



**Tallam v Rotich & another (Suing as the Administrator of the Estate of David Rotich –Deceased) & another (Environment and Land Appeal E044 of 2022) [2023] KEELC 19859 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19859 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**  
**ENVIRONMENT AND LAND APPEAL E044 OF 2022**  
**JM ONYANGO, J**  
**SEPTEMBER 20, 2023**

**BETWEEN**

**AGRIFAS TALLAM ..... APPLICANT**

**AND**

**JOAN JEPKOSGEI ROTICH AND BETTY JEPKORIR (SUING AS THE ADMINISTRATOR OF THE ESTATE OF DAVID ROTICH – DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR UASIN GISHU COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the Appellant’s application brought by way of Notice of Motion dated March 27, 2023 pursuant to Sections 1, 1A, and 3A of the *Civil Procedure Act* and Order 17 and 50 of the *Civil Procedure Rules* seeking a stay of proceedings of the trial court dated November 9, 2022 and a stay of the orders dismissing the Appellant’s original suit being Eldoret Chief Magistrate’s Elc Case No 82 Of 2019 together with all consequential orders thereto. He further seeks an order that the proceedings commenced in Eldoret Chief Magistrate’s Elc Misc Application No E038 Of 2023 be stayed pending the hearing and determination of this appeal.
2. The application is premised on the grounds outlined on the face of the Notice of Motion and the Supporting affidavit of Andrew T Kiboi Advocate and the applicant’s affidavit both sworn on March 27, 2023. In his affidavit, Mr Kiboi deposes that the Applicant’s suit No CM ELC Case No 82 of 2019 was fixed for hearing on November 9, 2022. On the said date, Mr Kiboi had other matters including a hearing in Kitale High Court. He therefore instructed another advocate to hold his brief and request for this matter to be placed aside till 2.30 pm. Counsel for the 2<sup>nd</sup> Respondent however indicated that the proposed time was not suitable to him as he had a meeting at 2.00pm. The court then set the hearing at 11.00 am but at the said time Mr Kiboi was unable to attend court prompting the court to dismiss



the suit for want of prosecution. He is of the view that his mistake should not be visited on his client who dutifully attended court on the hearing date.

3. In his affidavit, the Applicant corroborates what is stated in Mr Kiboi's affidavit that his advocate informed him that he had a hearing in the morning at Kitale High Court and he had requested a colleague to hold his brief and request that his case be heard at 2.30 pm. He later informed him that the court had scheduled the hearing at 11.00 a.m and he attended court as advised by his advocate. He avers that he was present in court 11.00 am but he only learnt what had transpired after he was informed that his case had been dismissed for want of prosecution. He avers that following the dismissal of his case, the Respondent filed Eldoret Elc Misc Application No E038 OF 2023 and obtained ex-parte eviction orders against him. He urged the court to allow the application as his advocate's failure to attend court was due to factors beyond his control. He added that he had been living on the suit land with his family since he bought it and he would be greatly prejudiced if the orders sought were not granted.
4. The 1<sup>st</sup> Respondent responded to the application through her Replying Affidavit sworn on April 14, 2023. She averred that the application is an abuse of the court process as the Applicant filed a similar application in the lower court and obtained an order of stay of proceedings as well as a stay of the eviction orders together with all consequential orders. She annexed a copy of the said order as exhibit JJR1. It was her contention that with regard to stay pending appeal, the Applicant had not satisfied the conditions laid down in Order 42 Rule 6 of the Civil Procedure Rules. She added that there was nothing to be stayed in the primary suit pending appeal since the suit was simply dismissed and no further orders were granted.
5. The application was canvassed by way of written submissions and both parties filed their submissions which I have considered.

### **Appellant's Submissions**

6. In his submissions learned counsel for the Applicant gave a background of the case in the lower court upto the time it was dismissed for want of prosecution. He then submitted that the Applicant had satisfied the conditions for stay pending appeal under Order 42 Rule 6 of the Civil Procedure Rules. He relied on the case of *Butt v Rent Restriction Tribunal (1982)KLR* which laid down the principles that should guide the court in considering an application for stay pending appeal. In particular, the Court held that the general principle is that in exercising its discretion whether or not to grant a stay pending appeal, the court ought to consider the special circumstances of each case and grant a stay so as not to render an appeal nugatory unless there are overwhelming reasons not to do so.
7. Turning to the conditions laid down in order 42 Rule 6 he submitted that Applicant shall suffer substantial loss if he is evicted from the suit land based on the Respondent's unproven claims. It was his contention that if the Respondent evicts the Applicant pursuant to the ex-parte orders she had obtained it would be impossible for the applicant to return to the suit land.
8. With regard to security for costs, she submitted that the Applicant was ready and willing to abide by any reasonable conditions that the court may impose.

### **1<sup>st</sup> Respondent's Submissions**

9. On his part learned counsel for the 1<sup>st</sup> Respondent submitted that the application herein is an abuse of the process of the court as the Applicant had obtained orders for stay of proceedings in the subordinate court and this court cannot stay what has already been stayed by another court.



10. With regard to the prayer for stay pending appeal, counsel submitted that the Applicant ought to have invoked the provisions of Order 42 Rule 6 of the Civil Procedure Rules which sets out the requirements for stay pending appeal. He nevertheless submitted that Applicant had not satisfied the conditions for stay pending appeal as he had had not demonstrated that he would suffer substantial loss nor had he explained the 4-months delay in filing the application. Finally, he had not furnished any security for costs.

### **Analysis And Determination**

11. Having considered the application, Replying Affidavit and rival submissions as well as the relevant law authorities cited by the parties, the following issues fall for determination;-
- a. Whether the order dated November 9, 2022 dismissing the Appellant's suit for want of prosecution ought to be stayed pending appeal.
  - b. Whether the proceedings in CM ELC Misc Application No 28 of 2023 ought to be stayed pending the hearing and determination of the appeal herein.

12. It is common ground that the appellant's suit was dismissed for want of prosecution on November 9, 2022. This was in line with Order 12 Rule 3(1) of the Civil Procedure Rules which provides as follows:

' If on the day fixed for hearing, after the suit has been called out for hearing outside the court . only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court'

Order 12 Rule 7 further provides that:

' Where under this order judgment has been entered or the suit has been dismissed, the court on application, may set aside the judgment or order upon such terms as may be just'

13. It is instructive to note that in the instant case, rather than apply to set aside the order of dismissal of the suit, the Applicant chose to file an appeal against the order of dismissal and an application for stay of the said order.
14. He also sought an order of stay of proceedings with respect to CM Misc Suit No 38 of 2023. What is interesting is that after filing the instant application, the Applicant filed a similar application in the lower court in CM Misc Suit No 38 of 2023 and obtained an order of stay of eviction and stay of proceedings in the said suit. What this means is that this court cannot entertain another application for stay of proceedings in CM Misc Suit No 38 of 2023 o courts as this is an abuse of the court process and it may result in the two courts issuing conflicting orders.
15. With regard to the question as to whether the court ought to stay the order of dismissal of the suit pending appeal, counsel for the 1<sup>st</sup> Respondent has contended that there is nothing to be stayed as the order is negative in nature, meaning that it cannot be executed. But even assuming that it could be executed, the Applicant would have to satisfy the conditions for say pending appeal set out in Order 42 Rule 6 of the Civil Procedure Rules which are 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.'
16. Further, in *Elena D Korir vs Kenyatta University (2014) eKLR* Justice Nzioki wa Makau stated as follows;
- ' The application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & another vs Thornton & Turpin Ltd* where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that 'The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must be made without unreasonable delay.
17. In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo vs Straman EA Ltd*[11](2013)'
18. The first condition that the Applicant has to satisfy is that he would suffer substantial loss if the stay is not granted. What constitutes substantial loss was discussed by Gikonyo J in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto (2012) eKLR* where it was held inter alia that:
- 'No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.
- The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal.'
19. In his supporting affidavit, the applicant has gone to great lengths to explain what transpired on November 9, 2022 leading up to the dismissal of his suit. He has also deposed that he has established his homestead on the suit land and that he has been in occupation thereof since he bought it and he would greatly be prejudiced if the orders sought are not granted. It is noteworthy that the suit herein has not been heard on the merits. It is also not in dispute that the Applicant resides on the suit land with his family and he would therefore suffer substantial loss if he was evicted without being given an opportunity to be heard.
20. The second condition is the question of delay. The Applicant's suit was dismissed on November 9, 2022 and he filed his application for stay on March 27, 2023 which is a period of about 4 months. Although the delay is not inordinate, the Applicant ought to have not offered an explanation why he did not file the application earlier.
21. The third condition relates to the issue of security for costs. Although the Applicant has not offered any security for costs, he has indicated that he is willing to abide by whatever conditions as to security as the court may impose.
22. Taking all the above factors into consideration, I am of the view that the interests of justice would be served if I exercise my discretion in favour of the applicant. In the circumstances, a stay of execution pending appeal shall be granted on condition that the Applicant deposits the sum of Kshs 100,000 in



court pending appeal within 30 days from the date of this ruling failing which the order for stay shall lapse automatically. The applicant shall also bear the costs of this application.

23. The Record of Appeal shall be filed within 60 days.

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

.....

**J.M ONYANGO**

**JUDGE.**

**In the presence of;**

Mr. Kiboi for the Appellant/Applicant

Mr. Kurgat for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Court Assistant: A. Oniala

