



REPUBLIC OF KENYA



KENYA LAW
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**Naitipa v Megesh & another (Environment and Land Case Civil Suit
25 of 2021) [2023] KEELC 18448 (KLR) (3 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18448 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KILGORIS

ENVIRONMENT AND LAND CASE CIVIL SUIT 25 OF 2021

EM WASHE, J

JULY 3, 2023

(FORMERLY KISII ELC NO. 495 OF 2015 & NAROK ELC SUIT NO.489 OF 2017 (O.S)

IN THE MATTER OF LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF LAND PARCEL NUMBER TRANSMARA/MOITA/296

BETWEEN

JOSEPH OLOINYENYE NAITIPA PLAINTIFF

AND

JEREMIAH SAOLI OLE MEGESH 1ST DEFENDANT

JOSHUA KINYAMAL OLE SHANKIL 2ND DEFENDANT

RULING

1. The 2nd Defendant (hereinafter referred to as “the Applicant”) filed a Notice of Motion application dated 16th December 2022 (hereinafter referred to as “the present application”) seeking for the following Orders; -
 - a. The Application herein be certified urgent and the same be heard ex-parte in the first instance.
 - b. Pending the hearing and determination of this Application, the Honourable Court be pleased to grant an interim order of stay of execution and/or implementation of the judgement and decree dated 22nd November 2022, together with all consequential orders and in particular, the limb directing the 2nd Defendant/Applicant herein to transfer L.R.NO. Transmara/moita/296 TO THE Plaintiff/Respondent.
 - c. The Honourable Court be pleased to grant an order of stay of execution of the judgement and Decree dated 22nd November 2022, together with all consequential proceedings and/or orders



and in particular, the limb directing the 2nd Defendant/Applicant herein to transfer L.R.NO. Transmara/moita/296 to the Plaintiff/Respondent pending the hearing and determination of the intended Appeal.

- d. The Honourable Court be pleased to grant such further and/or other orders as may be deemed just, appropriate and/or expedient be granted.
 - e. Costs of this Application do abide the intended appeal.
2. The Applicant has outlined a number of reasons in support of the prayers both in the body of the present Application as well as the Supporting Affidavit sworn on the 16th of December 2022.
 3. The Applicant's grounds in support of the present application can be outlined as follows; -
 - i. The Applicant was the 2nd Defendant in a claim of adverse possession instituted by the Respondent through an Originating Summons dated 5th November 2015.
 - ii. Upon hearing and determination of the said Originating Summons dated 5th November 2015, the Honourable Court pronounced its judgement on the 22nd of November 2022.
 - iii. The Judgement of this Honourable Court directed the Applicant to transfer the ownership of the property known as L.R. Transmara/moita/296 to the Respondent herein.
 - iv. The Applicant being dissatisfied with the whole judgement pronounced on 22nd November 2022 filed a Notice of Appeal dated 1st December 2022.
 - v. The Applicant now seeks for a stay of execution of the judgement pronounced on the 22nd of November 2022 pending the hearing and determination of the intended Appeal pending in the Court of Appeal.
 - vi. The Applicant submits that if the stay will not be granted, he will suffer substantial loss as the property known as L.R.NO. TRANSMARA/MOITA/296 will be transferred to the Respondent and thereafter all the proprietary rights will be extinguished to his detriment.
 - vii. The Applicant is of the view that the Intended Appeal raises several and pertinent issues of law which require to be ventilated before the Court of Appeal and determinations made thereof.
 - viii. Consequently therefore, the Intended Appeal is one which is arguable and has overwhelming chances of success.
 - ix. The Applicant pleaded that he will be ready and willing to satisfy any orders as to security which may be issued as a condition of granting the stay of execution orders sought herein.
 - x. The Applicant confirmed that the present Application was filed without any delays as require by law.
 - xi. Lastly, the Applicant stated that there will be no prejudice caused to the Respondent if the said orders sought in the present suit are granted.
 4. The present Application was then served on the Respondent who opposed the same by filing Grounds of Opposition dated 24th of March 2023.
 5. The Respondent opposed the present Application on the following grounds; -



- i. This Honourable Court which is the Trial Court is functus officio and has no jurisdiction to entertain and determine the present application for stay of execution in view of the Applicant's Notice of Appeal filed on the 1st December 2022.
 - ii. Any Application for Stay of Execution should therefore be filed before the Court of Appeal who is now seized of the matter by virtue of the Notice of Appeal dated 1st December 2022.
 - iii. The Provisions of Order 42 of the Civil Procedure Rules are only applicable to Appeals made to the High Court from the sub-ordinate Courts and does not cover stay of execution applications on matters that are before the Court of Appeal.
 - iv. Consequently, once a party files a Notice of Appeal against a judgement and/or Decree of the superior court, the subsequent application for stay of execution should be filed before the Court of Appeal in terms of the provisions of Rule 41 of the Court of Appeal Rules.
6. The Honourable Court after this response directed parties to canvass the present application by way of written submissions.
 7. The Applicant duly complied by filing his submissions on the 16th of March 2023 while the Respondent filed his submissions on 24th of March 2023.
 8. This Honourable Court has gone through the present application, the Grounds of Opposition, the submissions filed and hereby identifies the issues for determination as follows; -
 - Issue No. 1- Does This Honourable Court Have Jurisdiction To Entertain & Determine The Present Application?
 - Issue No. 2- Has The Applicant Satisfied The Principles Of Granting A Stay Of Execution Pending Appeal?
 - Issue No. 3- Is The Applicant Entitled To The Prayers Sought In The Present Application.
 - Issue No. 4- Who Bears The Costs Of The Present Application?
 9. The issues for determination having been duly outlined hereinabove, the same will now be discussed and determined as provided hereinbelow.

Issue No. 1- Does This Honourable Court Have Jurisdiction To Entertain & Determine The Present Application?

10. The first issue for determination is whether or not this Honourable Court has jurisdiction to entertain and determine the present Application filed by the Applicant.
11. The significance of jurisdiction in any proceedings was discussed in the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989), whereby it was observed as follows; -

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”



12. According to the Respondent, this Honourable Court became functus officio upon pronouncement of its judgement on the 22nd of November 2022 and the filing of the Notice of Appeal dated 1st December 2022.
13. Consequently, the present Application being brought under the provisions of Order 42 of the Civil Procedure Rules, 2010 is misplaced and does not invoke the appropriate jurisdiction for this Honourable Court to entertain and/or determine the prayers sought therein.
14. The Respondent's submissions is that the prayers sought in the present Application can only be entertained before the Court of Appeal upon invoking the provisions of Rule 41 of the Court of Appeal Rules.
15. The Applicant on the other hand in his Supplementary Submissions filed on the 13th of April 2023 submitted that an application for stay of execution pending Appeal can also be brought before the Court through Order 42 Rule 6 of the Civil Procedure Rules.
16. The Applicant further submitted that an aggrieved party can elect to file an application for stay in the Court from whose judgement is being appealed against as provided under Order 42 Rule 6 of the Civil Procedure Rules, 2010 or in the Court of Appeal by virtue of Order 5 (2) (b) of the Court of Appeal Rules, 2022.
17. According to the Applicant, either of these two procedures are lawful with Order 42 Rule 6 of the Civil Procedure Rules, 2010 bestowing jurisdiction on the Court whose jurisdiction is being appealed against and while Order 5(2)(b) of the Court of Appeal Rules, 2022 doing the same on the Court of Appeal.
18. The provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 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 appeal case of 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.
 - (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 Applicants 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 Applicants”.
19. The interpretation of the provision hereinabove is that an aggrieved party can seek a stay of execution pending Appeal from the Court which pronounced the said Judgement and/or Ruling thereof.



20. There are many authorities to confirm this position with one known as County Director Of Planning & Architecture, County Government Of Mombasa-versus- Makupa Transit Shade Limited (2017) eKLR being cited by the Applicant.
21. In conclusion therefore, this Honourable Court has the appropriate jurisdiction to entertain and determine the present Application before it.

Issue No. 2- Has The Applicant Satisfied The Principles Of Granting A Stay Of Execution Pending Appeal?

22. The principles of granting a stay of execution pending Appeal are expressly provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010.
23. A plain reading of the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 outlines the principles for consideration as follows; -
 - a. Is the Applicant likely to suffer substantial loss if the stay of execution is not granted?
 - b. Has the Applicant presented the application for stay of execution promptly?
 - c. Provision of security for the due performance of the Decree.
 - d. If the stay of execution is not granted, then the intended Appeal will be rendered nugatory.
24. The Honourable Court being guided by the above principles will now evaluate the same against the facts in the present Application.

A. Is the Applicant likely to suffer substantial loss if the stay of execution is not granted?

25. The Applicant's submission is that the Judgement pronounced on the 22nd of November 2022 directed the transfer of the property known as L.R.NO. Transmara/moita/296 to the Applicant.
26. The implementation of this order of transfer of the property known as L.R.NO. Transmara/moita/296 from the Applicant to the Respondent will cause substantial loss.
27. The Applicant submits that if the Orders contained in the Judgement pronounced on the 22nd of November 2022 are not stayed, then his ownership rights will be extinguished by the registration of the Respondent on the title to the property known as L.R.NO.Transmara/moita/296.
28. The act of cancelling the Applicant's name on the title of L.r.no.transmara/moita/296 and registering the name of the Respondent will cause substantial loss.
29. Indeed, it is true that one of the Orders issued in the Judgement pronounced on the 22nd of November 2022 was to extinguish the legal ownership of the Applicant over the property known as L.r.no.transmara/moita/296 and transfer the same to the name of the Respondent.
30. It is the Honourable Court's considered view that the transfer of ownership from the current owner who is the Applicant to the Respondent will result to alteration of legal rights over the property known as L.r.no. Transmara/moita/296 and result to substantial loss both over the said rights to the said property and the value thereof.
31. In essence therefore, this Honourable Court is satisfied that indeed, the implementation of the Judgement issued on 22nd November 2022 will cause substantial loss to the Applicant herein.



B. Has the Applicant presented the application for stay of execution promptly?

32. The second aspect in considering an application for stay of execution pending appeal is whether the said application was filed without unreasonable delay.
33. The proceedings in this file confirm that the judgement being appealed against was pronounced on the 22nd of November 2022.
34. Thereafter, the Applicant filed his Notice of Appeal on the 1st of December 2022.
35. The present Application was then filed on the 16th of December 2022 which was less than 30 days from the date of pronouncement of the judgement on Appeal.
36. It is therefore the Honourable Court's view that the present Applicant has been filed promptly and without any unreasonable delay.

C. Provision of security for the due performance of the Decree.

37. The third aspect for consideration in an application for stay of execution pending appeal is the issue of security.
38. The Applicant is required to provide if so ordered security for the due performance of the decree in the event the Appeal is not successful.
39. In the present Application, the Applicant has submitted that he is ready and willing to abide by any orders that will be made in terms of security.
40. The Respondent has not made any submissions on whether the Applicant is capable of providing security for the due performance of any decree if required to do so or not.
41. Consequently therefore, the Honourable Court has no doubt that the Applicant should be able to comply with any orders as appertains security for the due performance of the Decree herein.

D. If the stay of execution is not granted, then the intended Appeal will be rendered nugatory.

42. The last aspect for consideration is whether or not the Appeal will be rendered nugatory if the application for stay of execution is not granted.
43. In the present Application, the Applicant is seeking to Appeal against the Judgement pronounced on the 22nd of November 2022 directing the transfer of the property known as L.r.no. Transmara/ moita/296 from the Applicant to the Respondent within Thirty (30) Days from the date of its pronouncement.
44. The time frame given in the Judgement pronounced on 22nd November 2022 has indeed lapsed and if the orders therein are implemented, then the ownership of the property known as L.r.no.transmara/ moita/296 which is the core subject of the intended Appeal before the Court of Appeal will be altered.
45. This alteration of the ownership from the Applicant to the Respondent will grant the ability for the Respondent to alienate the same through a sale, sub-division and/or charging to third parties.
46. Such potential actions by the Respondent upon implementation of the judgement pronounced on the 22nd of November 2022 will render the Applicant's Appeal nugatory as the property in issue will have been passed to third parties before the hearing and determination of the substantive Appeal.



Issue No. 3- Is The Applicant Entitled To The Prayers Sought In The Present Application.

47. Consequently, on the basis of the determinations contained in Issue No. 2 hereinabove, the Honourable Court is satisfied that the Applicant has complied with the principles of granting a stay of execution pending appeal and therefore grants order no. 3 thereof.

ISSUE NO. 4- WHO BEARS THE COSTS OF THE PRESENT APPLICATION?

48. The Applicant being successful in the present Application, the Honourable Court is of the view that costs should abide the outcome of the substantive Appeal.

Conclusion.

49. The Honourable Court hereby makes the following orders as appertains the Application dated 16th December 2022; -

- a. There Be An Order Of Stay Of Execution Of The Judgement And Decree Issued On The 22nd Of November 2022 Pending The Hearing And Determination Of The Intended Appeal Herein.
- b. The Applicant For Deposit A Sum Of Kenya Shillings Fifty Thousand (kshs 50,000/-) As Security For The Performance Of The Decree Within 30 Days From The Date Of This Ruling.
- c. In Default Of Order No. 2, The Stay Of Execution Orders Issued In Order No.1 Will Automatically Lapse.
- d. Costs Of The Present Application Will Abide The Outcome Of The Substantive Appeal.

DATED, SIGNED & DELIVERED Virtually in KILGORIS ELC Court on 3RD OF JULY 2023.

EMMANUEL.M.WASHE

JUDGE

IN THE PRESENCE OF:

COURT ASSISTANT: MR. NGENO

ADVOCATE FOR THE APPLICANT: MS. OCHWAL

ADVOCATE FOR THE RESPONDENT: MR. BGI (N/A)

