



Koech v Koech (Land Case 8 of 2016) [2024] KEELC 13520 (KLR) (3 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13520 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
LAND CASE 8 OF 2016
JM ONYANGO, J
DECEMBER 3, 2024**

BETWEEN

ISACK KIPKALUM KOECH PLAINTIFF

AND

NATHAN KIBET KOECH DEFENDANT

RULING

1. There are two Applications before me all brought under Certificate of Urgency. The first is a Notice of Motion by the Defendant/Judgment debtor dated 22nd February, 2023 seeking for the following reliefs:
 - a. Spent
 - b. That there be a temporary stay of the decree and judgment herein pending inter partes hearing of this Application.
 - c. That there be a stay of execution of the decree and judgment herein pending the hearing and determination of the appeal.
 - d. That costs be provided for.
2. This Application was supported by the Defendant's Affidavit of the same date. He deponed that this suit relates to LR No. Nandu/Eisero/325 measuring 181 Acres (the larger property) and registered in the names of the Plaintiff and Hellen Jemeli Bargutwo (Defendant's mother). That the Honourable court delivered its judgment on 25th January, 2023 in favour of the Plaintiff, who is the first born of the family of Kipkoech Bargutwo, their father. He deponed that their late father transferred the title to them in 1979 in the ratio of $\frac{1}{4}$ to $\frac{3}{4}$, but the Plaintiff alleged in this suit that the Defendant had tampered with the title to the larger parcel by altering the entry $\frac{1}{2}$ to read $\frac{1}{4}$ and $\frac{3}{4}$ shares.
3. He averred that the Plaintiff solely subdivided the suit property into two new portions being LR No. Nandi/Eisero/425 (the suit property), in his name and LR No. Nandi/Eisero/426 in the Defendant's mother's name, whose title is yet to be seen by anyone. He stated that the original title to the larger



property was never surrendered when undertaking the subdivision. The Defendant deponed that the title deed to the larger property was surrendered to the DCI Nandi North, who after investigations concluded that the Defendant had tampered with the title deed. That he has since been charged in Kapsabet CMCR Case No. E1225 of 2021, which is part heard. He deponed that he and his 2 brothers occupy 135 Acres while the Plaintiff lives on 45 Acres being the $\frac{1}{4}$ portion left to him by their father.

4. The Defendant averred that he has never occupied the Plaintiff's property, but has lived on his share of the larger property until the Plaintiff filed this suit. That if the order for eviction is effected to remove him from his portion, he together with his family will be rendered homeless. The Defendant decried the fact that out of 3 brothers occupying the larger property, he was the only one sued in this matter. The Defendant averred that he had filed a Notice of Appeal dated 6th February, 2023 and the appeal has very high chances of success. That he therefore sought a stay of execution of the judgment pending the outcome of the appeal. He added that if the stay is denied, the appeal would be rendered nugatory and he would suffer great loss, which the Plaintiff cannot compensate. He stated that this being a family matter, the issue of security for costs should not arise, pointing out that the trial court did not award costs. He deponed that the Application was brought promptly and that the Plaintiff would suffer no prejudice if the orders sought were granted.
5. This Application was placed before the Court on 2nd March, 2023 and the court granted the interim stay of execution as requested under prayer 2 thereof. The Application was set down for hearing on 21st March, 2023. Before the said date, the Plaintiff/Decree holder did two things. First, he swore a lengthy Replying Affidavit on 8th March, 2023 in response to this Application which I will give a summary of. The Plaintiff told this court that the partition to the larger parcel was above board, and that the Land Registrar had disowned the Title Deed relied on by the Defendant as it had been altered and does not tally with the official records at the Land Registry. He deponed that during the pendency of the suit, the Defendant had contravened temporary injunctive orders in place and planted sugarcane on the land, and he now seeks this court's intervention to save what he illegally planted. He deponed that the Defendant was his step-brother who had resorted to the use of jungle law to achieve his desires and he listed several incidences to explain his point.
6. The Plaintiff deponed that the records at the Lands Registry supported his claim that he owned half of the larger parcel and the other half was owned by his step-mother, Hellen Jemeli Bargutwo. That there are no official records that support the Defendant's contention that the larger parcel was owned in the ratio of $\frac{1}{4}$ to $\frac{3}{4}$. He added that the minutes of the Land Control Board (LCB) of 27th September, 1990 at Minute 262/90 shows that his step-mother attended the Land Control Board and raised no objection to the partition, so the Land Control Board issued its consent thereto. That the law permits the Lands Registrar to partition the land either suo moto or on application. He stated that the Land Registrar summoned his step-mother to take the original title for the larger parcel, so he cannot attest to whether it was surrendered or not. He admitted the DCI's investigations and outcome thereto. He explained that that he sought a permanent injunction and an eviction order due to the Defendant's encroachment onto the suit property in 2016, and judgment was entered in his favour.
7. It is the Plaintiff's case that the Defendant will not be rendered homeless as he lives in his mother's house on LR No. Nandi/Eisero/426 and the Defendant is the one who applied for letters of administration in respect of her estate. That having been in contempt of the court orders, the Defendant cannot ask the court to assist him in his illegal occupation. He decried the fact that he had not been able to use his land for the last seven years. It is the Plaintiff's case that the Defendant's intended Appeal raises no triable issues for various reasons listed therein, one being that he failed to call the makers of the documents he was relying on. He also averred that Criminal and Civil proceedings can run concurrently and the outcome in the criminal case cannot be grounds to halt a civil case. He added that a stay of execution



is not warranted, and further that the prayer for cancellation of title over the suit property would not succeed. He reasoned that the prayer was based on the Defendant's Counterclaim, but it required him to wear the shoes of his late mother, yet the counterclaim was filed when the Defendant had no letters of administration, a defect that cannot be cured on appeal. He further stated that the Defendant does not own 45 Acres.

8. That awarding of costs is at the courts discretion but security for the due performance of a decree is a mandatory provision of law that under Order 42(6)(2) must be complied with. The Plaintiff averred that he would suffer prejudice by the further deprivation of use of his property. He indicated that he had made several reports at Kabiyet Police with no tangible action taken, and he listed several OB numbers. He opined that the Applicant was not interested in the Appeal but only wanted to delay the Plaintiff's enjoyment of the fruits of his judgment and in the meantime, buy time for his sugarcane to mature. The Plaintiff annexed several photographs as proof of his claims including the sugarcane planting. He denied the fire incident on the Defendant's property reported at page 18 of the Standard Newspaper of 6th June, 2023 and annexed photographs as proof that it never happened. He averred that the Plaintiff misled the court in order to obtain favourable orders, and further, that the Defendant's activities are disrupting him from peaceful use of his land. He urged the court to dismiss the application with costs.
9. After filing the Replying Affidavit, the Plaintiff went ahead and filed a Notice of Motion dated 14th March, 2023 asking this court to grant him the following reliefs:-
 - a. Spent
 - b. That pending the hearing and determination of this Application interpartes or till further orders of this Honourable Court, there be a stay of the Court's order of 2nd March, 2023 obtained pursuant to the Respondent's Application dated 22nd February, 2023 for having been obtained through fraudulent deception.
 - c. That the Honourable Court be pleased to review the Order Issued on 02nd March, 2023 obtained pursuant to the Respondent's Application dated 22nd February, 2023 by setting aside and permitting the Decree holder/Applicant to utilize the land for planting as the order was obtained through fraudulent deception.
 - d. That this Honourable Court be pleased to dismiss the Respondent's Application dated 22nd February, 2023 with costs to the Decree holder/Applicant
 - e. Costs be provided for
 - f. Any other and further relief that the Honourable Court shall deem just and expedient to grant
10. The Plaintiff's Application is supported by his Affidavit of the same date. The Plaintiff reiterated the averments in the Replying Affidavit dated 8th March, 2023 up to and including the allegations of contempt by the Defendants. The Plaintiff then added that the temporary injunctive orders issued by the trial court barred the parties herein from utilising 45 Acres of his 90-Acre portion during the pendency of the suit. That he complied and had not used the said portion of land. He deponed that the Defendant's plan is to lock out the Plaintiff indefinitely from the use of the suit property. Further, that a party who is in contempt ought not be heard by the court until he has purged the contempt. He averred that he has not been able to use the land due to the stay order issued herein and all funds he has used to prepare the land shall have gone to waste. He contended that the Defendants actions demonstrate that one can deliberately disobey valid court orders and obtain further orders to sustain his contempt. He challenged the Defendant's application for being a calculated, gross and deliberate



abuse of the court process. He averred that his Application was made in good faith and in the interest of justice.

11. The Plaintiff's Application was vehemently opposed by the Defendant through his Replying Affidavit dated 21st March, 2023 also reiterating most of the averments in his Supporting Affidavit of 22nd February, 2023. He went further to add that the Plaintiff had alluded to fraud but did not give the particulars as required. The Defendant indicated that each son of his father was allocated 45 Acres and that since birth he has lived on his 45 Acres portion. He deponed that the judgment ignored the process of acquisition of the suit property by the Plaintiff. He deponed that the reason the court denied the Plaintiff use of the land during pendency of the suit was because he failed to convince the court as to how he acquired the land, and he never sought to appeal or have the order reviewed. He admitted that he planted sugarcane on his share of the land where he has lived since birth and stated that he did so as of right.
12. The Defendant averred that the Plaintiff obtained title to the suit property fraudulently. The Defendant insisted that the appellate court would vindicate him, indicating his willingness to be investigated afresh. The Defendant averred that the photographs annexed by the Plaintiff showed damage done by hired goons on the 2nd and 3rd day of March, 2023. He also agreed that there was need to have the Deputy Registrar visit the suit property to verify the position. He deponed that the Plaintiff had not shown that the stay order was obtained through falsehoods or by fraudulent deception, and urged the court to confirm the order of stay and dismiss the Plaintiff's Application herein with costs. The Defendant urged that the Plaintiff had not shown anything to be reviewed, nor had he demonstrated why the orders of 2nd March, 2023 should be stayed.
13. On 18th April, 2023 the Defendant filed a Supplementary Affidavit to his Application dated 22nd February, 2023. This Affidavit again reiterated the averments in the Defendant's earlier Affidavit. In addition, the Defendant denied the Plaintiff's averment that the Land Registrar disowned the Title over Nandi/Eisero/325. He admitted that he had been charged with tampering with the Title to the larger property and the case was part heard. He once more admitted to planting sugarcane but justified again it by stating that he did so on his 45 Acres and not on the suit property herein. He deponed that by the time the court delivered its judgment, he was lawfully and permanently in occupation of his 45 Acre portion. He deponed that the outcome of the Criminal case was important as once acquitted, he would retain his portion of land. He deponed that he had satisfied the conditions for stay pending appeal. He thus asked that the order of stay be extended pending hearing and determination of the Appeal.
14. While the two applications were pending, the Defendant filed yet another application dated 25th July, 2024 seeking an order that he be authorized to harvest his mature cane grown on his portion of land parcel No.Nandi Eisero/325.
15. On 23rd September, 2024 when the court was expected to deliver the ruling on the two applications dated 22nd February 2023 and 14th March 2023, counsel for the Defendant applied to arrest the ruling on the grounds that there were new developments which he wished to bring to the court's attention as they had a bearing on the 2 applications. He then sought leave to file a Further Supplementary Affidavit. The court arrested the ruling and granted the parties time to file additional affidavits and submissions.
16. The Defendant filed a Supplementary affidavit sworn on 24.9.24 in which he deposed that the sugarcane was planted on a portion of land parcel No. Nandi/Eisero/325 measuring 45 acres which was his share of the 181 acres or thereabouts. He further averred the said cane was mature and needed to be harvested. He cast doubts on the sub-division of parcel 325 and stated that the issue as to how



the Plaintiff acquired parcel No. Nandi/Eisero/425 in 1990 and kept it a secret until 2016 would be determined by the Court of Appeal.

17. He further deponed that in Kapsabet HC P&A Cause No. 42 of 2021- In the matter of the estate of Hellen Jemeli Bargutwo, the court had delivered a ruling on 17th July, 2024 in which the Grant earlier issued to the Plaintiff was revoked and a Grant was issued jointly to himself and the plaintiff.
18. Additionally, he deponed that in Kabiyet PMC Criminal Case No.222 of 2022 where the Defendant been charged with 4 counts of making a false document and uttering a false document to wit a False Land Certificate No. Nandi/Eisero/325 and green card of the said parcel number, the court had delivered a ruling on 17th September, 2024 acquitting him of the charges. He was therefore of the view that the two rulings had changed the substance of this matter and he should thus be allowed to harvest the cane.
19. In response to the Defendant's Supplementary affidavit, the Plaintiff filed a Replying affidavit sworn on 8th November 2024 in which he deponed that on 28th January, 2016 the court issued an injunction restraining both parties from utilizing 45 acres comprised in land parcel no. Nandi/Eisero/425 pending the hearing and determination of the main suit. He deponed that in its judgment the court issued a permanent injunction and an eviction order against the defendant and the orders have since been effected. He further deponed that allowing the Defendant to harvest the cane would amount to condoning disobedience of court orders, rewarding wrongdoing and setting aside the judgment through the back door. He explained that the Defendant's documents in respect of parcel No. 325 were disowned by the Land Registrar and Land Adjudication office and it is on this basis that he was charged with the offence of forgery at Kabiyet court.
20. He denied that the Defendant owns 45 acres as alleged as the succession matter is still pending and the Defendant has 10 siblings who are entitled to the estate of the late Hellen Jemeli Bargutwo.

Defendant's Submissions

21. Both Applications were canvassed by way of written submissions. The Defendant filed separate submissions for each Application both dated 11th April, 2023. With respect to the Application dated 22nd February, 2023 Counsel reiterated the averments in the Defendant's Affidavits, asserting that the order of stay is deserved. He submitted that the Defendant had now obtained certified proceedings and judgment and had since filed Civil Appeal No. E021 of 2023. It was counsel's opinion that the Appeal was weighty with high chances of success and it would be rendered nugatory if the order for stay of execution was not extended pending hearing and determination of the Appeal.
22. In his Further submissions dated 7th November 2024 counsel submitted that the effect of the ruling in Kapsabet HC P&A Cause No. 42 of 2021 is that parcel no. Nandi/Eisero/325 is available for distribution. It was his contention that the ruling in Kabiyet PMC Cr Case No. 222 of 2022 which acquitted the Defendant of any wrongdoing with respect to title no. 325 put to doubt the authenticity of parcel 425 which forms the basis of the judgment herein. He submitted that in view of the conflicting judgments by this court and the High Court, the court ought to allow the Defendant to harvest the cane.
23. On the issue of security for costs, Counsel submitted that the trial court directed that each party bear its own costs, thus it should not be an issue for the Defendant to be asked to deposit security for costs. Counsel submitted that the Plaintiff admitted to manufacturing the title over the suit property and was estopped from retracting that admission. Counsel submitted that the Defendant had demonstrated that he had a formidable Appeal and prayed that the court grants the stay of execution pending the hearing of the Appeal.



24. With respect to the Application dated 14th March, 2023 it was submitted that the Plaintiff's allegation of fraud pointed an accusing finger at the Defendant's Counsel as well as the court without setting out the particulars or providing proof of the alleged fraud and deception. Counsel challenged the Application for only focusing on the suit property as opposed parcel No. Nandi/Eisero/325, and opined that the grounds set out in the Plaintiff's Application were all falsehoods. Counsel opined that the Plaintiff could have the paper title over the suit property but he would never have the 45 Acres belonging to the Defendant. He submitted that the Defendant did not live in his late mother's house but in his own house, however, his parents' house still stands on his portion of the land.
25. Counsel agreed with the Plaintiff that a party who is in contempt of a lawful court order should not be heard until he purges the contempt. However, he was of the view that the Plaintiff needed to explain how the Defendant had breached the order in question. Counsel submitted that the balance of convenience tilts in favour of the Defendant and justice demands that the order of stay in place be retained pending hearing and determination of the Appeal. Counsel submitted that Order 45 Rule 1 provided for grounds on which review can be granted, but argued that the Plaintiff had not laid any basis for review of the Court's order dated 2nd March, 2023. He urged the court to dismiss the Plaintiff's Application with costs.

Plaintiff's Submissions

26. The Plaintiff's submissions on both Applications are dated 14th April, 2023. Counsel for the Plaintiff submitted that the finding of the court that the Defendant had failed to prove his Counterclaim is a negative order, which could not be stayed. Counsel relied Nbi Misc. Application No. 207 of 2018 (CA), *Shade Manufacturers & Hotel Ltd v Serah Mweru Mutuu & 3 Others* where the court cited *Kanwal Sarjit Singh Dhinman v Keshavji Jivraj Shah* (2008) eKLR where it was held:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs.”
27. Counsel also relied on Nyeri Civil Application No. 9 of 2017, *Daniel Lomagul Kandeji & 2 Others v Kamanga Holdings Ltd & 40 Others* (UR7/17) and *George Ole Sangui v Kedong Ranch Limited*, CA Nai 55 of 2015 where the Court of Appeal held that a dismissal order cannot be stayed. Counsel then submitted that the Plaintiff had since restored his destroyed fence after the judgment and that the property remains fenced. That the Defendant has tried on two occasions to encroach on the suit property but he was repulsed. That the Defendant remains outside of the Plaintiff's land and only the sugarcane planted illegally by the Defendant, which he now seeks to protect, remains within the suit property. Counsel submitted therefore that the Decree had already been perfected and no stay should be granted. He submitted that the Defendant should prosecute his appeal while outside the land and if he succeeds, he can be compensated by way of costs, if at all. On the Plaintiff's Application dated 14th March, 2023 Counsel reiterated his earlier submissions and asked that the Application be allowed, alongside any other prayer that the court deems just and expedient.
28. In his Further Submissions dated 7th November, 2024 in respect of the application dated 22nd February, 2023 counsel submitted that the reason why the Defendant wanted the ruling arrested was because he wanted to introduce the ruling in Kapsabet HC P & A Cause No. 42 of 2021 in which the judge in his ruling delivered on 17th July, 2024 recognized the disputed title no. Nandi/Eisero/325 which the document examiner found to have been tampered with and which was rejected by the Land Registrar



during the hearing. The Defendant also sought to introduce the ruling in Kabiyet PMC Criminal Case No.222 of 2022 where the court acquitted the Defendant of the charges of forgery in relation to land title No. Nandi/Eisero/325.

29. Counsel submitted that the Plaintiff has since applied for review of the ruling in Kapsabet HC P & A Cause No. 42 of 2021 and that the state intends to appeal against the ruling in Kabiyet PMC Criminal Case No.222 of 2022.
30. He faulted the Defendant for introducing exhibits that have no relevance to the Plaintiff's land parcel number Nandi/Eisero/425 and that relate to different periods. He contented that the top-dressing documents relate to 28.9.23 after delivery of the judgment on 25th January, 2023 while other documents relate to the years 2017 and 2018 before sugar cane was planted on the Plaintiff's land parcel No.425. He insisted that land parcel number Nandi/Eisero/325 ceased to exist upon sub-division on 16th October, 1990 when it gave rise to parcels number Nandi/Eisero/425 and 426.

Analysis and Determination

31. It is unfortunate that in the Affidavits filed, the parties mainly focused on arguing the merits and demerits of the intended appeal as opposed to the prayers in their respective applications. Their Advocates also did not fare any better in the submissions, as they also descended into the merits of the intended Appeal. I have however considered the two applications, the affidavits filed in support as well as affidavits in opposition and annexures thereto. I have also considered the submissions by both counsel for their respective clients, together with case law cited. The main issues for determination are:
 - i. Whether the Defendant has demonstrated that the temporary orders for stay of execution pending appeal are merited and should be confirmed
 - ii. Whether the Defendant is in contempt of the orders of the court

a. Whether the Defendant has demonstrated that the temporary orders for stay of execution pending appeal are merited and should be confirmed

32. It is necessary that I begin by setting the record straight on the nature of the orders sought to be stayed. Counsel for the Plaintiff submitted that the orders of the court that the Defendant seeks to stay are negative orders, and therefore are not capable of being stayed. To be clear, the judgment delivered in this suit not only dismissed the Defendant's counterclaim, but also allowed some of the prayers in the Plaintiff. The order dismissing the Defendant's counterclaim was indeed a negative order not capable of being stayed. However, the Court issued a permanent injunction as well as a declaration that the suit property belonged to the Plaintiff and found that he was entitled to an order of eviction. The prayers granted to the Plaintiff herein cannot in any way be termed negative orders, and those are the orders the Defendant asked to be stayed.
33. The reason a court will allow an application for stay of execution pending appeal is to preserve the subject matter in dispute to allow the intended appellant exercise his right of appeal and the ensure that the appeal, if successful, is not rendered nugatory. Stay of execution pending appeal is governed by Order 42, Rule 6 of the *Civil Procedure Rules*, 2010 which provides 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.”

34. Therefore, in deciding whether to grant an order for stay of execution of a decree or order pending appeal, the court has to ensure that the following conditions have been met:

- a. substantial loss may result to the applicant unless the order is made,
- b. the application has been made without unreasonable delay, and
- c. 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.

35. In addition to the above, stay may also be granted for sufficient cause. The Court in deciding whether or not to grant the stay, also gives regard to the overriding objectives stipulated in Sections 1A and 1B of the *Civil Procedure Act*. Courts are now enjoined to give effect to them, hence the Court is no longer limited to the conditions set out in the foregoing provisions.

36. The first requirement this Court must determine whether not granting the order will occasion substantial loss to the intended Appellant. 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.”



37. It has been held that substantial loss occurring to the Applicant is the cornerstone of the jurisdiction of the High Court in granting stay of execution. See the case of *Kenya Shell Limited v. Benjamin Karuga Kigibu & Ruth Wairimu Karuga* (1982-1988) KAR 1018 where the Court of Appeal stated that:

“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdiction for granting stay”

38. The Defendant was therefore bound to place before the court such material and information that should lead this court to conclude that he stood a risk of suffering substantial loss if the Plaintiff was allowed to evict him from the suit property. This would have laid the basis for grant of the orders for stay. The Defendant contends that they would suffer substantial loss if the stay order is not granted because he and his family live on the land and will be rendered homeless. However, it is not enough for the Defendant to merely state that he and his family would be rendered homeless if the stay is not granted. He had to prove that fact to the satisfaction of the court. Contrary to his allegation however, the Plaintiff averred that the Defendant does not in fact live on the disputed portion of the suit property, but on his mother’s parcel of land.

39. Further, the Deputy Registrar conducted a site visit on 11th May, 2023 and he noted in his report that there are old houses on the disputed land recently demolished, he also indicated that the remainder of it is open grazing field. The court also visited the suit property on 19th December, 2023. The truth of the matter is that Defendant does not live on the disputed portion of the suit property and there is no risk of him and his family being rendered homeless if the order of stay of execution is not granted. The Court has seen no basis for the allegation that the Defendant will suffer risk or loss if stay is not granted. It follows then that the Defendant has not discharged that onus.

40. Moreover, to prove that one is likely to suffer substantial loss, it must be shown that the intended appeal is arguable and raises triable issues. This would show that it has high chances of success and that if the applicant succeeds, then he would have suffered the alleged loss. The essence being that if the execution is not stayed yet the appeal raises triable issues, it would be rendered nugatory should the decision of the appellate court overturn that of the trial court. Ideally, this court would have looked at the Memorandum of Appeal to determine whether the grounds raised therein are triable. Unfortunately, although the Defendant filed a Notice of Appeal as required, this court has not been provided with a copy of the Memorandum of Appeal so as to be able to determine whether the grounds raised therein are triable. All this court has to go by are the words of the Defendant who averred that one of the grounds was that he was seeking a cancellation of the Plaintiff’s title over the suit property herein.

41. From the arguments put forward by the Defendant in this application, it appears that he seeks to have the title that he relied on during the trial declared to be valid. The Defendant’s title is to the effect that the larger parcel belonged to the Plaintiff and the late Hellen Jemeli in the ratio of ¼ to ¾. There was overwhelming evidence produced during the title against the Defendant’s assertion. The Court found that:

“On November 25, 2020, the court directed the DCI Nandi to investigate the contested documents and file a report in court within 90 days. On March 8, 2022, the DCI Nandi North filed a report in court. The report indicated that the defendant’s counsel, Mr Miyianda, had declined to record his statement as to how he came across the contested documents. The documents that were investigated were;



- i. The green card of Nandi/Eisero/325 indicating that Isaac and Hellen are each holding equal share, a partition was conducted on October 16, 1990 and title closed and the creation of Plot 425 and 426. (marked as A-3),
- ii. The green card of Nandi/Eisero/325 indicating that Isaac and Hellen are each holding equal shares certified by the land registrar. (marked as A-2),
- iii. The green card of Nandi/Eisero/325 indicating that Isaac and Hellen are holding a quarter and three quarters shares respectively. (marked as A-1),
- iv. An title deed produced by counsel for the defendant opened on November 2nd 1970 measuring 73.5 ha indicating that Isaac and Hellen were to share a quarter and three quarters respectively.

The documents were examined by PC Evelyne Othim, and after subjecting the title document presented for Nandi/Eisero/325 to image enhancement, magnification, superimposition and ink differentiation procedures, she concluded that entry number 2 and 3 on the title document for Nandi/Eisero/ 325 were made by different instruments. As a result, the defendant was arrested on the July 16, 2021, charged with the offence of making a false document contrary to section 347 (b) of the Penal Code on July 19, 2021 before Kapsabet Law Courts and he pleaded not guilty. The DC1 report is in agreement with the report of the Land Registrar, Nandi County, JC Cherutich, dated February 5, 2021, that referred to the green card in their records, which showed that Isaac and Hellen each owned half share of the land and that a partition was registered on October 16, 1990 to create Plot 425 and 426. The Land Registrar concluded that after comparing their records, the green card which stated that Hellen and Isaac held equal shares was the genuine one. Further it was confirmed that the green card showing the portions of a quarter and three quarters shares seems to have been added after the title was signed.”

42. It was on the basis of the findings of this report that the Defendant was arrested and charged in the Criminal case. The trial court also went on to state that:

“The defendant had claimed in his testimony that in 1978, his late father subdivided the land giving his mother 135 acres and the plaintiff 45 acres. He stated that in 1984 during the wedding of the plaintiff, their father had called the plaintiff, his mother Hellen and elders who pointed out to them the portion of the plaintiff’s land which was 45 acres, and the rest was left for Hellen. However, on cross examination, he admitted that he was only 6 years when the plaintiff wedded and that he only learnt of what had transpired in the said meeting from his mother in the later years. The defendant’s elder sister, Rosa Chepchirchir Barkutwo, testified in support of the plaintiff’s case as PW5. She stated that their father gave land to their mother, Hellen and the plaintiff in 1979 and by that time the defendant was 2 years old, and that when their father died in 1988, the defendant was about 11 years old. She stated being the eldest, she had not heard their father state that the land was to be shared into four portions with each of the sons getting a quarter share. The court therefore finds that as the gift by the late Kipkoech was freely given, and transfer regularly and lawfully effected during his lifetime, no grounds have been made upon which to impugn it.”

43. In the counterclaim raised by the Defendant against the Plaintiff, the Defendant had equally sought a prayer for cancellation of the Plaintiff’s title. The Defendant had claimed that the Plaintiff’s title was acquired through fraud, manifested in the manner that the Plaintiff partitioned that larger property



into the two new parcels, one of which is the suit property herein. The court did not agree with the Defendant and held that under Section 104 of the *Registered Land Act* Cap (repealed), the Plaintiff could, on his own, apply for partitioning of parcel Nandi/Eisero/325. The Plaintiff did in fact apply for partition vide his application for partition dated the October 15th, 1990.

44. The Defendant seems to have pegged the strength of his entire case on the alleged fraud of the Plaintiff, basing his arguments on the alleged shareholding of the initial Tenants-in-Common of Nandi/Eisero/325. He appears to be doing the same with the intended Appeal and claims that his Appeal has very high chances of success. Granted that the Defendant was acquitted of the offence of forgery and that the High Court in Kapsabet HC P& A Cause 42 of 2021 held that land parcel No. Nandi/Eisero/325 was the subject of distribution, these two rulings were made after this court had rendered its judgment. In the absence of the Memorandum of Appeal, this court is unable to comment on whether the appeal has high chances of success.
45. The second aspect is to consider whether the Application before court was filed without undue delay. In *Mwangi S. Kimenyi v Attorney General and Another*, (2004) eKLR, the court stated:
- “There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable... Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases.”
46. I note that the judgment herein was delivered on 25th January, 2023. The Application for stay is dated and filed on 22nd February, 2023 approximately one month from the date of the judgment. I find it hard to believe that one would wait one month to file an application for stay when he, together with his family, were allegedly facing homelessness. However, I will give the Defendant the benefit of doubt, and not hold this unexplained delay against him.
47. The final consideration is security. Although this is not a money decree, the security for costs is meant to prove ability to comply with any order as to costs that may be made against the Defendant. Courts have repeatedly held that the requirement for security is not to punish the judgment debtor but to stand as security for due performance of such decree or order as may ultimately be issued that is binding on the Applicant. In *Arun C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates* (2014) eKLR, the court held that 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. Further in *James Wangalwa & Another v Agnes Naliaka Cheseto* (*supra*), the court held that:-
- “18. I agree with the respondent that the Applicants have not offered or proposed any security for the due performance of the decree of the lower court. This should be done as a sign of good faith that the Applicant is ready and willing to commit to giving security. But my reading of order 42 rule 6(2) (b) of the *CPR* reveals that, it is the court that orders the kind of security the applicant should give as may ultimately be binding on the applicant. This modelling of the law is to ensure the discretion of the court is not fettered.”



48. The Defendant in this matter has not offered any security in the event that the appeal fails, he has openly indicated his unwillingness to deposit security for costs. The condition of security has therefore not been met. The requirements for granting stay of execution pending appeal must be met simultaneously. They are conjunctive and not disjunctive. It is my finding that the Defendant herein, though he brought this Application without undue delay, failed to adequately demonstrate the substantial loss that he would suffer if stay was not granted, and he also has declared his unwillingness to furnish security for costs as stipulated under Order 42 Rule 6(2)(b).

b. Whether the Defendant is in contempt of the orders of this court

49. Regarding the alleged contempt, it is trite that before a court reaches the conclusions that a party is in contempt, it must be satisfied that the key ingredients required to prove contempt of court have been met. These ingredients are set out in the case of *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR which is cited by the Applicants, where the court held that:

“Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated:-

‘There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- (b) the defendant had knowledge of or proper notice of the terms of the order;
- (c) the defendant has acted in breach of the terms of the order; and
- (d) the defendant’s conduct was deliberate’.”

50. On the first limb of the above test, there were very clear orders regarding the use of the disputed portion of the suit property put in place before the hearing. From the record, this matter came before Hon. Justice Ombwayo on 28th January, 2016 whereupon he made the following order with regards to use of the land:

“Both parties are restrained from utilizing the land measuring 45 Acres comprised in Nandi/Eisero/425 in the name of the Plaintiff/Applicant until hearing of this suit.”

51. The Plaintiff through an Application dated 20th April, 2016 sought to have the orders reviewed/set aside, but that application was dismissed on 15th June 2017. Afterwards, the said order was never discharged, reviewed or appealed, it remained in place throughout the hearing of the suit. The suit was determined on 25th January, 2023 when the court delivered its judgment, making a finding that the Plaintiff had proved his claim against the Defendant. The court entered judgment in terms of prayer (a) and (b) of his Plaint, and dismissed the Defendant’s counterclaim. The Decree was extracted in the following terms:

- “(a) Permanent Injunction be and is hereby issued restraining the Defendant whether by himself or his agents, servants, nominees or whomsoever claiming through from trespassing and moving into the Plaintiff’s parcel No.



Nandi/Eisero/425 and removing, fencing off, evicting, alienating, ploughing, preparing for planting, planting, evicting or doing anything, act or matter detrimental and prejudicial to the Plaintiff proprietary interests and rights over the said suit property.

- (b) Declaration be and is hereby issued that the Plaintiff is the legal and registered owner of Parcel Nandi/Eisero/425, an order of eviction and removal of the Defendant, whether by himself or his servant, agents, personal or legal representatives, assigns or nominees acting on his instructions from that part or portion of parcel Nandi/Eisero/425 now forcefully occupied by the Defendant.
- (c) That the Defendant has failed to prove his counterclaim dated 8th March, 2016 to the standard required by the law and the same is hereby dismissed.
- (d) Each party to bear its own costs.”

52. Both the temporary and the final permanent orders are clear and unambiguous. This the first limb of that test has therefore been met.
53. Was he aware of the orders of the Court prohibiting him from use of the disputed land? The answer is yes. On 28th January, 2016 the Plaintiff's Application dated 16th January, 2016 came up before Hon. Justice Ombwayo for inter partes hearing upon which he made the order extracted above pending hearing of the suit. The order made by Justice Ombwayo on 28th January, 2016 was made in the presence of both parties' Counsel. It was later on served to the Defendant's Advocates on record as an Annexure to the Plaintiff's Application dated 20th April, 2016 as annexure IKK3 thereof. The Defendant is also aware of the outcome of the suit having filed a Notice of Appeal against it and an Appeal for stay of its execution.
54. As to whether the Defendant breached the court orders in place, the Deputy Registrar's report from the site visit notes that there is approximately 20 Acres of sugar cane nearing maturity owned by the Defendant. Yet from the orders of Justice Ombwayo of 28th January, 2016 the parties were barred from utilising the disputed portion of the suit property. Then came the order of permanent injunction clearly barring the Defendant from entering into or in any other way dealing with the disputed portion of the suit property. The temporary order and the judgment/Decree quite specifically barred the Defendant from, ploughing, preparing for planting and planting on the suit property. There was never any lacuna from which the Defendant could have operated to go into the land and plough it, prepare it for planting and then actually go ahead and plant on the disputed portion of the land. Yet the report of the site visit indicates that there is sugarcane growing on the disputed land belonging to the Plaintiff. No matter when the sugarcane was planted, whether before or after the judgment, the Defendant clearly disobeyed the order of injunction.
55. The Defendant does not deny the contempt per se, he only tries to rationalise and I dare say trivialise his contempt by alleging that he only planted on his 45-Acre portion of the larger parcel No. Nandi/Eisero/325. It does not take a genius to discover that even from the instant applications and affidavits filed herein, his alleged 45-Acre portion and the disputed portion herein are one and the same thing.
56. In addition, this court has seen photographs of the sugarcane allegedly growing on the suit property. The photographs are dated 26th February, 2023 which is after the delivery of the Judgment herein. This Court also relies on the Deputy Registrar's report of the site visit conducted on 11th May, 2023 where it is clearly indicated that the sugarcane growing thereon belongs to the Defendant. There can be no



other conclusion drawn from this other than that the Defendant is in breach of the express orders of the court.

57. Moreover, in his fervent denials, he has ended up admitting to being in contempt. The Defendant's Counsel also went further to declare that the Plaintiff may have the paper title over the suit property, but he will never occupy it. It appears that the Defendant has no intention of obeying even the Court of Appeal's decision should the outcome of his intended appeal not bend to his will.
58. It is a statement loaded with utter contempt and total disregard of the decision of the court in the suit herein. Most importantly though, it reeks of wilful disobedience of the said orders as well as bad faith on the part of the Defendant. I am guided by the case of *Katsuri Limited v Kapurchand Depor Shah* [2016] eKLR, where the court cited the South African case of *Kristen Carla Burchell v Barry Grant Burchell* (Eastern Cape Division case No 364 of 2005)a, that:
- “(5) In order to succeed in civil contempt proceedings the applicant had to prove the terms of the order, knowledge of these terms by the respondent, and a failure by the respondent to comply with the terms of the order. Upon proof of these requirements the presence of wilfulness and bad faith on the part of the respondent would normally be inferred, but the respondent could rebut this inference by contrary proof on a balance of probabilities.”
59. On one hand, the Defendant approached this court to protect himself from the impending eviction arising out of the judgment and decree of this court, exhibiting belief that the reliefs granted by this court would be sufficient to protect his presumed rights over the suit property. On the other hand, he has shown blatant disrespect of the orders of the very court he now seeks to come to his aid. The court ought not, and will not, come to the aid of the party who has disrespected it and acted in contempt of its orders.
60. Having delivered its judgment on 25.1.23 this court became functus officio and it is therefore unable to vary its decision based on the ruling delivered in Kapsabet HC P&A No 42 of 2021 on 17th July, 2024 and the ruling in Kabiyet PMC Criminal Case No. 222 of 2022 delivered on. The Supreme Court in *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* Petition no. 5 of 2013 [2013] eKLR defined the doctrine of functus officio as a doctrine which prescribes that a person vested with decision making powers may only exercise those powers over the same matter once and such a decision cannot be varied or revoked by the decision maker.
61. In view of the foregoing, I find that the Defendant has not only failed to prove that he is entitled to the order of stay of execution, but that he has also disobeyed the court orders barring him from entering into or using the suit property. For all the above reasons, I find and hold that the Defendant's application dated 22nd February, 2023 is without merit and is hereby dismissed with costs to the Plaintiff. With regards to the Plaintiff's Application dated 14th March, 2023 since the Defendant's Application dated 22nd February, 2023 has been dismissed, the Court's order of 2nd March, 2023 is hereby discharged and it stands to reason that there is no longer need to have the same reviewed.
62. The effect of this ruling is that the application dated 25th July, 2024 is spent as the court cannot authorize the harvesting of sugarcane on land parcel No.Nandi Eisero/325 when the court held that the said parcel had been partitioned to give rise to land parcels No. Nandi Eisero/425 and 426.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 3RD DAY OF DECEMBER 2024

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J.M ONYANGO



JUDGE

In the presence of;

1. Mr. C.F Otieno for the Plaintiff
2. Mr. Miyiinda for the Defendant

Court Assistant: Brian

