



**Basweti v Ogweri (Environment and Land Appeal 5 of 2023)
[2023] KEELC 18538 (KLR) (4 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18538 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL 5 OF 2023**

M SILA, J

JULY 4, 2023

BETWEEN

KENNETH ORENGE BASWETI APPELLANT

AND

YOBENSIA BITENGO OGWERI RESPONDENT

(Application for stay pending appeal; applicant having earlier filed a similar application before the Magistrate's Court which was pending ruling when this application was filed; abuse of court process in having two similar applications in two different courts at the same time; in any event, no demonstration of substantial loss; application dismissed)

RULING

1. The application before me is that dated and filed on 2 May 2023 by the appellant. It is an application seeking an order of stay of execution of the judgment appealed from, which is the judgment delivered on 27 January 2023 in the suit Ogembo SPMCC/ELC No. 10 of 2015, pending hearing and determination of the appeal. The applicant has annexed a copy of the decree and has contended that if the judgment is executed, it will cause him substantial loss. He has added that upon extraction of the decree the respondent showed up at night with hired goons armed with crude weapons with intent to evict him and that it took the intervention of neighbours to repulse them.
2. The respondent has opposed the application through a replying affidavit. She has averred that her claim before the lower court was allowed and the applicant's counterclaim dismissed. She has vehemently refuted the allegation that she showed up at night with goons and has deposed that she is an old woman incapable of conducting herself as such. She has deposed that upon delivery of the judgment on 27 January 2023, the applicant filed an application dated 30 January 2023, seeking stay of the judgment, and that interim orders were issued pending determination of the application and she could not thus have moved to execute the decree. She averred that she opposed the application and ruling was delivered on 5 May 2023 vide which the application was dismissed. She has deposed that while that ruling



was pending the applicant filed this motion on 2 May 2023 without disclosing the existence of the previous application before the lower court and has therefore come to court with unclean hands and is guilty of non-disclosure of material facts. She has also urged that the application has been filed after unreasonable delay.

3. I directed the application to be heard by way of written submissions and I have seen the submissions of counsel for the applicant and counsel for the respondent.
4. This being an application for stay of execution pending appeal, I stand guided by the principles set out in Order 42 Rule 6 (2) which provides as follows :-
 - (2) No order for stay of execution shall be made under subrule (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 has been given by the applicant.
5. From the above, three principles are discernible, that is :-
 - (i) The application needs to be made without unreasonable delay;
 - (ii) The applicant needs to demonstrate that he will suffer substantial loss if stay is not granted.
 - (iii) The applicant should be ready to offer security for the due performance of the decree.
6. However, before I consider the above, the respondent has raised other pertinent issues which I think deserve consideration as well. She has pointed out that the applicant had an earlier application for stay pending appeal, filed in the Magistrates' Court, which was pending ruling when this application was filed and she contends that this is an abuse of the process of court. I agree totally that it is an abuse of the process of court for a party to seek similar orders in two different courts at the same time for this puts the court in a situation where two conflicting orders may issue which cannot augur well for the administration of justice.
7. Order 42 Rule 6 (1) does permit a party to seek stay from the court which issued the orders appealed from and there is also liberty to seek stay from the court to which the appeal is preferred. It provides as follows :-
 - (1) 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 of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside
8. From the above it is discernible that if an appeal is to this court from a decision of the Magistrates' Court, one may opt to file an application for stay in the Magistrates' Court, or to this court. He can also file an application to this court depending on the outcome of the application before the Magistrates' Court. However, the law above does not contemplate having two applications running in the two different courts at the same time.



9. When this application was filed, the application before the Magistrates' Court was still pending. The applicant needed to wait until that application is determined before filing this one, or alternatively, proceed to withdraw it before filing this application. As I have stated earlier, it is an abuse of the court process to file a similar application in two different courts. From the affidavit of the respondent, the applicant already had interim orders in his favour from the Magistrates' Court awaiting ruling in respect of that application. He did not disclose that fact when he filed this application, and indeed, when the application first came before me ex parte on 2 May 2023, I issued interim orders of status quo. The applicant was thus operating on two orders from two courts which is a clear abuse of the court process. I do not think that the applicant ought to benefit from abusing the court process, for that will be akin to rewarding a wrongdoer, and on that basis alone, this application must be dismissed.
10. Even if I was to disregard all the above and consider the merits of the application, I would still dismiss it. I already laid down the principles upon which an application such as this may be considered. The cornerstone of such applications is demonstration of substantial loss. I have gone through the affidavit of the applicant, and other than simply stating that he stands to suffer substantial loss, I have not seen any enumeration of what this loss could be. The applicant did not enclose the judgment so that I can be well apprised of what transpired before the lower court and what exactly he does on the disputed property. There are absolutely no facts before me to point at what this substantial loss may be and it is not for this court to speculate.
11. For the above reasons, I do not find merit in this application and it is hereby dismissed with costs.
12. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 4 DAY OF JULY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

