



**Jelimo & another v Chumba (Environment and Land Appeal
E006 of 2023) [2023] KEELC 18646 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18646 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND APPEAL E006 OF 2023**

MN MWANYALE, J

JULY 6, 2023

BETWEEN

ANN JELIMO 1ST APPLICANT

CHARLES KIPROTICH 2ND APPLICANT

AND

SELAH JELAGAT CHUMBA RESPONDENT

RULING

1. By a Notice of Motion dated March 27, 2023 brought under Order 42 Rule 6 of the *Civil Procedure Rules*, the applicant herein substantially seeks stay of execution of the judgment in Kapsabet PMC No E006 of 2021 and all consequential orders therein.
2. The application is premised on grounds on the face of it as well as supporting affidavit sworn by Ann Jelimo, the 1st applicant herein. According to the applicant, judgment was delivered on February 22, 2023 in favour of the respondent. Dissatisfied with judgment of the trial court, the applicant preferred an appeal by way of Memorandum of Appeal. She avers that she is in occupation and has been since 1978. That unless stay of execution orders are granted against the judgment, there is risk of eviction by the Respondent, which in turn shall render the appeal nugatory.
3. In opposing the application, the respondent filed grounds of opposition dated May 2, 2023 wherein it is stated that the trial court lawfully held that the title to the suit property was rightfully issued to the respondent. Hence, the appeal filed by the applicant is not meritorious. It was stated further that the applicants had not satisfied the threshold for grant of stay pending appeal, in view of the above, the respondent urged this court to dismiss the application with costs.
4. In rebuttal, the applicant filed a supplementary affidavit dated May 3, 2023 in which she reiterated the contents of her supporting affidavit.



5. By the court's directions on May 11, 2023, the application was canvassed by way of written submissions. Both parties complied with this direction by filing their respective submissions.
6. The applicants submitted that they were deserving of the orders sought since the application met the threshold provided under Order 42 rule 6 of the Civil Procedure Rules. The applicants averred that they stand to suffer substantial loss in the event of their eviction from the suit property which over 40 years and practice subsistence farming therein. Subsequently, they prayed for grant of the orders sought.
7. The respondent submitted to the effect that the applicants had failed to discharge the onus placed upon them for grant of the stay orders sought. In particular, that the applicants had not demonstrated the substantial loss they will suffer. Secondly, that the applicants had not preferred or proposed any security for due performance of the decree. To buttress this position they relied in the case of Arun C Sharma v Ashana Raikundalia t/a Raikundalia & Company Advocates & 2 others (2014) eKLR where the honourable court expounded the purpose of security in such applications. Consequently, the respondent urged this court to dismiss the present application with costs.

Analysis And Determination: -

8. Having considered the application, grounds of opposition, submissions filed by respective parties as well as authorities relied upon, the main issue emerging or determination is whether the application is merited.
9. As rightly submitted by both parties herein, stay of execution pending appeal is governed by Order 42 Rule 6 (2) of the Civil Procedure Rules which 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 ay ultimately be binding on him has been given by the Applicant.”
10. The three conditions for grant of stay order emanating from the above provision of the law are: -
 - i. The court is satisfied that substantial loss may result to the applicant unless stay of execution is ordered.
 - ii. The application is brought without undue delay; and
 - iii. Such security as may be ordered by the court for the due performance of decree.
11. Guided by these conditions, the applicants are required to first demonstrate the substantial loss they will suffer if the judgment of the trial court is not stayed. The applicants stated that they have been in occupation of the suit property since the year 1978. Furthermore, they have been utilizing the land through subsistence farming for their daily upkeep. These assertions were not rebutted by the respondent. In my view since the applicants have been in occupation of the suit land and risk being evicted if the trial court's decision is executed, I find that they have sufficiently demonstrated the substantial loss they will suffer if stay is granted.
12. As regards to the issue of delay, this court had noted that the trial court delivered judgment on 22nd March 2023 while the instant application was filed on April 4, 2023. This translates to a period of 10 days which in my view is no delay.



13. On the last condition as to provision of security, the court has noted that no such offer or suggestion on the applicants willingness to deposit security for due performance of the decree was made. However, in view of the fact that the respondent holds the original title deed to the suit property and the said property has not been valued to ascertain what amount can be deposited as security, I find that no prejudice will be suffered by the Respondent if no security is provided since they hold the title documents to the suit property.
14. In the premises, I find merit in the application dated March 27, 2023 and hold that the applicants have made a case for grant of stay of execution pending appeal. The application is allowed as prayed.
15. Orders accordingly.

DATED AND DELIVERED AT KAPSABET THIS 6TH DAY OF JULY 2023.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

Ms. Kosgey for Mr. Omboto for Respondent

m. Kambiha for Ngigi for Applicant

