



Kitur & another (Suing on Behalf of the Estate of Stephen Kitur) v Kitur (Environment & Land Case 68 of 2021) [2023] KEELC 17253 (KLR) (4 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17253 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 68 OF 2021**

MN MWANYALE, J

MAY 4, 2023

BETWEEN

CHARLES KITUR 1ST PLAINTIFF

ELIZABETH JELAGAT 2ND PLAINTIFF

SUING ON BEHALF OF THE ESTATE OF STEPHEN KITUR

AND

HILLARY KITUR DEFENDANT

RULING

1. This ruling relates to the applicant's Notice of Motion dated February 7, 2023 seeking the following orders;-
 - a. Spent
 - b. Spent
 - c. That this honourable court be pleased to stay the execution of Decree and any consequential orders emanating from judgment by Justice M. N. Mwanyale dated January 19, 2023 pending the hearing and determination of the intended appeal.
 - d. That costs be in the cause.
2. The application is premised on the grounds on its face. The applicants main ground is that they are aggrieved by the decision of this court delivered on January 19, 2023 and intend to appeal against the entire judgment.
3. The respondent did not file any replying affidavit or Grounds of Opposition to controvert the averments by the applicants. Basically the present application is unopposed but this Court shall determine the same on merit.



4. The applicants filed their written submissions dated February 28, 2023. It was submitted that the Applicants have met the conditions set out in Order 42 Rule 6 (2) of the *Civil Procedure Rules* for grant of stay of execution pending appeal. Counsel relied on several cases to buttress their position including the Court of Appeal case of *Butt v Rent Restriction Tribunal* [1979], *Antoine Ndiaye v African Virtual University* [2015] eKLR as well as the decision in *James Wangalwa and another v Agnes Naliaka Cheseto* [2012] eKLR.
5. Counsel for the Applicants therefore urged this court to allow the present application in the interest of justice.

Analysis and Determination

6. Upon careful consideration of the application the affidavit in support as well as submissions filed on behalf of the applicants, the sole issue for determination is whether the application has satisfied the principles for granting stay of execution orders pending appeal.
7. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are set out under Order 42 rule 6 (2) of the *Civil Procedure Rules* which states as follows;-

“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 as been given by the applicant.”
8. These principles have been considered and analyzed by courts and several decisions binding upon this court rendered. Some of these decisions which I will heavily rely on include;
 9. The Court of Appeal decision in *James Wangalwa and another v Agnes Naliaka Cheseto* [2012] eKLR held that:

“An applicant must establish 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 a successful party.”

10. Similarly, the Court of Appeal while dealing with an application for stay of execution pending appeal in the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 held that the court has discretionary power to grant it. It held further that a stay must be granted so that an appeal may not be rendered nugatory and a stay should not be refused if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
11. The purpose of an order for stay of execution order pending appeal was well expounded in the case of *RWW v EKW* (2019) eKLR where the Court states as follows;

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed,



to grant or refuse an application for stay of execution pending appeal is discretionary. The court while granting the stay however, must balance the interests of the appellant with those of the respondent.”

12. Bearing in mind that the substratum of this case is land whose character may change during the pendency of the appeal, I shall proceed to analyze the facts vis-à-vis the principles for grant of stay of execution pending appeal.
13. The first issue I wish to address is with regards to whether the application has been made without unreasonable delay. Judgment in this matter was delivered on January 19, 2023 while the application was filed on February 10, 2023. This translates to 19 days from the date of delivery of judgment hence no delay whatsoever.
14. On the issue of substantial loss, the applicants averred that they were apprehensive that the Respondent may sub-divide the suit property to their detriment. Upon perusal of this court’s judgment delivered on January 19, 2023, it is evidence that the portions awarded to the Applicants were those they already occupied hence any sub-division by the Respondent would not prejudice them in any way noting that the plaintiff/applicant had withdrawn their suit in any event. This is to say any sub-division by the respondent would not lead to the applicant’s evictions from the suit property. Therefore, it is the court’s view that no substantial loss would be suffered by the applicants if stay orders sought are not granted.
15. However, in order to balance the interest of all parties herein and preserve the suit property so as not to render the appeal nugatory, this court holds the view that the order befitting in the circumstance is that of status quo prevailing from date of delivery of judgment pending appeal.
16. The upshot of this is that the orders sought in the application dated February 7, 2023 for stay of execution pending appeal are declined but order for status quo currently prevailing both on the ground and on the register to remain pending finalizing of appeal in the Court of Appeal.
17. There shall be no orders as to costs.
18. Orders accordingly.

DATED AND DELIVERED AT KAPSABET THIS 4TH DAY OF MAY 2023.

HON. M. N. MWANYALE,

JUDGE

Delivered in the presence of:-

- 1. Ms. Kesei holding brief for Mr. Omusundi for the Respondents/Defendant.**
- 2. No appearance for Mr. Rotuk for Applicant/Plaintiff.**

