



Thuo v Ahmacha & 3 others (Environment & Land Case 240 of 2014) [2024] KEELC 7013 (KLR) (16 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7013 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 240 OF 2014**

**A OMBWAYO, J
OCTOBER 16, 2024**

BETWEEN

SAMUEL NG'ANG'A THUO PLAINTIFF

AND

YUSUF JUMA AHMACHA 1ST DEFENDANT

ISAAC MOKAYA MAKORI & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS 2ND DEFENDANT

RULING

1. This ruling is in respect of the 1st Defendant’s Notice of Motion application dated 25th June, 2024 which sought the following orders;
 - a. Spent
 - b. Spent
 - c. Pending the hearing and determination of the intended appeal herein, this honourable court be pleased to issue an order of injunction restraining the Respondent, his agents, successors and assigns and/or issuing an order staying the execution of the judgment dated 6th June, 2024 and or subdividing, annexing, alienating and or any interference with the ownership and possession of the parcel of land known as Nakuru/Municipality Block 29/2284 and Nakuru/Municipality Block 29/2285.
 - d. The court be pleased to make such orders as may be appropriate in the preservation of the suit property hereof and to ensure that the intended appeal is not rendered nugatory.
 - e. The costs of this application be provided for.



2. The grounds on the face of the application are that judgement was delivered on 6th June, 2024 against the Defendants. The 1st Defendant/Applicant being aggrieved by the said judgement, filed an appeal.
3. The application was supported by the affidavit of Yusuf Juma sworn on 25th June, 2024. He reiterated the grounds on the face of the application and stated that the judgment by this court ordered cancellation of the 1st and 2nd Defendants title deed and eviction order against himself and the 2nd Defendant. He deposed that the judgment exposed the suit property to being transferred and alienated to third parties. That he is apprehensive that the Plaintiff and 3rd Defendant would rectify the register and cancel the 1st and 2nd Defendants title deed and have the same re-issued to the Plaintiff would defeat the present appeal.
4. He deposed that unless this court grants the prayers sought in the application, he will lose the suit lands thus being rendered homeless. He further deposed that he filed a notice of appeal dated 17th
5. June, 2024 and requested for typed proceedings. He also deposed that he has an arguable case with high chances of success and that he filed the instant application without undue delay.

Response

6. In response, the Plaintiff filed his Replying Affidavit sworn on 23rd July, 2024 where he averred that that the instant application was incompetent and an abuse of the court process. He further averred that the application was fatally defective for mix-up of prayers as it sought for both injunction and stay pending of appeal. He averred that the application was brought under the wrong provisions of the law. He further averred that the Applicant failed to demonstrate the basic condition to warrant grant of an order of injunction and/or stay pending appeal.
7. The Plaintiff averred that the issues as raised by the Applicant were dealt with in the main suit and that the court already pronounced itself on the same. He also averred that the Applicant did not place before this court evidence that the Plaintiff was likely to execute. He added that the Applicant failed to show the loss it would be occasioned. The Plaintiff averred that the Applicant failed to show any willingness to place security for grant of the prayers sought. He also averred that the Applicant failed to adduce any evidence to warrant grant of an injunction and/or stay pending appeal. He added that the orders sought are prejudicial as it shall interfere with his right of enjoyment of fruits of his judgment. In conclusion, he urged the court to dismiss the application.

Submissions

8. Counsel for the Applicant filed his submissions dated 5th August, 2024 where he relied on Order 42 Rule 6 of the Civil Procedure Rules and the case in *Butt V Rent Restriction Tribunal* [1982] KLR 417. On whether the Applicant has an arguable appeal, counsel submitted in the affirmative and argued that the appeal raised 16 arguable grounds of appeal with high chances of success. He cited the case of *Stanley Kang'ethe Kinyanjui V Tony Keter & 5 Others* (2013) eKLR.
9. On whether the appeal will be rendered nugatory, counsel for the Applicant submitted that in the event stay of execution is not granted, the appeal would be rendered nugatory. He argued that the Respondents may move the 3rd Defendant to rectify the register and re-issue fresh titles to the suit properties. He added that the Respondents would further move to evict the Applicants by demolishing their properties on the suit land. Counsel cited the case in *Equity Bank Limited V West Link Mbo Limited Civil Application No. 78 of 2011* and urged the court to preserve the suit property. On whether the Application has been brought timeously and matters security counsel submitted in the affirmative. He submitted that the application was filed on 27th June, 2024 before the lapse of the initial stay



hence no delay. Counsel relied on the case of *Focin Motorcycle Co. Ltd V Ann Wambui Wangui & Ano* [2018] eKLR. In conclusion, counsel submitted that the application met the threshold expected of applications brought under Order 42 Rule 6 of the *Civil Procedure Rules*.

Analysis and determination

10. The Court has considered the application and the main issue for determination is whether orders of stay of execution pending appeal should issue.
11. Order 42 Rule 6 (1)(2) of the *Civil Procedure Rules* provides as follows;
 - (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.

In *RWW V EKW* [2019] eKLR the court held as follows:

“...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.”

12. For this court to grant an order of stay of execution, the 1st Defendant/Applicant must demonstrate that it filed the application under consideration without unreasonable delay, that it will suffer substantial loss if the orders sought are not granted and that it is willing to deposit security for costs.
13. On whether the application was filed without unreasonable delay, a perusal of the court record shows that judgement in the matter was delivered on 6th June, 2024 while the present application was filed on 27th June, 2024. It is this court’s view that the same has been filed without unreasonable delay.
14. The Applicant has to also demonstrate that unless the court grants stay of execution orders pending appeal, he stands to suffer substantial loss. The 1st Defendant/Applicant argued that the Respondents would proceed to evict them from the suit land, demolish their properties and new titles will be issued unless orders of stay of execution are granted.
15. On the issue of security of costs, the Applicant stated that he was ready to abide by the terms and conditions that the court shall be inclined to impose.
16. In the case of *Kenya Commercial Bank Limited V Sun City Properties Limited & 5 Others* [2012] eKLR the court held as follows:

“...in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced in a bid to balance the two competing interests, the Courts usually



make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal. I do not see, why the same should not be applicable in this case."

17. This court is of the view that grant of stay remains a discretionary order that must consider the fact that the court ought not to make a practice of denying a successful litigant the fruits of their judgment.
18. In the upshot, this court shall exercise its discretion and order of stay of execution of this court's judgement delivered on 6th April, 2024 on the following conditions;
 - a. The 1st Defendant to deposit a sum of Kshs. 250,000/= as security for costs in a fixed joint interest earning account in the names of both counsel for the parties within 14 days from the date of this ruling.
 - b. The 1st Defendant shall compile, file and serve a record of appeal within 60 days and move the Court appropriately towards the finalization of this Appeal within 180 days from the date of this ruling.
19. In the event the 1st Defendant fails to abide by any of the above stated two conditions within the fixed time lines there will be an automatic lapse of the stay of execution herein irrespective of whether or not one condition shall have been met earlier than the failure of the latter. It is so ordered.

RULING DATED SIGNED AND DELIVERED ELECTRONICALLY THIS 16TH DAY OF OCTOBER 2024.

SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO

NAKURU ENVIRONMENT AND LAND COURT ENVIRONMENT AND LAND COURT

