

**EO OBAGA, J
OCTOBER 15, 2024**

BETWEEN

MARY NABWIRE BWIRE 1ST APPELLANT

JAMES WAFULA WANGIRA 2ND APPELLANT

AND

MARTIN CHEMONGES SIWA RESPONDENT

RULING

1. This ruling is with respect to the Appellants/Applicants' Notice of Motion dated 18th April, 2024 brought under Certificate of Urgency, which seeks the following orders:-
 - i. Spent
 - ii. Spent
 - iii. That there be stay of execution and/or further execution of the Decree in Eldoret CMCC ELD No. 73 of 2020 pending the hearing and determination of the Appeal.
 - iv. That costs hereof be costs in the Appeal.
2. The application is premised on the grounds set out on Motion and on the Supporting Affidavit sworn by James Wafula Wangira, the 2nd Appellant, sworn on 18th April, 2024. The Appellants' case is that in Eldoret CMC ELC No. 73 of 2020, the Defence case was closed without their knowledge. Judgment was delivered on 21st December, 2023 in the Respondent's favour directing the Appellants to transfer 28 Acres of Land Parcel No. Uasin Gishu/Moiben/3 (the suit property) to the Respondent, and also restrained them from using the said property. They filed an application to set the judgment aside, but it was dismissed vide a ruling delivered on 11th April, 2024 which they have challenged through this instant Appeal.



3. The 2nd Appellant deponed that the Respondent is desirous of executing, and has in fact accessed the land and has ploughed it for planting and also intends to construct structures thereon. That such actions are likely to cause them harm and they will suffer substantial loss if the Appeal succeeds, hence the stay ought to be granted. He asserted that their Appeal is properly before court and has merit, with high chances of success. He claimed that no prejudice will be suffered if the orders are granted and neither will the Respondent be in a state of jeopardy. He deponed that the Application is made in good faith and expressed willingness to provide security for the performance of the decree.
4. The Application was opposed through the Replying Affidavit of Martin Chemonges Siwa sworn on 6th May, 2024 where he deponed that despite the court directing that the matter be fast tracked, the Appellants chose to delay it for their benefit. He deponed that the Appeal has no high chances of success but merely a waste of time since he had a very strong case. He confirmed that the only issue remaining is the processing of the title deed and he was apprehensive that the Appellants would transfer the land to a third party since the status quo orders from the trial court had lapsed.
5. He deponed that he paid KShs. 8,000,000/- but the Appellants refused to give him possession, claiming there was a pending criminal case over the suit property. That the Appellants have not appealed the Judgment of the lower court thus the orders sought herein are unavailable. He explained that the application is in bad faith with intentions to deprive him of the fruits of the judgment, hence he stands to suffer if the application is allowed. He asked that the application be dismissed with costs, or in the alternative, the Appellants be compelled to furnish security and deposit the title deed in court pending hearing of the Appeal.
6. The Appellants responded through the 1st Appellant's Supplementary Affidavit sworn on 13th May, 2024. He deponed that an order to fast track a matter cannot be used to injure parties. He insisted that the appeal has high chances of success. According to him, the Respondent only paid KShs. 2,500,000/=, which amount is not worth granting 28 Acres. He averred that the criminal case is before a different court for hearing and determination and is not subject of this court. He reiterated the willingness to furnish security, but indicated that the title deed to the suit property had been lost and produced a copy of a Police Abstract reporting the said loss. He urged that the Appeal will be rendered nugatory if the Application is not allowed.
7. In further response, the Respondent also filed a Supplementary Affidavit dated 7th June, 2024. He reiterated his earlier averments adding that he has at all times since purchase been in occupation and use of the land. He outlined how he paid the KShs. 8,000,000/- and the dates of the instalments, a fact he said was proved in the subordinate court. Upon payment, the Appellants then released the Original title deed to him to commence the transfer process, and he submitted it to the Land Registrar for the same. The Registrar then asked him to obtain Transfer forms from one Johannes Boy Okoba, to whom the Appellants had donated a Specific Power of Attorney over the land. He deponed that unbeknownst to him, the Land Registrar was known to the Appellants and he secretly released the title deed to them. He reported the matter to the police, which resulted in Criminal Case No. 1572 of 2021.
8. The Respondent deponed that the allegation that the title deed is lost is therefore untrue and a mere afterthought. The same is also a change in tune from the expressed willingness to abide by any order to furnish security arising from the Respondent's proposal that the same be deposited in court as it is the best security. Further, that the Appellants have not followed the process laid out under Section 34 of the [Land Registration Act](#) regarding loss of an original Title, thus there is nothing before the court to prove the same. That the Appellants have not lost the title, and are only hell bent on frustrating the Respondent. He insisted that it is the Respondent who will be prejudiced if the stay is granted, and that the Appeal will not be rendered nugatory if the title is deposited in court.



Submissions

9. On 7th May, 2024 the court issued directions that parties file their Supplementary Affidavits together with their submissions. On 9th May, Counsel for the 1st Applicant asked for 7 days to put in their submissions. The 2nd Appellant's Advocate confirmed that they had filed their submissions. I have not seen their submissions, the only submissions on the record are the Respondent's Submissions which are dated 7th June, 2024.
10. In those submissions, Counsel indicated that the conditions to be met in an application for stay of execution pending Appeal are laid out in Order 42 Rule 6 of the Civil Procedure Rules. For a party to succeed, he must satisfy each of the conditions therein (Nicholas Stephen Okaka & Another vs Alfred Waga Wesonga (2022) eKLR). On the first condition, Counsel submitted that the Appellant had alleged that they would suffer substantial loss but had not demonstrated the loss they would sustain. On the other hand, that the Respondent will be highly prejudiced as he will be delayed from proceeding with execution. He relied on James Wangalwa vs Anges Naliaka Cheseto (2012) eKLR, Mbola (Appealing through his recognised agent John Ndambuki Kitenge) vs Masila (2024) KEELC 1634 (KLR), Charles Kariuki Njuri vs Francis Kimaru Rwara (suing as Administrator of the Estate of Rwara Kimaru alias Benson Rwara Kimaru-Deceased) (2020) eKLR.
11. On the second limb, Counsel submitted that the Application was made 5 months after delivery of the judgment, at which point the Respondent had already extracted the Decree, and that to date, no appeal has been lodged against the judgment. Therefore, there was inordinate delay in filing this application and the same should be dismissed. With regards to security, Counsel argued that the Appellants should furnish security, and that they should be ordered to deposit the title deed in court. He cited Mwangi (suing as the Administrator of the Estate of Joseph Mwangi Gatiari) vs Mwangi (sued as the administrator of the Estate of Susan Njeri Mwangi) (2023) eKLR. On the allegation that the title is lost, Counsel reiterated that the Appellants had not followed the procedure at Section 33 of the [Land Registration Act](#) regarding loss of title. Counsel, concluded that the Appellants had not satisfied the requirements for grant of an order of stay of execution. In the event the court is inclined to grant the stay, Counsel proposed that they should be asked to deposit KShs. 14,000,000/- as security.

Analysis and Determination;

12. I have considered the application for stay, the Affidavits filed in support of and opposing the Application, the submissions together as well as the applicable laws. The main issue for determination is whether the Appellants have demonstrated that they are entitled to the order of stay of execution pending appeal.
13. Indeed, the principles guiding the grant of a stay of execution pending appeal are set out under Order 42 rule 6(1) and (2) of the Civil Procedure Rules which provide:
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 subrule (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 first element to be considered by this Court is whether the Appellants have demonstrated that failure to grant the order of stay will occasion them substantial loss. Substantial loss was explained in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* (2012) eKLR, 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.”

15. It is worth noting that the condition is that the party seeking stay must show that the loss will be suffered if the stay is not granted pending hearing and determination of the Appeal. The Appellants however indicated that they stand to suffer substantial loss in case the appeal succeeds. In addition, there is no indication what that substantial loss is exactly. The conclusion is that the condition of substantial loss has not been met.
16. Secondly, the application must be brought without undue delay. Judgment in Eld CMC ELC No. 73 of 2020 was delivered on 21st December, 2023. Notably, this Application was filed 4 months after the delivery of the judgement in the subordinate case. However, the Appellants did not go to sleep in that time. Upon delivery of the judgment, the Appellants immediately filed an Application seeking to have it set aside. This application was dismissed vide a ruling delivered on 11th April, 2024. Once that application was dismissed, the Appellants then filed this instant Motion on 19th April, 2024 just 8 days after the ruling. To set the record straight, the appeal is against the ruling of 11th April, 2024 but it is worth noting that if this appeal is allowed, it will have the effect of setting the judgment aside. Therefore, it’s determination will have an impact on the judgment and consequently execution herein. In view of the circumstances, this court finds that the delay was not inexcusable or inordinate.
17. Lastly, the Appellants are required to furnish security to the Court as security for the due performance of the decree. The purpose of security was clearly enunciated in *Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others* (2014) eKLR, where the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor... Civil process is quite different because in civil process the judgment is like



a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

18. The issue of security is discretionary and it is upon the court to determine the same. The Appellants deponed that they were willing to abide by any condition imposed by the court with respect to security for the due performance of the decree. They however shot down the Respondent’s proposal to deposit the title deed to the suit property in court alleging that the same is lost. They only produced a police abstract as proof of the loss. Even though they said that they are in the process of obtaining a replacement title thereto, no copy of the application for a replacement title has been produced. They have not offered any alternative form of security. The Respondent has proposed that the court order the applicant pay Kshs. 14,000,000/-.
19. This not being a money decree, I agree with the Respondent that depositing the title in court would have been the most sufficient security that the Appellants could offer. In shooting down the proposal to deposit the title, a shadow is cast on the Appellants alleged willingness to abide by any condition on security that this court would issue. To this end, the Appellants have not fully satisfied the third prerequisite as required under Order 42 Rule 6(2)(b).
20. An order of stay of execution pending appeal in effect bars a decree holder from enjoying the fruits of his judgment until the appeal is determined. Where a party seeks stay, such an application must still be weighed against the parameters under Order 46 Rule (2). The court must also balance the rights of the parties and satisfy itself that that no party will suffer undue prejudice. This principle was enunciated in the decision of the Court of Appeal in Absalom Dova vs Tarbo Transporters (2013) eKLR, where it stated: -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”
21. An order of stay of execution should only be granted where sufficient cause has been shown by the applicant. It is only granted after the Applicant has satisfied the three conditions provided under order 42 rule 6 of the Civil Procedure Rules, which must be met simultaneously. They have been held to be conjunctive and not disjunctive. This court has found that the Appellants herein brought this Application without undue delay. They however failed to demonstrate the substantial loss that they would suffer and have failed on the ground of security. Consequently, I proceed to dismiss the Applicant’s application with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 15TH DAY OF OCTOBER, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;



Mr. Karanja for Mr. Rabala for Appellant/Applicants.

Court Assistant -Laban

E. O. OBAGA

JUDGE

15TH OCTOBER, 2024

