



REPUBLIC OF KENYA



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**Oginda v Nyamwange & 2 others (Environment and Land Appeal
E010 of 2024) [2024] KEELC 7301 (KLR) (5 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7301 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E010 OF 2024
MAO ODENY, J
NOVEMBER 5, 2024**

BETWEEN

ANN KEMUNTO OGINDA APPELLANT

AND

CALEB ISABOKE NYAMWANGE 1ST RESPONDENT

ABRHAM BIRUNDU NYANGOTO 2ND RESPONDENT

DISTRICT LAND REGISTRAR NAKURU 3RD RESPONDENT

RULING

1. This ruling is in respect of a Notice of Motion dated 4th July, 2024 by the Appellant seeking the following orders:
 - a. Spent
 - b. Spent
 - c. That this Honourable court be pleased to grant stay of execution of the judgment and decree in MOlo Elc No 91 Of 2019 Caleb Isaboke Nyamwange Vs Abraham Birundu Nyangoto & 2 Others pending the hearing and determination of the this (sic) appeal.
 - d. That the cost of this application be in the cause.
 - e. Any further orders this Honourable Court may deem fit and just to grant.
2. The application was supported by the affidavit of Ann Kemunto Oginda sworn on 4th July, 2024 where she deponed that she was aggrieved by the judgment delivered on 23rd January, 2024 of which she has preferred an appeal in this court. Further, that she has sought for stay of execution orders of which if not issued the appeal will be rendered nugatory.



3. The Appellant also deponed that she has filed the application within reasonable time, that the suit property is adequate security, undertakes not to sell or mortgage the suit land and that the respondent will not suffer any prejudice if the order of stay of execution is granted.
4. The 1st Respondent filed a Replying Affidavit sworn on 11th July, 2024 and deponed that the application is an afterthought, brought in bad faith which is meant to prevent him from enjoying the fruits of a regularly obtained judgment.
5. The respondent further deponed that the Appellant's Memorandum of Appeal is scanty and does not raise any triable issues hence has not met the threshold for the issuance of orders of stay of execution pending appeal as set out in the law and should be dismissed with costs.

Appellant's Submissions

6. Counsel filed submissions dated 9th August, 2024 and identified one issue for determination as whether stay of execution of the Judgment delivered on 23rd January 2024 should issue.
7. Counsel relied on Section 1A and 1B of the *Civil Procedure Act*, Order 42 rule 6 (2) of the Civil Procedure Rules and the cases of *Butt vs Rent Restriction Tribunal Civil Application No NAI 6 OF 1979* eKLR, Peter Nakupang Lowar vs Nautu Lowar [2022] eKLR, and submitted that the application has been made without unreasonable delay as it was filed on 4th July, 2024 two days after the applicant's stay application filed in the lower court was dismissed and execution had not commenced.
8. It was counsel's submission that the Appellant will suffer substantial loss as he has been in occupation of the suit land for over 20 years, and further that he has an arguable appeal hence the need to preserve the subject matter of the appeal. Counsel relied on the case of Charles Kariuki Njuri vs Francis Kimaru Rwaru (suing as Administrator of Estate of Rwaru Kimaru alias Benson Rwaru Kimaru (Deceased) [2020] eKLR.
9. Counsel submitted that the subject property in dispute is adequate security it being immovable property and it will be available to the successful part and urged the court to allow the application as prayed.

1st Respondent's Submissions

10. Counsel for the 1st Respondent filed submissions dated 20th September, 2024 relied on Order 42 rule 6 (2) of the Civil Procedure Rules 2010 and submitted that it is the 1st Respondent who stands to suffer substantial loss if stay of execution pending appeal is granted as he was found to be the rightful owner of the suit land and has been deprived of the same for several years.
11. Counsel submitted that court must take into account the interests of both the applicant and the respondent when considering an application for stay of execution pending appeal and relied on the cases of *Ken Travelers Company Limited & another vs Ndalu & Savola as legal representative of the Estate of the Late Zacharia Wasike & another (Civil Appeal 149 of 2022)* [2023] KEHC 2846 (KLR) and *Muturi Investments Ltd vs National Bank of Kenya* [2007] eKLR.
12. Counsel further submitted that the Appellant is not seeking any relief in her Memorandum of appeal and has come to court with unclean hands and relied on the cases of *Daniel Kiprugut Maiywa vs Rebecca Chepkurgat Maina* [2019] eKLR & *Lucase Onginjo Gogo vs Naftali Omondi Ambala & 3 others* [2015] eKLR.
13. According to counsel, there has been unreasonable delay in filing the instant application as Judgment was delivered on 23rd January, 2024 and the application was filed on 20th March, 2024 only upon



realizing that the 60 days' period within which she was to vacate the suit land was coming to an end. Counsel relied on the case of Jeremiah Yatich (Suing as the Administrator of the Estate of Joshua Yatich Chepyegon (Deceased) vs Christopher Kipkosgei & 3 others [2021] eKLR.

14. On the issue of security for the due performance of the decree, counsel submitted that the Appellant undertaking not to sell the suit property is neither here nor there because she does not hold any valid title to the suit property and urged the court to dismiss the application with costs.

Analysis And Determination

15. The issue for determination is whether the Appellant has met the threshold for grant of stay of execution as provided for under Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

- “(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.”

16. An applicant must file an application for stay of execution without unreasonable delay, must demonstrate that he/she will suffer substantial loss if the orders sought are not granted and that he/she is willing to offer security for the due performance of the decree.

17. On whether the application was filed without unreasonable delay, the judgment was delivered on 23rd January 2024, the applicant filed the application on 20th March 2024 in the lower court which was dismissed on 2nd July 2024. This application was filed on 4th July 2024, 2 days after the dismissal of the application in the lower court. I find that there was no undue delay in filing the current application.

18. In the case of Jaber Mohsen Ali & another v Priscillah Boit & another [2014] the court held as follows:

- “The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.”

19. The Appellant stated that she has been in occupation of the suit land for over 20 years and that she will suffer substantial loss if an order of stay is not granted. In the case of Elishaphan Omollo Nyasita v Gradus Atieno Othim & another [2019] eKLR the court held as follows:

- “11. It is trite law that it is not merely sufficient for the applicant to state that he or rather she is likely to suffer substantial loss if the application for stay of execution sought is not allowed. The applicant has not shown the damage or loss that he is likely to suffer if the order sought in the application is not granted. Moreover, to grant the order aforesaid would deny a successful litigant (respondent) the fruits of his Judgment as held in Kenya Shell Ltd case.”



20. In the case of *Karungu v Masira & another* (Environment & Land Case 540 of 2016) [2024] KEELC 5683 (KLR) (25 July 2024) (Ruling) where this court held that:

“It should also be noted that where there is an order of eviction, it is not enough to say that a party shall be evicted, as that is a decree that was issued after the parties have been heard and a case is determined. A mere mention of imminent eviction is not proof of substantial loss.”

21. On issue of security, it was the appellant’s case that she undertakes not to sell or mortgage the suit property pending the determination of the appeal and that the suit property is adequate security which will be available to the successful party upon determination of the appeal.

22. It should be noted that the suit property is not in the Applicant’s name hence it cannot be adequate security as submitted by the Applicant. Even though the court is not dealing with the Appeal, the Memorandum of appeal is very scanty.

23. In the case of *Exclusive Mines Limited & another vs Ministry of Mining & 2 others* [2015] eKLR, the court stated as follows:

“...On the issue of furnishing security, my understanding is that an applicant seeking an order of stay pending appeal should, as a sign of good faith, offer or propose any such security for the performance of the decree which the appeal has been preferred. I have looked at the Interested party’s affidavit in support of his Notice of Motion and nowhere in his seventeen (17) paragraph affidavit does he make any offer of any security nor bind himself to meet any such orders that the Court may impose. While the law leaves it to the Court’s discretion to make such orders as to security as it may deem fit, it is a good practice for an applicant seeking such an order to intimate to the Court his preparation to meet such orders as the Court may impose as this assists the Court while exercising its discretion in that respect.”

24. In an application for stay of execution, the court must consider the rights of both the successful litigant who will be denied an opportunity to enjoy the fruits of his/her judgment and that of the aggrieved litigant who would like another bite of the cherry in the higher court. The court must do the balancing act and apply the discretion judiciously.

25. In doing so and in the interest of justice, I hereby grant a conditional stay of execution and order that the Applicant deposits Kshs. 300,000/ (Three Hundred Thousand Only) in a joint interest earning account of the advocates on record within 30 days failure to which the stay lapses.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 5TH DAY OF NOVEMBER 2024.

M. A. ODENY

JUDGE

