



**Cherutich v Mburu & 5 others (Environment & Land Case
4 of 2013) [2023] KEELC 657 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 657 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 4 OF 2013
EO OBAGA, J
FEBRUARY 9, 2023**

BETWEEN

SHADOCK CHEPKIENG CHERUTICH PLAINTIFF

AND

SAMMY MUIRURI MBURU 1ST DEFENDANT

HESBON MOKONO 2ND DEFENDANT

DAVID SONGOK LAGAT 3RD DEFENDANT

DISTRICT LAND REGISTRAR 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

EQUITY BANK LIMITED 6TH DEFENDANT

RULING

1. This is a ruling in respect of a notice of motion dated July 7, 2022 in which the 1st Defendant Judgement Debtor/Applicants seeks stay of execution of the judgment delivered on May 11, 2022 pending hearing and determination of an appeal which he has preferred to the Court of Appeal.
2. The Applicant contends that he is the registered owner of the suit property and that the impugned judgment decreed that the Plaintiff/Respondent is the lawful owner of the suit property and proceeded to direct the 4th Defendant/Respondent to rectify the register and have the Plaintiff /Respondent registered as owner. The Applicant therefore argues that if this were to happen, it will interfere with the substratum of the suit.
3. The Applicant further contends that the appeal which he has preferred to the Court of Appeal has overwhelming chances and that he is willing to abide with any conditions which the Court will impose.



4. The Applicant's application was opposed by the Plaintiff Decree Holder/Respondent through a replying affidavit sworn on September 19, 2022. The Respondent contends that the Applicant's application is devoid of merit; has been brought late; has been overtaken by events since execution has been carried out and that the Applicant has not demonstrated any substantial loss he will suffer should stay not be granted.
5. In a further affidavit sworn on October 7, 2022, the Applicant states that failure to file this application in time was due to the fact that it took time for the court file to be returned from Malindi where it had been taken for Judgement. On the issue of the execution having taken place, the Applicant states that this was done in bad faith as he had already filed an appeal and that the Respondent should be stopped from further dealing with the suit property as he is likely to sell the same and this might render the appeal nugatory.
6. The parties were directed to file written submissions. The Applicant filed his submission on October 14, 2022. The Respondent filed his submission on October 26, 2022. I have carefully considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submission by the parties. The only issue for determination in this matter is whether the Applicant has met the threshold for grant of stay of execution pending appeal.
7. Under order 42 Rule 6 of the *Civil Procedure Rules*, there are three conditions which fetter the discretion of the court. Firstly, an Applicant has to bring the application without unreasonable delay. Secondly, there has to be demonstration of substantial loss absent stay. Thirdly, there has to be such security given as may ultimately be binding upon the decree by the Applicant.
8. In the instant case, the impugned judgment was delivered on May 11, 2022. This application was filed on July 8, 2022. The application was filed slightly under two months later. The late filing has been explained. The file had been taken to Malindi where the trial judge had been transferred to. I therefore find that the application was filed without undue delay in the circumstances.
9. Has the Applicant demonstrated that he will suffer substantial loss? Demonstration of substantial loss is the cornerstone of grant of stay. In the instant case, the Applicant has never taken possession of the suit property. It is the Respondent who has been in possession all through. The Applicant only had title which has been impeached. In the affidavit in support of the Applicant's application, he did not state that he will suffer substantial loss. He merely stated that if his title was to be cancelled, the substratum of the suit will be affected.
10. It is only after the Respondent indicated in the replying affidavit that he was in the process of obtaining title documents that he stated that the Respondent should be stopped from any further dealing as he might sell the property which will render the appeal nugatory and that he will suffer substantial loss.
11. There is no evidence that the Respondent is intent on selling the suit property. One cannot allege that he will suffer substantial loss without substantiating the alleged loss. If title is finally processed in favour of the Respondent and the appeal succeeds, the registration will simply be reversed. The appeal will therefore not be rendered nugatory. In any case, it will be an exercise in futility if the court were to grant stay of execution in a process which is at its tail end.
12. The issue of security would have been addressed if the Applicant had demonstrated that he will suffer substantial loss. This being the case, I find that the Applicant's application is devoid of merit. The same is dismissed with costs to the decree holder/respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 9TH DAY OF FEBRUARY, 2023.



E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Kibii for Decree Holder/Respondent

Mr. Kinyanjui for Mr. Kimani for Judgment Debtor/Applicant.

Court Assistant –Akidor

E. O. OBAGA

JUDGE

FEBRUARY 9, 2023

