



**Ondicho & another v Kimeli & 2 others (Environment & Land Case 108 & 132 of 2016 (Consolidated)) [2023] KEELC 19844 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19844 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 108 & 132 OF 2016 (CONSOLIDATED)  
JM ONYANGO, J  
SEPTEMBER 20, 2023**

**BETWEEN**

**EVANS ORINA ONDICHO ..... PLAINTIFF**

**AND**

**LUKA KIPCHUMBA KIMELI ..... 1<sup>ST</sup> DEFENDANT**

**PERIS CHEPKEMBOI TUM ..... 2<sup>ND</sup> DEFENDANT**

**AS CONSOLIDATED WITH  
ENVIRONMENT & LAND CASE 132 OF 2016**

**BETWEEN**

**LUKA KIPCHUMBA KIMELI ..... PLAINTIFF**

**AND**

**EVANS ONDICHO ..... DEFENDANT**

**RULING**

1. The Appellant filed an application dated January 16, 2023 seeking the following orders:
  - a. Spent
  - b. Spent
  - c. Pending the hearing and determination of the intended appeal, there be a stay of execution of the decree of the honourable court in ELDORET ELC NO 132 OF 2016.
  - d. The costs of this application be provided for.



2. The application is based on the grounds set out on the face of the Notice of Motion and the Applicant's Supporting affidavit sworn on January 16, 2023. The gist of the Applicant's application is that his case was dismissed on December 20, 2022 and an injunction was issued against him restraining him, his servants or agents from erecting structures or interfering with the defendant's enjoyment of the 1<sup>st</sup> defendant property known as Uasin Gishu/Kimumu Settlement Scheme/7563. Being aggrieved by the said decision, the in Applicant has filed an appeal in the Court of Appeal. Since he is possession of the suit property, he of the view that he will suffer substantial loss if the judgment is enforced before his appeal is heard and determined.
3. In opposing the application, Luka Kipchumba the Respondent herein filed a Replying Affidavit sworn on the February 9, 2023 in which he deponed that there were no good reasons why execution should be stayed as is the registered owner of the suit property and he has been continuously utilizing it. He depones that the application is merely intended to prevent him from enjoying the fruits of his judgment.
4. The court directed that the parties to file their submissions in respect of the application and both parties duly complied.

### **Analysis And Determination**

5. Having considered the application, the affidavits filed by the parties and the rival submissions, the singular issue for determination is whether the Applicant has satisfied the conditions for the grant of a stay of execution.
6. The principles that guide the court in considering an application for stay pending appeal are found in Order 42 Rule 6 of the *Civil Procedure Rules* which provides as follows:

Order 42 Rule 6 (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
- b. that the application has been made without undue delay; and
- c. such security as the court orders for due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

7. In *Samvir Trustee Limited vs Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997 the court held as follows:

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely



put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss.

8. Further, in *Kenya Shell Limited v Benjami Karuga Kibiru & Another* (1986)KLR the court pronounced itself as follows:

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”

9. What can be gleaned from the above authorities is that an applicant must demonstrate in a convincing manner that if the stay is not granted, he will suffer substantial loss. In the present case the applicant has merely asserted that he is in exclusive possession of the suit property, a fact that was disproved during the hearing. What is clear from the record is that the Applicant has been using a portion of the suit property to carry on his business, and he has not demonstrated that in the event that he succeeds on appeal, the Respondent would not be able to compensate him for any loss he might have suffered.

10. In *Machira T/A Machira & Co Advocates V East African Standard* (2002) 2 KLR 63 Kuloba J (as he then was) stated that:

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must provide specific details and particulars. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay”

11. Beyond his desire to continue occupying the disputed portion of land, the Applicant has not demonstrated what tangible loss he stands to suffer if the order for stay is not granted. It is therefore my finding that the Applicant has failed to satisfy this condition.

#### **Whether the application has been made without undue delay.**

12. The applicant filed a Notice of Appeal soon after the judgment was delivered. He then filed an application for stay on January 16, 2020, which is less than a month after judgment was delivered. It was therefore made without undue delay.

#### **Whether the Applicant has furnished security for costs.**

13. In the case of *Exclusive Mines Limited & another v Ministry of Mining & 2 others* [2015] eKLR, the court stated as follows:

“...On the issue of furnishing security, my understanding is that an applicant seeking an order of stay pending appeal should, as a sign of good faith, offer or propose any such security for the performance of the decree which the appeal has been preferred.”

14. With regard to security for costs, the applicant has not demonstrated by way of affidavit that he is willing to furnish security for costs which is one of the prerequisites for the grant of an order of stay pending appeal.

15. All in all, the Applicant has not satisfied all the conditions for stay. Accordingly, the application lacks merit and it is hereby dismissed with costs to the Respondent.



**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20<sup>TH</sup> .DAY OF SEPTEMBER, 2023**

.....

**J.M ONYANGO**

**JUDGE**

In the presence of;

Mr. Odhiambo for Mr. Omusundi for the 1<sup>st</sup> Respondent

No appearance for the Applicant

Court Assistant: A. Oniala

