



**Kojwang' v Ondiek & another (Environment and Land Appeal
E010 of 2023) [2023] KEELC 18576 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18576 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E010 OF 2023**

E ASATI, J

JULY 6, 2023

BETWEEN

RICHARD OGADA KOJWANG' APPLICANT

AND

BERNARD ODHIAMBO ONDIEK 1ST RESPONDENT

GEORGE OWUOR OKOTH 2ND RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion application dated 5th March 2023 brought pursuant to the provisions of sections 1A, 1B, 3A of the [Civil Procedure Act](#) and Order 42 Rule 4 of the [Civil Procedure Rules](#) 2010. It seeks for orders of:-
 - a. Stay of execution of the decree and judgement in Winam SPMC ELC NO. E093 OF 2021 delivered on 28/2/2023 pending hearing and determination of the appeal.
 - b. a temporary injunction restraining the Respondents, their agents or anybody claiming through them from any dealings in respect of land No. Kisumu/nyahera/56 (the suit land herein) pending hearing and determination of the appeal.
 - c. Costs of the application be in the cause
2. The grounds upon which the application was brought as shown on the face of the application and the Supporting Affidavit sworn by the Appellant are that the Appellant is the beneficial owner of the suit land having bought it in the year 1988 and has been in occupation thereof to date. That the judgement appealed against herein, dismissed his suit with no order as to costs. That he stands the risk of being evicted as the 1st Respondent has threatened to demolish his buildings following the judgement and that he stands to suffer substantial loss. That the appeal raises serious triable issues and that the application is made timely.



3. The application was opposed vide the grounds contained in the Replying Affidavit sworn by the 1st Respondent on 13th April 2023. The 1st Respondent's case was that he is the registered owner of the suit land having bought it from the 2nd Respondent. That there are no buildings on the suit land. That there is no decree in Winam SPMC ELC No E093 of 2021 capable of being executed by way of eviction since the suit was dismissed and no order of eviction was made therein. That the appellant has not offered any security for granting of the orders of stay as is mandatorily required by law. That the application is devoid of merit.

4. I have considered the application and the grounds upon which it is premised. I have considered the reply thereto. The grounds for stay of execution pending appeal are provided for under Order 42 Rule 6 Civil Procedure Rules 2010 as follows: -

“No order for stay of execution may 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 has been given by the Applicant.”
5. To succeed in an application for stay of execution pending appeal, an applicant must demonstrate that unless the order of stay of execution is granted, he will suffer substantial loss, that he has brought the application without unreasonable delay and should give security for the due performance of such decree or order as may ultimately be binding on him. In the present case the judgement appealed against merely dismissed the suit with no order as to costs. No execution can emanate from such a judgement. The judgement did not direct any party to undertake any action or refrain from undertaking any action. The judgement was essentially a negative order and the Court of Appeal has held that to such, an order of stay of execution is not available. In the case of Western College of Arts And Applied Sciences Vs Oranga & Others [1976] KLR 63 the Court of Appeal whilst considering whether an order of stay can be granted in respect of a negative order stated:-

“But what is there to be executed under the judgment? The subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....”

The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.”

And in David Kipruto Chingi & Another vs Director of Public Prosecutions & 2 Others [2016] eKLR where the Court observed that an application seeking stay of execution of a negative order was bound to fail and proceeded to dismiss the same. I find that in the present case the relief of stay of execution is unavailable to the applicant.

6. As concerns the prayer for temporary injunction pending appeal, the law is found in order 42 Rule 6 (6) which provides;

“Notwithstanding anything contained in sub-rule (1) of this Rule the High Court shall have powers in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”



7. Under Order 42 Rule 6(6) the conditions for the grant of temporary injunction pending Appeal is that the procedure for instituting an appeal from a subordinate court has to be complied with. The procedure of instituting the appeal is by filing a Memorandum of Appeal. In the present case, that has been done. In the case of *Patricia Njeri & 3 Others vs National Museums of Kenya* [2014] eKLR the court gave the following guidance on grant of temporary injunctions pending appeal:
- a. An order of injunction pending appeal is a discretionary matter which will be exercised against an applicant whose appeal is frivolous. (Also see case of *Venture Capital & Credit Limited vs Consolidated Bank of Kenya Ltd* Civil Application No Nairobi 349 of 2003 (174 of 2003 UR)
 - b. The discretion should be refused where it would inflict great hardship than it would avoid
 - c. The applicant must show that to refuse the injunction would render the appeal nugatory
 - d. The court should also be guided by the principles in *Giella vs Cassman Brown & Co. Ltd*.
8. The principles for grant of temporary injunctions were settled in the case of *Giella –vs- Cassman Brown & Co. Ltd* [1973] EA 358 at page 360. An applicant must firstly show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages and thirdly if the court is in doubt, it will decide an application on the balance of convenience.
9. The burden of proof of the grounds for grant of the application lies with the applicant. In the present case, the basis of the application is that the applicant bought the suit land and took possession thereof since the year 1990. That after the judgement appealed against, the Respondents have threatened to evict him. However, no evidence of occupation or threat of eviction was exhibited. The status of the land on the ground thus remains unknown; while the appellant claims to be in possession thereof since the year 1990, the Respondent claims to have fenced round the land and taken possession. The Respondent claims that the land has no buildings on it. The copy of register (green card) attached to the application shows that as at the year 2019, the suit land was registered in the name of one John Orimba Misula deceased, the original owner and that the land was transferred to the 1st Respondent in the year 2021. The temporary injunction sought is to restrain the Respondents from any dealings in the suit land pending the appeal. Possession and occupation having not been proved, this court finds no basis for granting an order of temporary injunction restraining activities on the suit land as prayed. The court however considers that it is in the interest of justice to preserve the current registration status of the suit land pending determination of the appeal.
10. For the above-stated reasons I find that the prayer for stay of execution is not merited. In respect of the prayer for temporary injunction pending appeal, I hereby order that the status quo of the register in respect of the suit land as at the date of this ruling be maintained pending hearing and determination of the appeal. Costs of the application to the Respondents.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 6TH DAY OF JULY 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:



Steven - Court Assistant.

Boaz Aguttu Advocate for the Appellant/Applicant.

No appearance for the Respondents.

