



Inoti v M’Mutungi (Legal representatives of David M’Marete (Deceased) (Environment & Land Case 37 of 2020) [2023] KEELC 419 (KLR) (1 February 2023) (Ruling)

Neutral citation: [2023] KEELC 419 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 37 OF 2020**

CK NZILI, J

FEBRUARY 1, 2023

BETWEEN

MARY KITHINJI INOTI PLAINTIFF

AND

**SALOME KARUGA M’MUTUNGI (LEGAL REPRESENTATIVES OF DAVID
M’MARETE (DECEASED) DEFENDANT**

RULING

1. By an application dated October 31, 2022, the court is asked to grant leave for the firm of Kelvin Nyenyire & Co Advocates to come on record for the plaintiff, the status quo be maintained and, in the alternative, a stay of execution to issue against execution of the judgment delivered on October 26, 2022. The grounds for the application are set out in the affidavit of Mary Kithinji Inoti sworn on the even date who said that she has been in possession of the suit premises and risks being evicted.
2. The defendant has opposed the application through a replying affidavit sworn on November 10, 2022, on the basis that it was an afterthought; it will deny her the realization of fruits of the judgment; the intended appeal has no chances of success and that in the event the court grants the stay a security of Kshs 2,000,000/= should be deposited in a joint account of the two advocates as a condition precedent.
3. Parties opted to canvass the application by written submissions dated November 22, 2022 and November 18, 2022 respectively.
4. The applicant submitted that the court should not only consider order 42 rule (2) *Civil Procedure Rules* but also sections 1A, 1B of the *Civil Procedure Act* guided by *RWW v EKW* [2019] eKLR the court is urged to find it is in the interest of justice and fairness to grant the stay otherwise the applicant shall suffer substantial loss in terms of the land, costs and interest.
5. On the other hand, the defendant submitted that she would be more disadvantaged if stay was granted by being denied what was owed to her rightly after performing part of the agreement. Secondly, due to



- lack of a draft memorandum of appeal, the respondent submitted that this court could not determine the success of the intended appeal which in any event was not for this court to determine.
6. Further the respondent submitted that on the face of the application there was no material to show that there will be a state of affairs to irreparably affect or negate the very essential core of the subject matter rendering the intended appeal nugatory as held in *Silverstein v Chesoni* [2002] 1 KLR 867. Additionally, the respondent relying on *Equity Bank Ltd v Taiga Adan Co Ltd* [2006] eKLR urged the court to find no offer for security has been made by the applicant and it was not for the court to infer or imply it or make an order to that effect otherwise it would be stepping into the arena of the dispute.
 7. For a party to be entitled to any order for stay he must demonstrate substantial loss, offer security for costs or due performance of the decree, come before court within a reasonable time and lastly, demonstrate that it is in the interest of justice to allow the application. See *Visbram Ravji Halal and Another v Thorton & Turpin* [1963] Ltd [1990] eKLR.
 8. By a judgment dated October 26, 2022, the court dismissed the plaintiff's suit on the basis that she remained a licensee of the suit premises and was not entitled to the orders of adverse possession. The defendant had not counterclaimed for the suit land. Therefore, the court did not issue any positive order in favour of the respondent worthy executing.
 9. In *Machira t/a Machira & Co advocates v East African Standard No (3)* [2002] 2 KLR, the court held that a party must specify and give details or particulars of substantial loss. Further the court held that a stay order would not be given on mere or vague speculation.
 10. In *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR the court took the view that an execution was a legal process which by itself did not amount to substantial loss in absence of other factors establishing that an execution would create a state of affairs likely to irreparably affect or negate the very substratum of the appeal and the appellant as a successful party in the appeal.
 11. In *Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others* [2021] eKLR, the court was faced with an application for both stay and temporary injunction pending appeal where the trial court had merely dismissed the applicant's suit which no party was ordered to do anything or refrain from doing anything.
 12. The court cited with approval *Western College of Arts & Applied Sciences v EP Oranga & 3 others* [1976] eKLR where it was held that there was nothing arising out of the High Court judgement for the court to stay save perhaps for costs.
 13. In the affidavit in support of the motion before this court, the applicant has not specified if any notice of eviction has been served upon her if at all she has been in occupation. Secondly, the nature of occupation, developments thereof, extent of loss by way of a valuation report or otherwise have not been particularized at all. In *RWW v EKW (supra)* the court held that the two competing rights of a successful litigant and that of an unsuccessful party with an undoubted right of appeal have to be put in a weighing scale so that no party suffers prejudice that cannot be compensated by an award of costs.
 14. The applicant herein has not made an offer or proposed to offer any security for costs or for the due satisfaction of the decree in the event the court was to grant the application. It is not for this court to impose security without an invitation by the applicant to do so. The discretion to grant a stay is to be exercised judiciously and based on sound principles. The applicant has failed to discharge the onus of proving substantial loss or offering security for the due realization of the decree should the appeal not succeed. There is also nothing to stay since as held in *Oliver Collins Wanyama v Engineers Board of Kenya* [2019] eKLR that a dismissal giving rise to a negative order is incapable of being stayed. Similarly, the applicant has not defined the current status quo which should be maintained. See *TSS*



Spinning & Weaving Co Ltd v NIC Bank Ltd & another [2020] eKLR. *Thugi River Estate v NIC Bank* [2015] eKLR.

15. In the premises, I find the application herein lacking merits save for the prayer for a notice of change of advocates.

Costs to the respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 1ST DAY OF FEBRUARY, 2023

In presence of:

C/A: Kananu

Nyenyire for applicant

Mrs. Otieno for respondent

HON. C.K. NZILI

ELC JUDGE

