



**Kaptien Farmers Ltd & 17 others v Cheptililik Farmers Co-operative Society & 230 others
(Environment & Land Petition 6 of 2021) [2023] KEELC 18035 (KLR) (5 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18035 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND PETITION 6 OF 2021
MN MWANYALE, J
JUNE 5, 2023
(FORMELY ELDORET ELC SUIT NO. 5 OF 2016)**

BETWEEN

KAPTIEN FARMERS LTD & 17 OTHERS PETITIONER

AND

CHEPTILILIK FARMERS CO-OPERATIVE SOCIETY 1ST RESPONDENT

HENRY KOSGEY 2ND RESPONDENT

NATIONAL LAND COMMISSION 3RD RESPONDENT

CHIEF LAND REGISTRAR 4TH RESPONDENT

DISTRICT LANDS OFFICER -NANDI 5TH RESPONDENT

LAWRENCE K SITIENEI 6TH RESPONDENT

ZETH KIRWA MISOI 7TH RESPONDENT

KIPTANUI NGOSOSI KAPSIKWA & 223 OTHERS 8TH RESPONDENT

RULING

1. Before me is the Petitioners application dated February 22, 2023 brought under Order 42 Rule 6 (2), Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, Rule 1 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya. The Applicants seek the following orders;

i. Spent

ii. Spent



- iii. That there be an order of stay of taxation and/or the stay of proceedings and/or stay of further proceedings in this matter, stay of issuing the certificate of taxation and eventual stay of execution of costs pending the hearing and determination of the appeal before the Court of Appeal in the Court of Appeal at Eldoret Civil Appeal No E007 of 2023 Kaptien Farmers Limited and 18 others v Cheptililik Farmers' Co-operative Society Ltd and 223 others.
 - iv. That costs of this application be in the cause.
2. The application is premised on grounds annexed thereto and supporting affidavit of James K Chirchir, the Secretary to the Petitioners herein. He averred that the Applicants have lodged an appeal to the Court of Appeal being Civil Appeal No E007 of 2023 Kaptien Farmers Limited and 18 others v Cheptililik Farmers against ruling of this Court delivered on June 30, 2022. That the Appeal raises arguable issues with high chances of success. Further that the 2nd, 6th, 7th and 8th Respondents have filed party and party bill of costs for taxation which bill once taxed, shall greatly prejudice the Applicants and render the appeal nugatory. Therefore that it was necessary to preserve the substratum of the matter pending outcome of the appeal.
 3. In opposition to the application, the 2nd, 6th, 7th and 8th Respondents have filed Replying Affidavit dated March 10, 2023 deponed by their advocate Alan Kosgey. Counsel deponed that the instant application was without merit or legal basis since it was a ploy to deny the Respondents fruits of this court's ruling delivered on June 30, 2020. Further that there has been inordinate delay in the filing of this application which delay has not been explained. He urged the Court to dismiss the instant application with costs. Alternatively, counsel deponed that should the Court grant stay then the same be granted on condition that costs be deposited in Court as security pending appeal.
 4. The Petitioners/Applicants in response to the replying affidavit filed a Supplementary Affidavit deponed by James K Chirchir on March 24, 2023. He reiterated the contents in his supporting affidavit and added that before filing of the appeal, they were following up with typed and certified proceedings which were supplied late hence a certificate of delay was issued by the Court. It was deponed further that since no costs had been taxed, no party would suffer any prejudice if, the prevailing status quo is maintained and/or preserved pending outcome of the appeal.
 5. On March 15, 2023 this Court directed parties to file and exchange submissions which directions were complied with by all parties.
 6. In summary, the Applicants Counsel submitted that a substantive appeal had, been filed against ruling of this Court delivered on June 30, 2022. Meanwhile a party and party bill of costs was filed by the 2nd, 6th, 7th and 8th Respondents to taxation. That unless the order for stay of proceedings is granted, the Applicant shall suffer substantial loss if the bill of costs is taxed and eventually executed. To buttress this position, counsel cited the case of *Jason Ngumba Kagu & 2 others v Intra Africa Assurance Company Limited* [2014] eKLR.
 7. It was also submitted that it was necessary to preserve the substratum of the matter pending outcome of the appeal so that no party suffers any prejudice. Counsel placed reliance in the case of *Rosengrens Limited v Sage Deposit Centres Limited* [1984] 3 All ER 198 which was cited by the Court of Appeal in *Gitabi & another v Warugongo* [1988] KLR 621. Counsel urged this Court to maintain status quo pending outcome of the appeal before the Court of Appeal.
 8. Counsel for the 2nd, 6th, 7th and 8th Respondents on their part submitted that the Applicants are not entitled to the orders sought since the Petitioners slept on their right to seek stay orders for 8 months. It was further submitted that no credible reason has been given as to the inordinate delay in filing the



instant application. Counsel urged this Honourable Court to dismiss the instant application. If not then the Applicant be ordered to deposit costs as security in Court pending appeal. He relied in the case of *Focin Motorcycle Company Limited v Ann Wambui Wangui and Another* [2018] eKLR to buttress this position.

Analysis and Determination:

9. Upon consideration of the present application, reply thereto as well as rival submissions by parties, the main issue for determination is whether there ought to be stay of taxation proceedings and eventual execution pending the outcome of Eldoret Civil Appeal No E007 of 2023.

10. As rightly submitted by both parties, this Court's jurisdiction, whether to grant stay of proceedings is derived from Order 42 Rule 6 of the *Civil Procedure Rules*. It provides that;

“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 from whose decision the appeal is preferred may apply to the appellate Court to have the orders set aside.”

11. Sub – rule 2 of Order 42 Rule 6 of the *Civil Procedure Rules* provides that;

- “(2) No order for stay of execution shall be made under sub-rule (i) 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 has been given by the Applicant.”

12. In essence, the Applicants need to satisfy the following conditions before this Court can grant the orders sought;

- i. Substantial loss may occur to the Applicant unless stay orders are granted.
- ii. The application has been made without unreasonable delay, and
- iii. Security as may be ordered by the Court.

13. The above are the principles this Court has to bear in mind while determining the present application. The first consideration is whether substantial loss may occur to the Applicant if stay is not granted. It is the duty of the Applicant to establish that he/she will suffer substantial loss if orders sought are not granted.

14. The Court of Appeal emphasized the centrality of substantial loss in *James Wangalwa & another v Agness Naliaka Cheseto* [2012] eKLR by stating that;-

“the issue of substantial loss is the cornerstone of both jurisdictions. The substantial loss is what has to be prevented by preserving the *status quo* because such loss would render the appeal nugatory.”



15. The Applicants submitted that they stand to suffer substantial loss if the Party and Party Bill of costs filed by the Respondents is taxed and executed. That a state of affairs have not been presented or explained by the Applicant in order to satisfy the Court that indeed they shall suffer substantial loss.
16. On the second consideration whether the instant application was brought without unreasonable delay, The Respondents submitted that a delay of 8 months was inordinate and inexcusable. A perusal of the record shows that indeed the ruling of this Court being appealed against was delivered on June 30, 2022 while the instant application for stay of proceedings and execution was filed on February 22, 2023. This is a period of 8 months since delivery of ruling. The Applicants on their part acknowledge the delay but attribute it to delay in procuring typed proceedings. This reason preferred by the Applicants, in the Court's view, has no nexus with delay in filing the application for stay of proceedings and execution. This excuse or reason may have been applicable to delay in filing a record of Appeal, which is not the case herein.

Therefore this Court is not satisfied with the reason tendered by the Applicants for a delay was inordinate and not satisfactorily explained.

17. The last consideration is whether security may be ordered in this case for due performance of the orders or ruling of this Court. The Applicants submitted that the ruling of this Court delivered on June 30, 2022 entitled the Respondents to costs of the suit only. That this being a land matter, the Applicants ought not to be disadvantaged to give security considering the fact that there is no monetary decree. The Respondents on their part submitted that the entire amount drawn in the Party and Party Bill of costs being kshs 24,007,360.00 before taxation be deposited by the Applicants in Court as security pending appeal.
18. The Court in the case of *Deposit Protection Fund -vs- Rosaline Njeri Macharia* (2006) eKLR while dealing with an application for stay of taxation proceedings such as the one before me observed that;

“Going back to the 2nd Defendant's arguments, I note them saying that if the Court did not grant an order for stay of the proceedings, the Applicant would not suffer substantial loss, on account of the taxation of the Defendant's Bill of costs. When faced with those submission, the Applicant did not tell the Court how taxation of the Defendants Bill of Costs cannot occasion any loss to the person against whom it is taxed. Therefore, the issue of taxation causing substantial loss does not even arise. The only effect of taxing a Bill of Costs is the ascertainment of the quantum of costs payable by one person to another. Thereafter, the party whose costs had been ascertained could take out execution proceedings..... Furthermore, if the learned taxing officer were to proceed to tax the Defendant's Bill of Costs, the sums would be ascertained, and that would be the foundation upon which this Court could base the size of the security which the Applicant would need to raise, if the Court did order that there be a stay of execution.”

19. This Court has established, upon perusal of the record that a ruling date for the Respondents Bill of Costs had been reserved for March 16, 2023. However, the same had been pending delivery due to the filing of the present application. It is this Court's considered view that the instant application was prematurely filed since the only orders the Respondents were entitled to be costs which costs are yet to be ascertained. Going by the observation in the *Deposit Protection Fund* case cited herein above, I see no prejudice that the Applicants will suffer if ruling on the Bill of Costs is delivered. It is trite that it is only through taxation that costs can be ascertained. At this stage in the proceedings, costs has not been ascertained in order for the Court to make an order for deposit of the same as security pending appeal. It would be unfair and unjust to order for deposit of costs as drawn in the Respondent's Bill of Costs.



20. Furthermore, the Court is aware that in the prayer for stay of proceedings (prayer 3), the Applicants equally, sought for stay of execution of costs pending outcome of the appeal. One wonders what costs are to be stayed since, none has been taxed. It is only after taxation that the same can be ascertained and eventually stayed by the Court upon prompt by a part vide an application, for stay of execution. Again this Court finds this extract of the prayer premature. The Applicant therefore fails to meet this condition for grant of the orders sought as well.
21. From the foregoing, it is the Court's considered view that the delivery of ruling on taxation of Respondent's Bill of Costs is not prejudicial to the Applicants. This is so because they can thereafter seek for stay of execution if the Respondents proceed to execute the costs as previously stated.
22. The upshot of this is that the Applicants have failed to meet the threshold set for grant of the orders sought and proceed to dismiss the application dated February 22, 2023. Costs of this application shall await the outcome of the appeal before the Court of appeal. Interim orders issued on March 1, 2023 are hereby vacated forthwith.
23. It is so ordered.

DATED AND DELIVERED AT KAPSABET THIS 5TH DAY OF JUNE, 2023.

Hon. M. N. Mwanyale,

JUDGE

In the presence of;

Mr. Masese holding brief for Mr. Kosgey

Ms. Martin holding brief for Mr. Arusei for Applicant

