



Yego & another v Kapsabet Municipality Board & 6 others (Environment & Land Case 129 of 2021) [2023] KEELC 16071 (KLR) (8 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16071 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 129 OF 2021
MN MWANYALE, J
MARCH 8, 2023**

BETWEEN

PROFFESOR JOSEPHAT KIPKOECH YEGO 1ST PLAINTIFF

EMILY CHEPLETING YEGO 2ND PLAINTIFF

AND

KAPSABET MUNICIPALITY BOARD 1ST DEFENDANT

MUNICIPAL MANAGER, KAPSABET MUNICIPALITY 2ND DEFENDANT

NANDI COUNTY PHYSICAL PLANNING OFFICER 3RD DEFENDANT

NANDI COUNTY GOVERNMENT SURVEYOR 4TH DEFENDANT

COUNTY GOVERNMENT OF NANDI 5TH DEFENDANT

JOHN SONGOK 6TH DEFENDANT

DAVID K. SEREM 7TH DEFENDANT

RULING

1. By a Notice of Motion dated December 8, 2022, the Applicant herein substantially seek stay of execution of Decree of this Court pending hearing and determination of the intended appeal.
2. The motion is supported by two affidavits, one dated December 8, 2022 and a further affidavit dated January 24, 2023 both sworn by Prof Josephat Kipkoech Yego.
3. The Applicant amplifies, the grounds set out on the face of the motion and claims that the judgment of this Court delivered on October 27, 2022 dismissing the Plaintiff's claim and allowing Defendants counter-claim was erroneous. That a Notice has been filed on Applicants intention to Appeal to the Court of Appeal. The Applicant further claims that unless stay of execution is granted, the



Respondents will proceed with the Government low cost housing programme to the detriment of the Applicants. The Applicants are willing to abide by terms and conditions that maybe set by this Court for grant of stay orders.

4. The motion was opposed by way of replying affidavits dated January 17, 2023 deponed by Francis K Sang and another one dated December 30, 2022 deponed by David K Serem.
5. David K Serem the 7th Defendant/Respondent, vide his replying affidavit in actual fact supports the motion. He contends that the Applicants shall suffer irreparable loss and damage if orders sought are not granted. That no prejudice will be suffered by the Respondents if orders sought are granted.
6. Francis K Sang, the County Secretary of the 5th Defendant/Respondent opposes the instant motion by stating that the counter-claim was competent pursuant to Court orders allegedly issued on February 10, 2020. The deponent contends that the Applicants have not demonstrated how they will suffer loss if orders sought are not granted. That the suit land had been set aside for low density residential and denial of use of this property is prejudicial to members of the public.
7. On December 9, 2022, this Court issued directions that the motion be canvassed by way of written submissions. The parties herein duly complied.
8. It was submitted for the Applicants that the application satisfied the conditions mentioned in the case of *Kinyunjuri Muguta –vs- Wotuku Muguta* (2018) eKLR as well as the threshold set out under Order 42 of the *Civil Procedure Rules*.
9. On the part of 1st – 5th Respondents, it was argued that the motion failed to meet the conditions for grant of stay of execution set out under Order 42 Rule 6 of the *Civil Procedure Rules*. Counsel relied in the cases of *Kinyunjuri Muguta –vs- Wotuku Muguta* (2018) eKLR and *John Cheruiyot Mursoi vs Austine Chepkwony Murei and Another* (2020) eKLR to buttress this.
10. In response to 1st – 5th Respondents submissions, the Applicants submitted vide supplementary submissions that grant of orders sought would not defeat public interest. That the intended appeal would be rendered nugatory if orders sought are not granted since the 1st – 5th Respondents had demonstrated in their replying affidavit dated January 17, 2013 that they are keen on proceeding with the Housing Programme. It was therefore necessary that a stay of execution pending appeal be issued.

Analysis And Determination:-

11. I have considered the material canvased by all parties in respect of the instant motion. Essentially, the Applicants are seeking for stay of execution of the orders and decree of this Court pending hearing and determination of an appeal.
12. The Application is brought under Order 42 Rule 6 of Civil Procedure Rules which provides that;

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- (i) 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 to 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 undue 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.”

13. The first issue is whether the Applicant have demonstrate the like hood of suffering substantial loss if stay of execution is not granted. In the instant case, the Applicants averred that there was imminent eviction as well as destruction of properties if stay is not granted. The Respondents on the other hand contended that the suit land is government land set aside for development of low density housing. However, they did not dispute the fact that implementation of this Court’s findings will lead to the eviction of the Applicants. To this end, I find that the Applicants will suffer substantial loss and damage if stay pending appeal is not granted.
14. The second issue to be determined is whether the instant application has been made without undue delay. Judgment was delivered on October 27, 2022 and this application was filed on December 9, 2022, hence a lapse of one month 12 days. From the Court’s record, the Applicants were granted 45 days stay of execution upon delivery of judgment on October 27, 2022. In view of this, the Court finds that the instant application was brought without delay as the same was filed within the 45 days widow period.
15. On the third of security, the Applicants stated in the Supporting Affidavit deponed by Professor Josphat Kipkoech Yego that, they are willing to abide by such terms and conditions imposed by the Court. I have perused the Court’s record and established that copies of certificate of leases over the suit properties were produced by the Applicants in evidence. The said properties are registered in the name of the first Applicant. Considering the above and in view of the fact that, the value of these properties are not ascertainable at this point, the Court in exercise of its discretion finds merit in the application and directs and orders that certificates of lease over plot numbers KAPSABET TOWNSHIP/536-546 in the name of the 1st Applicant be deposited in Court within 30 days from the day hereof as security pending hearing and determination of the appeal at the Court of Appeal. Failure to deposit this security in Court within the stipulated time aforementioned the orders of then stay of execution shall automatically lapse.
16. Costs of this application shall abide the outcome of the appeal.
17. Orders accordingly.

DATED AT KAPSABET THIS 8TH DAY OF MARCH, 2023.

HON. M. N. MWANYALE,

JUDGE.



In the presence of;

Mr. Esikuru holding brief for Alwenga for 6th and 7th Defendant.

Mr. Sambu for 1st to 5th Defendant.

Ms. Nyaribo holding brief for Mr. Kipkenywei.

