



Eunice Wanjiru Kaigai t/a Safariline Africa v Njapit & 3 others (Suing as the Administrators of the Estate of Nelson Sanaet Njapit); Land Registrar, Narok North/ Narok South Districts (Interested Party) (Environment and Land Appeal E005 of 2023) [2023] KEELC 20286 (KLR) (3 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20286 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL E005 OF 2023**

**CG MBOGO, J
OCTOBER 3, 2023**

BETWEEN

EUNICE WANJIRU KAIGAI T/A SAFARILINE AFRICA APPELLANT

AND

**NAISWAKU ENE NJAPIT, NOONKIPAENE NJAPIT, KARSIS ENE
NJAPIT, JAMES OLE NJAPIT (SUING AS THE ADMINISTRATORS OF THE
ESTATE OF NELSON SANAET NJAPIT) RESPONDENT**

AND

**LAND REGISTRAR, NAROK NORTH/ NAROK SOUTH
DISTRICTS INTERESTED PARTY**

*(Being an appeal from the ruling of the Hon. S.M Mungai
delivered on 23rd May 2023 in EMELC No. E086 of 2022)*

RULING

1. Before this court for determination is the Notice of Motion Application dated May 25, 2023 filed by the appellant/applicant and is expressed to be brought under Sections 1A, 1B, 3A and 63(e) of the [Civil Procedure Act](#) and Orders 22 Rule 22 & 25 and Order 51 Rule (1) of the [Civil Procedure Rules](#) seeking the following orders: -
 1. Spent.
 2. Spent.



3. That in the interim and pending the hearing and determination of this appeal, the honourable court be and is hereby pleased to stay execution and enforcement of the ruling of the honourable S M Mungai on May 23, 2023 in CMELC No E086 of 2022.
4. Costs be provided.
2. The application is premised on the grounds on the face of it and more so as set out in the affidavit. The application was supported by the affidavit of the appellant/applicant sworn on even date. The appellant/applicant deposed that by a ruling delivered by the lower court on May 23, 2023, the appellant/applicant together with the interested party were found in contempt of court orders and she is apprehensive and that unless this court intervenes, her right to appeal will be prejudiced and she will suffer great prejudice. Further, that the intended appeal is not frivolous as it raises substantial questions of law and that unless the stay orders is granted the same will be rendered nugatory.
3. The application was opposed by the replying affidavit of James Ole Njapit sworn on September 2, 2023 and on behalf of the respondents. The respondents deposed that they filed an application for contempt of court orders vide an application dated March 28, 2023 citing the appellant/applicant for contempt of injunction orders issued on November 17, 2022.
4. The respondents further deposed that by a ruling delivered on May 23, 2023, the court found the appellant/applicant and the interested party in contempt and as a result, the interested party was ordered to purge his contempt by rectifying the records over the suit land within seven days to reflect the original position as when the order of injunction was obtained. That the position was that the records indicated that the only sub-lessee over the suit land was Adora Leisure Limited.
5. The respondents further deposed that the application and appeal is frivolous as it raises no triable issues with high chances of success and it is aimed at denying the respondents from enjoying the fruits of successful litigation. It was further deposed that it is the respondents and the sub-lessee who will suffer substantial loss as the current sub-lessee is in occupation of the suit land under a valid lease agreement dated September 16, 2022. Further, that the sub-lessee is the registered proprietor of the leasehold over the suit land and has proprietary interest over the same.
6. It was further deposed that the appellant/applicant breached the terms of the sublease agreement as she was in rent arrears and the respondents exercised their rights under the sublease and validly terminated the same. Further, that the applicant has no beneficiary interest over the suit land and the application is meant to forestall use, enjoyment and operations over the suit land in retaliation of her terminated sub-lease. Also, that the appellant/applicant failed to obey the court orders directing that the land records at the registry not be interfered with by interfering with the same and now seeks protection from this court from her unlawful and illegal actions(sic).
7. The respondents further deposed that the contempt of court application was served upon the respondents and the interested party but the interested party did not file a response. Further, that the official searches reveal crucial interference with the records at the lands registry and the interested party being aware, rightfully reinstated Adora Leisure Limited to avoid being held in contempt. As such, the instant application to stay execution of Adora Leisure Limited reinstatement is rendered ineffective as it has already been overtaken by events owing to the rectification of the records which occurred prior to the delivery of the ruling and subsequent filing of this application.
8. The appellant/applicant filed a further affidavit in response thereto which was sworn on June 12, 2023. The appellant/applicant while reiterating the contents of her supporting affidavit, deposed that she followed due process in conducting a search in December, 2022 which confirmed that she was the official sub-lessee and it would be correct to point out that the respondent had no valid lease with the



- alleged current sub-lessee. Further, that it is surprising that as at April, 2023, Adora Leisure Limited was the registered sub-lessee which information was not brought before the lower court and affirms that it was necessary to inform the lower court since the issue was still not determined.
9. The application was canvassed by way of written submissions. On June 21, 2023 the appellant/applicant filed written submissions dated June 19, 2023 and raised three issues for determination as listed below: -
 1. Whether in the interim and pending the hearing and determination of this appeal, the honourable court should be pleased to stay execution and enforcement of the ruling of the Honourable S M Mungai on May 23, 2023 in CMELC No E086 of 2022.
 2. Whether the respondents are in a quest to defeat the ends of justice and the actions of this honourable court ought to take.
 3. Who should bear costs.
 10. On the first issue, the appellant/applicant submitted in the affirmative and went on to state that the court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable outcome. Also, that the court in doing so, ought to always opt for the lower rather than the higher risk of injustice. The appellant/applicant relied on the cases of *Housing Finance Company of Kenya versus Sharok Kher Mohamed Ali Hirji & Another* [2015] eKLR and *NIC Bank Limited & 2 Others versus Mombasa Water Products Limited* [2021] eKLR.
 11. The appellant/applicant further submitted that the appeal raises triable issues as stated in her grounds of appeal which are sufficient and is convinced will succeed. Reliance was placed in the case of *Yuasa International Limited versus Gilbert Mwongera Mutwemeri* [2021] eKLR. Further, she submitted that if this honourable court does not grant stay and the ruling of the lower court is executed, the appeal will be overtaken by events and she will suffer irreparable harm.
 12. On the second issue, the appellant/applicant submitted that it is clear that the respondents are malicious in this matter as they seem to have been sure of the ruling thus influencing their way at the land's registry even without any court order and the actions alluded to by the respondents in their replying affidavit are aimed at denying the applicant justice and her constitutional right to a fair hearing.
 13. In conclusion, the appellant/applicant submitted that she has met the threshold under Order 42 Rule 6 of the *Civil Procedure Rules* and as such, the application should be allowed with costs.
 14. On July 4, 2023 the respondents filed written submissions dated June 29, 2023 and raised two issues for determination as listed below: -
 - i. Whether the present application has become moot.
 - ii. Whether the present application merit the condition for grant of the orders sought.
 15. On the first issue, the respondents submitted that this court is confined to matters related to contempt of court as raised in the ruling that forms the foundation of this application and appeal. Hence, this court lacks jurisdiction to adjudicate on issues pertaining to ownership and proprietary rights over the suit land. The respondents went on to give history that precipitated the filing of the instant application from the time they entered into a sub-lease agreement with the applicant, to the rectification that took place at the land registry. Also that in or around April, 2023 the interested party rectified the records by reinstating Adora Leisure Limited as the current sub-lessee even before the ruling of the lower court was delivered.



16. The respondents submitted that owing to the rectification of the records at the registry even before the ruling was delivered, the instant application had become moot rendering the relief sought unnecessary as the changes in circumstance has resolved the matter. The respondents relied on the case of *Daniel Kaminja & 3 Others (Suing as Westland Environmental Caretaker Group) versus County Government of Nairobi* [2019] eKLR.
17. On the second issue, the respondents submitted that the application fails to satisfy the conditions for grant of stay of execution pending appeal as set out under Order 42 Rule 6 of the Civil Procedure Rules. They relied on the cases of *Mburia Ngari versus Peter Nyaga Gicheru* [2019] eKLR and *James Wangalwa & Another versus Agnes Naliaka Cheseto* [2012] eKLR.
18. The respondents submitted that the appellant/applicant will not suffer substantial loss as she does not have legal interests over the suit land and neither is she in physical occupation of the same as she ceased business operations in the year 2016. They relied on the cases of *Kipsang Chepkwony versus David Kiptoo Cheluget & Another* [2014] eKLR. Further, they submitted that the appeal lacks meritorious grounds and is an exercise in futility as the interested party through their own volition upon being served with the contempt of court application, rectified the illegal and unlawful interferences made at its registry pertaining the records of the suit land. Reliance was placed in the cases of *Amoke Otiemo Pascal versus Melvin Anyango Owuor* [2022] eKLR and *Elyves Situma Wanjala & Another versus Samuel Omollo Ochung* [2021] eKLR.
19. In conclusion, the respondents submitted that it is in the interest of justice to the maintain status quo as is prevailing. They relied on the case of *Elisha Kare Busienei & 3 Others versus Japhet Kipyego Chepkwony (Suing as the administrator of the Estate of Elizabeth J Sirma & 17 Others)* [2016] eKLR.
20. I have carefully analysed and considered the application, the replies thereof and the written submissions together with the authorities filed by both parties and in my view, the issue for determination is whether the appellant/applicant has satisfied the conditions necessary under Order 42 Rule 6 of the Civil Procedure Rules to merit grant of the orders sought.
21. Order 42 Rule 6 of the Civil Procedure Rules provides as follows:

“No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except 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 sub rule (1) unless—
 - (a) the Court is satisfied that substantial loss may result to the 1st 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 1st Applicant.”



22. There are three conditions for grant of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to which:-
- 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 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.
23. The purpose of stay of execution is to preserve the substratum of the case. In the case of Consolidated Marine. vs. Nampijja & Another, Civil App.No.93 of 1989 (Nairobi), the Court held that:-
- “The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
24. From the documents relied on by the parties, the lower court delivered a ruling on May 23, 2023 where five orders were granted among them an order directing no further alterations in the Lands Registry in regard to the suit property being Cis-Mara/Olchoro-Oirowua/95 and Cis-Mara/Olchoro-Oirowua/97. However, a look at the proprietorship section of the lease shows Adore Leisure Limited as the registered lessee of the suit land as at September 16, 2022. It appears that the entries of records with respect to the suit properties took place even before the ruling was delivered. The question then is, what is the status quo on the suit land? The appellant/applicant contends that she would suffer substantial loss if stay is not granted. From the material presented before this court, the applicant has no legal interest in the suit land to establish substantial loss.
25. More importantly is that the substance the subject of the application seems moot. This is for the reason that the interested party made changes to the records of the suit land even before the ruling was delivered. In essence, there is nothing for this court to stay at the moment.
26. The appellant/applicant has all the right to proceed with the appeal since she has raised grounds in her memorandum of appeal which she opines has a high chance of success. In the meantime, the orders sought are not tenable in view of the fact that it has been overtaken by events.
27. Arising from the above, the notice of motion application dated May 25, 2023 is hereby dismissed with no orders as to costs. It is so ordered. Mention on October 18, 2023 to issue directions on the disposal of the appeal herein.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 3RD DAY OF OCTOBER, 2023.

HON. MBOGO C.G.

JUDGE

3/10/2023.

In the presence of:

CA:Pere Meyoki

