



Kimaiyo & 3 others v Biwott & 5 others (Environment & Land Case 102 of 2016) [2024] KEELC 6496 (KLR) (8 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6496 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 102 OF 2016**

**JM ONYANGO, J
OCTOBER 8, 2024**

BETWEEN

**WILLIAM KIPTOO KIMAIYO 1ST PLAINTIFF
DANIEL KIPROP KIPTANUI 2ND PLAINTIFF
SIMION KIPKOSKEGEI RUTO 3RD PLAINTIFF
SANIAKO CHEBO 4TH PLAINTIFF**

AND

**HON. NICHOLAS BIWOTT 1ST DEFENDANT
THOMAS CHEBII CHANGACH 2ND DEFENDANT
MICHEAL KIPKOSGEI KWAMBAI KININGA 3RD DEFENDANT
ANDREW KIBIEGO BIWOTT 4TH DEFENDANT
THE LAND REGISTRAR UASIN GISHU 5TH DEFENDANT
THE ATTORNEY GENERAL 6TH DEFENDANT**

RULING

1. Before me are two applications both brought by the Plaintiffs/Applicants. The first is a Notice of Motion dated 18th November, 2022 in which they seek the following orders:-
 - a. Spent
 - b. Spent
 - c. That there be interim stay of execution of judgment and decree pending the hearing and determination of the Appeal in Court of Appeal.



- d. Such other orders as this court may deem fit to grant.
 - e. That costs of this application be provided for.
2. This application is anchored on the grounds on the face of the Motion and on the Supporting Affidavit of Daniel Kiprop Kiptanui, the 2nd Plaintiff, sworn on the same day. He deposed that judgment was delivered in favour of the Defendants on 12th October, 2022 and the Plaintiffs have since lodged an appeal against the whole judgment. The Defendants are intent on executing the decree against the Plaintiffs with the intention of evicting the deponent from the suit property which is where he lives and derives his source of livelihood. He states that if he is evicted it will occasion him substantial loss and damage. He deposed that the defendants' appeal is meritorious with high chances of success, thus it will be rendered nugatory if this application is not allowed.
 3. He emphasized the need for the court to preserve the status quo immediately before judgment by directing that he remains in possession of the suit property. He averred that the application was made timeously and without undue delay. Further, that the Defendants will not be prejudiced if the application is allowed, and that any inconvenience can be remedied by way of costs. He asked that the application be allowed to enable the Appellate Court determine the issues between the parties. The 1st and 3rd Plaintiffs swore Affidavits confirming the averments in the 2nd Plaintiff's Affidavit.
 4. The application was opposed through the Affidavit of the 2nd Defendant, Thomas Chebii Changach, of 8th December, 2022 where he deposed that none of the Plaintiffs are in possession of the suit property. He deposed that the Defendants have been in possession of the suit property and after judgment they reinforced the fence that they had put up prior to commencement of the suit. Further, that after the judgment they moved to complete the work of subdividing the land to their members which had been stopped when the suit was instituted. That when they visited the suit property between November and October, 2022 they found that the maize planted for the previous year's season had already been harvested. He denied the allegation that the Plaintiffs are the ones in possession of the suit property, indicating that the application was brought in bad faith and it ought to be dismissed.
 5. The 3rd Defendant also filed a Replying Affidavit dated 8th December, 2022 opposing the application. He reiterated the averments in the 2nd Defendant's Affidavit above. He added that it was established and confirmed during the hearing that the Defendants already had a title deed issued in their names. He deposed that they have been in possession and occupation of the suit property which they had already fenced along the established boundaries, and it is this fence that they reinforced after judgment. The effect of execution therefore would be reinforcing the fence and stopping the Plaintiffs from accessing the land, hence the issue of eviction was only raised to provoke emotions.
 6. The 2nd Defendant also deposed that any orders issued during the hearing were automatically discharged upon delivery of judgment. That the Plaintiffs' photographs are misleading as the structures therein are on the Defendant's piece of land, not on the suit property. That the Application brought over 40 days after judgment is not timeous, and in any event, they already moved to the land to implement the judgment and decree. He added that they will be prejudiced as the order of stay would deny them enjoyment of their interests on the land and reverse possession which they already have. He averred that the Plaintiffs will suffer no prejudice since they are not the title holders and neither are they in possession. That the Plaintiffs had not met the conditions for grant of stay hence the application is fatally defective, and it is only fair and just that it be dismissed with costs.
 7. In response, the Plaintiffs then filed a Further Affidavit sworn by Daniel Kiprop Kiptanui on 16th December, 2022 and verified by the affidavits of the 1st and 3rd Plaintiff. He reiterated that he was in possession during the hearing and at the time of judgment. That the Defendants admitted to evicting



the Plaintiffs from the suit property and erecting a fence contrary to laid down eviction procedures. He insisted that his homestead is on the suit property and that the Surveyor found that there were no existing boundaries between the parcels. He added that the Defendants were tilting the status quo to favour them. He insisted that the application was made timeously.

8. The second application is a Notice of Motion dated 14th December, 2022 seeking the following orders:
 - a. Spent
 - b. That the orders of status quo ordered by this Honourable Court on 24th November, 2022 that is currently in force be defined in favour of the Applicant who has been in occupation and use at the time of issuing notice of appeal dated 4th November, 2022.
 - c. That such other and/or further orders as this court may deem fit to grant in the best interest of justice.
 - d. That costs of this application be provided for.
9. The application is also supported by the affidavit of the 2nd Plaintiff, Daniel Kiprop Kiptanui, sworn on 14th December, 2022. He deponed that by the time of delivery of judgment on 12th October, 2022 the Defendants had not taken possession of the suit property, and he is the one who has been living with his family and utilising it to date. That since issuance of the order of status quo, the Defendants are attempting to enter thereon by putting up fences and bringing cattle to graze, thus interfering with his peaceful use of the property. He explained that the status quo at the time of the Notice of Appeal and on issuance of the order on 24th November, 2022 is that he was the only one occupying and using the land. The Defendants have entered the land in a bid to modify the status quo and in contempt of the order of the court. He asked the court to declare that the status quo is that he has exclusive possession and use. The 1st and 3rd Plaintiff again swore affidavits in support of the 2nd Defendant's averments.
10. This application was opposed vide a Replying Affidavit sworn by the 3rd Defendant, Michael Kipkosgei Kwambai Kiniga on 17th January, 2023 where he reiterated the contents of his affidavit of 16th December, 2022. The 3rd Defendant outlined the orders issued by this court on 7th December, 2022 including the order of status quo. That the Plaintiffs have never been in possession and they were seeking to reverse the order of status quo unprocedurally. That the County Surveyor's report indicated that the Defendant's house is on Parcel No. 21 and not the suit property, thus the Plaintiffs' averments in the are misleading.

Submissions

11. The court directed that the application be canvassed by way of written submissions. However, I have seen no submissions from either the Plaintiffs or the Defendants herein. considering that the two applications have been pending since 2022, this court shall proceed to render its decision in the absence of those submissions.

Analysis and Determination

12. I have considered the two applications and the Affidavits filed both in support of and in opposition thereto as well as the law applicable. The issues that this court is required to determine are:
 - i. Whether the Plaintiffs have satisfied all the conditions for grant of an order for stay;
 - ii. In the alternative, whether an order for status quo should issue and in whose favour; and
 - iii. Who shall bear the costs of the two application?



13. By way of a brief background, the Plaintiffs filed this suit seeking for orders that the registration of the parcel of land known as Sergoit/Koiwoptai Block10 (KARO) 47 (the suit property herein) in the names of the 2nd, 3rd and 4th Defendants was fraudulent. they sought a cancellation of the title issued to the said Defendants as well as a permanent injunction barring them from dealing with the suit property. They also prayed for an order of rectification of the register to reflect that the Plaintiffs were the owners of the suit property. On their part, the Defendants lodged a Counterclaim seeking to be declared the duly and legally registered owners as trustees of the suit property. The Defendants equally prayed for a permanent injunction against the Plaintiffs restraining them from accessing, using or otherwise interfering with the land as well as special and general damages.
14. Judgment in the suit was delivered by my predecessor Hon. Justice Kibunja on 12th October, 2022 dismissing the Plaintiffs' claim against the Defendants. The court allowed the Defendants' Counterclaim dated 15th June, 2016 holding that the Defendants had established their entitlement to the suit land but had failed to prove their claim for damages. The court declared the 2nd, 3rd and 4th Defendants owners of the suit property and granted a permanent injunction as prayed. It is this judgment that the Plaintiffs seek to stay. I will now proceed to determine the issues mentioned in paragraph 12 herein.

a. Whether the Plaintiffs have satisfied all the conditions for grant of an order for stay;

15. A party seeking an order of stay of execution of a judgment and/or decree pending appeal ought to satisfy the conditions set out in Order 42 Rule 6(2), namely:-
 - a. that substantial loss may result to the applicant unless the order is made;
 - b. that the application has been made without unreasonable delay; and
 - c. that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
16. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR 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.”

17. The 1st Plaintiff has alleged that they will suffer substantial loss and damage if the Defendants are allowed to proceed with execution. He has explained that the suit property is his place of abode, that he has been in occupation of the land together with his family and that it is his source of livelihood. He further averred that this was the status quo before judgment, at the time of the judgment as well as the time of lodging the Notice of Appeal, which is the state of affairs this court should maintain pending the hearing and determination of the Appeal. The Defendants however contested this allegation, stating that the 1st Plaintiff has never been in occupation of the suit property and that he is in fact on the parcel of land known as land parcel No. Sergoit/Koiwoptai Block 10 (Karo)/21.



18. To unravel the issue of what a stay of execution would mean in this instance, I perused the court file and noted that on 23rd November, 2018, the court directed the County Surveyor to conduct a site visit on the suit property and file his report in court. The purpose of the visit was to ascertain whether the 2nd Plaintiff resides on land parcel No. Sergoit/Koiwoptaoi Block 10 (Karo)/ 47, the suit property herein. The Surveyor in his report dated 25th January, 2019 indicated that the site visit was conducted on 23rd January, 2019 way before the impugned judgment was delivered.
19. Indeed, the Surveyor indicated that there is no distinct boundaries defining the parcels and that he re-established the boundaries and showed them to the Plaintiffs and Defendants. However, he also noted that the 2nd Plaintiff's structure/house falls on land parcel No. Sergoit/Koiwoptaoi Block 10 (Karo)/21. The Deputy Registrar also conducted a site visit as directed by this court on 18th January, 2023. In his report on the site visit conducted on 12th May, 2023 he also indicated that the structure belonging to the Plaintiff was on one of the parcels separated by barbed wire, but it was not on the disputed portion.
20. In the case of Machira t/a Machira & Co. Advocates v East African Standard (No 2) (2002) KLR 63, it was held as follows;

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”
21. The Plaintiffs ought to have established that the execution will create a state of affairs that will irreparably affect them. This is not the case here as it is clear that none of the Plaintiffs was occupying the property before or after the judgment herein was delivered, and certainly not at the date of lodging the Notice of Appeal. For that reason, the issue of pending eviction does not arise as they are not on the suit property, they reside on another plot, which the County Surveyor Identified as Plot No. 21. The Plaintiffs cannot also be heard to say that the suit property is their source of livelihood yet they do not possess, occupy or reside on it. That being the case, it is clear that the Plaintiffs have not demonstrated that they will suffer any substantial loss if the order of stay of execution is not granted. The alleged loss has not been demonstrated in this application as it was clearly only raised to mislead the court into granting the order of stay.
22. The second condition is that the application must be made without undue delay. Judgment in this suit was delivered on 12th October, 2022. The application for stay of execution is dated 18th November, 2022 although it was filed on 21st November, 2022. There was only Forty (40) days between the judgment and the application, which period this court does not deem as inordinate delay.
23. The last condition is that the applicant must furnish security for the due performance of the decree. The purpose of security was explained in the case of Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others (2014) eKLR 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 the 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.”

24. I have read through all the affidavits filed by the Plaintiffs in support of their two applications. Not once was it indicated that they were willing to provide any security or even that they will abide by any condition that this court would issue. It only appears on the face of the Motion but is not deponed to by the Plaintiffs, who would be the ones to satisfy any order as to costs or any condition set by the courts for the grant of the order of stay. For this reason, I am not convinced that the Plaintiffs have met this final hurdle.
25. It needs no further explaining that the Plaintiffs’ application has not satisfied all conditions set out under Order 42 Rule 6 for the grant of an order of stay of execution. It follows therefore that the Plaintiffs have not demonstrated their entitlement to the order of stay, and that prayer must thus fail.

b. Whether an order for status quo should issue and in whose favour;

26. An order for status quo means that things be left as they are until the determination of certain facts or the occurrence of such events as the court may direct. The meaning of status quo was defined by the Court of Appeal in *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR:-

“It is in the circumstances important to define what status quo means and what it meant for purposes of this appeal. We are apt to mention however, that when that order was made, none of the parties in Court sought any clarification from us as to what the status quo entailed. The presumption therefore must be that everybody knew the meaning and import of that order. “Status quo” in normal English parlance means the present situation, the way things stand as at the time the order is made, the existing state of things. It cannot therefore relate to the past or future occurrences or events. We fail to see what can be ambiguous about that order. All it meant was that everything was to remain as it was as at the time that order was given.”

27. In effect, an order of status quo merely leaves the situation or things as they stand as at the time when the order is made. An order of status quo must therefore be interpreted with respect to the existing factual scenario. It is worth noting that none of the applications which are the subject of this ruling sought an order for status quo. The said order was issued by this court on 24th November, 2022 in the interim, pending hearing and determination of the application dated 18th November, 2022. Yet the Plaintiffs in their Motion dated 14th December, 2022 sought to have it defined in their favour. They have explained that the status quo as at the time of the order, and even currently, is that the 2nd Plaintiff is in occupation of the suit property, and according to them, this has been the state of affairs since before judgment herein.
28. However, as explained above, the two site visits conducted by the County Surveyor and the DR on 23rd January, 2019 and 12th May, 2023 respectively revealed that this is not the case. The 2nd Plaintiff is not on the suit property. For this reason, even if the court were to define the status quo order, to do so in favour of the Plaintiffs as prayed would be to tilt the state of affairs. This would be against the very essence of an order of status quo, which as explained above is to preserve the subject matter as it is/existed, as at the day of making the order.
29. Since an order for status quo merely leaves the situation or things as they stand, this court cannot therefore allow the application seeking to define the order of status quo in favour of the Plaintiffs. To do so would be to alter or tilt the position that was prevailing as at the time the order was made.



c. Who shall bear the costs of the two application?

30. The law has always been and remains that costs follow the events. It is the successful party therefore that is entitled to costs. The power to award costs is discretionary donated to this Court by Section 27, of the *Civil Procedure Act*, which provides that:-

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

31. It is trite that such discretion must be judiciously exercised and the reasons thereof given. The Court has noted that the two applications were filed by the Plaintiffs/Applicants. As a result, the Defendants were forced to incur costs in responding to the Applications, which they have convinced this court are not merited. The Plaintiffs on the other hand failed to demonstrate their entitlement to the orders sought in the said Applications. The Defendants have thus emerged successful in this venture. They are therefore entitled to the costs of the two Applications herein.

32. The upshot is that the Plaintiffs’ Notices of Motion dated 18th November, 2022 and 14th December, 2022 are both without merit. The two applications are consequently dismissed with costs to the Defendants.

DATED SIGNED AND DELIVERED THIS 8TH DAY OF OCTOBER 2024.

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J.M ONYANGO

JUDGE

In the presence of;

1. Mr. Collins Kigen for Mr. Songok for the Plaintiffs/Applicants

2. Mr. Korir for Mrs. Kipseii for the Defendants/Respondents

Court Assistant: Brian

