



**Nyandat v Ochieng (Environment & Land Case 61 of 2016)
[2023] KEELC 710 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 710 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 61 OF 2016
SO OKONG'O, J
FEBRUARY 9, 2023**

BETWEEN

MILLICENT NYANDAT PLAINTIFF

AND

PAMELA ACHIENG OCHIENG DEFENDANT

RULING

1. In the judgment delivered by this court on October 15, 2021, the court granted a permanent injunction restraining the defendant from carrying out any activity or remaining upon, trespassing upon or in any other manner interfering with the plaintiff's quiet possession, occupation and/or enjoyment of all that parcel of land known as Title No Kisumu/Dago/1300. The court also dismissed the defendant's counter-claim against the plaintiff and awarded the plaintiff the costs of the suit. The defendant was dissatisfied with the said judgment and filed a Notice of Appeal against the same on October 27, 2021.
2. On September 16, 2022; almost a year after the delivery of the said judgment, the appellant filed a Notice of Motion application dated August 15, 2022 seeking a stay of execution of the said judgment of October 15, 2021 pending the hearing of the appeal that the defendant has preferred against the same in the Court of Appeal. That is the application before me. The application has been brought on the grounds set out on the face thereof and on the affidavit of the defendant sworn on August 15, 2022. The defendant has averred that she has lodged an appeal against the decision of this court made on October 15, 2021 and that if the execution of the said judgment is not stayed, the appeal would be rendered nugatory and the defendant would suffer substantial loss. The defendant has averred that she is amenable to furnishing a suitable security as a condition for the stay if granted.
3. The application is opposed by the plaintiff through grounds of opposition dated November 29, 2022. The plaintiff has contended that the application has been brought after unreasonable delay. The plaintiff has contended further that the application is based on irrelevant grounds. The plaintiff has averred that the defendant's application does not meet the conditions for the grant of a stay set out in



Order 42 Rule 6 of the Civil Procedure Rules. The plaintiff has averred that the application has no merit.

4. The application was argued by way of written submissions. The defendant filed her submissions on December 2, 2022 while the plaintiff filed her submissions in reply on December 14, 2022. I have considered the application together with the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the plaintiff in opposition to the application. Finally, I have considered the submissions by the advocates for the parties and the various authorities cited in support thereof. The defendant's application was brought under Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6(2) of the Civil Procedure Rules provides that:

- (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 ultimately be binding on him has been given by the applicant.'

5. In *Kenya Shell Limited v Karuga (1982 – 1988) I KAR 1018* the court stated that:

'It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. 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 corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.'

6. I am not persuaded that the defendant would suffer substantial loss if the stay sought is not granted. In the judgment that was delivered on October 15, 2021, the defendant was merely restrained from interfering with the plaintiff's occupation of Title No Kisumu/Dago/1300 owned by the plaintiff and in respect of which the plaintiff has a title. In the judgment, the court found that the defendant has her own parcel of land namely; Title No Kisumu/Dago/1755 in respect of which she has a title. The plaintiff came to court to restrain the defendant from interfering with her parcel of land Title No Kisumu/Dago/1300 which the defendant claimed to be Title No Kisumu/Dago/1755. The court found that Title No Kisumu/Dago/1300 and Title No Kisumu/Dago/1755 were separate and distinct and that both existed on the survey map and on the ground. The court found that the purported change of location of Title No Kisumu/Dago/1755 to the location of Title No Kisumu/Dago/1300 and vice versa was unlawful. The court held that Title No Kisumu/Dago/1300 and Title No Kisumu/Dago/1755 remain in their respective locations where they were before the purported interchange of geographical locations. The defendant was therefore restrained from laying a claim to the land comprised in Title N Kisumu/Dago/1300 owned by the plaintiff. She was required to be contented with her Title No Kisumu/Dago/1755 where it was situated on the ground. In the circumstances, the defendant has not convinced me that she will suffer substantial loss if the injunction restraining her from interfering with the plaintiff's occupation and enjoyment of Title No Kisumu/Dago/1300 remains in force pending the hearing and determination of her appeal to the Court of Appeal. As correctly submitted by the plaintiff's advocate, the defendant retains her title in respect of Title No Kisumu/Dago/1755 and the land comprised therein. It has not been suggested that the defendant stands to lose her parcel of land as a result of the injunction order or that the defendant's title risks being cancelled. The defendant has therefore failed to discharge the burden of proving that she will suffer substantial loss unless the stay sought is granted.



7. I am also in agreement with the plaintiff that the defendant's application was brought after an unreasonable delay. The judgment the execution of which is sought to be stayed was made on October 15, 2021. The stay application before the court was not filed until 11 months later on September 16, 2022. The explanation given by the defendant for this delay is that the defendant wanted to file the appeal in the Court of Appeal before applying for a stay. As correctly submitted by the plaintiff, a Notice of Appeal once filed acts for all intents and purposes as an appeal for the purposes of stay. The defendant's contention that she was waiting to file an appeal in the Court of Appeal before filing a stay application is therefore unreasonable and as such is not an answer to the delay in the filing of the present application.
8. The upshot of the foregoing is that the defendant's application dated August 15, 2022 has no merit. The defendant has failed to satisfy the conditions for granting an order of stay of execution. The application is dismissed with costs to the plaintiff.

DELIVERED AND DATED AT KISUMU ON THIS 9TH DAY OF FEBRUARY 2023

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiff

Mr. Muchela for the Defendant

Ms. J. Omondi-Court Assistant

