



REPUBLIC OF KENYA



Fiolabchem Company Limited & 3 others v Ndule & 7 others (Environment & Land Case 46 & 17 of 2019 (Consolidated)) [2023] KEELC 20618 (KLR) (12 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20618 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 46 & 17 OF 2019 (CONSOLIDATED)
MAO ODENY, J
OCTOBER 12, 2023**

BETWEEN

**FIOLABCHEM COMPANY LIMITED 1ST PLAINTIFF
ABDIRAHMAN MAALIM ABDULLAHI 2ND PLAINTIFF
LAWRENCE MUSYOKA ISIKAH 3RD PLAINTIFF**

AND

KATANA NDULE DEFENDANT

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 17 OF 2019**

BETWEEN

KATANA NDULE PLAINTIFF

AND

**ROSEMARY AUMA OILE 1ST DEFENDANT
JOSHUA MUTINDA KITEME 2ND DEFENDANT
FIOLABCHEM COMPANY LIMITED 3RD DEFENDANT
SAID NUR OSMAN 4TH DEFENDANT
ROBIN MUNYUA KIMOTHO 5TH DEFENDANT
ABDULRAHMAN MAALIM ABDULLAHI 6TH DEFENDANT
ABDI OSMAN ABDI 7TH DEFENDANT**



RULING

1. This ruling is in respect of a Notice of Motion January 19, 2023, by the Defendant/Applicants seeking the following orders;
 - a. Spent.
 - b. Spent.
 - c. That there be a stay of execution of the judgment and decree of this court passed on November 15, 2022 pending hearing and determination of the appeal to the Court of Appeal against the said judgment and decree passed on November 15, 2022.
 - d. That costs of this application be in the cause.
2. The application was premised on the grounds enumerated on the face of the motion and supported by the affidavit of Katana Ndule, the Defendant herein, dated January 19, 2023.
3. The Defendant deponed that should the Plaintiffs commence execution of the judgment, he shall suffer substantial loss since he resides on the suit property together with his family. He stated that the application was made timeously and was willing to provide security to secure the due performance of the decree.
4. The Plaintiffs opposed the application and filed grounds of opposition dated January 27, 2023 stating that the application was frivolous, vexatious and abuse of the court process. That the application did not disclose any basis for granting the orders sought and that there was no copy of a Memorandum of Appeal to establish whether the intended appeal would raise any triable issues.
5. The Plaintiffs also filed a Replying Affidavit sworn by Lawrence Musyoka Isika on February 28, 2023 where Mr Isika deponed that the Defendant resided on the one acre piece of land known as Kilifi/Mtondia/950 and not the entire suit property. He added that the Plaintiffs not intended to evict the Defendant from the said plot and reiterated their offer to allow the Defendant to continue occupying the same subject to his payment of stamp duty.
6. In rebuttal, the Defendant filed a further affidavit on March 3, 2023 and stated that the intended appeal was not limited to Plot No Kilifi/Mtondia/950 but the entire suit property and judgment of the court. He added that there was no evidence that he occupied only the aforementioned plot.
7. Following this court's directions, the Defendant filed written submissions on February 17, 2023, however the Plaintiffs opted to rely on their grounds of opposition and replying affidavit.

Defendants' Submissions

8. Mr. Shujaa, counsel for the Defendant submitted that the Defendant had met the conditions for grant of stay of execution prescribed under Order 42 rule 6 sub-rule 2 of the *Civil Procedure Rules*.
9. Counsel relied on the case of *Mukuma v Abuoga [1988] KLR 645*, on the definition of substantial loss highlighted in the case and submitted that execution in this suit would see the demolition of the Defendant's home and eviction from the suit property thus creating a state of affairs that would render the intended appeal nugatory.



10. Mr Shujaa further submitted that the purpose of stay pending appeal was to preserve the substratum and relied on the case of *RWW v EKW [2019] eKLR* where the court quoted with approval the case of Purity Kathoki Maweu v Hezekiah Njuki Mwangi and another, ELC No 175 of 2021.
11. Counsel urged the court to exercise its discretion in the Defendant's favour and cited the case of *Butt v Rent Restriction Tribunal [1982] KLR 417*. On the issue of the appeal to the Court of Appeal, Mr Shujaa submitted that Order 42 rule 6 sub-rule 4 of the Civil Procedure Rules, an appeal to the Court of Appeal is deemed to have been filed when a notice of appeal was given. He submitted that whether or not an intended appeal was arguable was not a matter for consideration under Order 42 rule 6 and urged the court to allow the application.

Analysis And Determination

12. Having carefully considered the application, grounds of opposition, submissions and authorities cited by both sides, I find that the sole issue for determination is whether the Applicant has met the conditions for grant of an order for stay of execution pending appeal.

13. Order 42 rule 6 of the Civil Procedure Rules provides:-

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.

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 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.
14. In *Butt -v- Rent Restriction Tribunal [1979] eKLR*, the Court of Appeal stated what ought to be considered in determining whether or not to grant stay of execution pending appeal. The court explained that the power of a court to grant or refuse an application for stay of execution is discretionary, and the discretion should be exercised in such a way so as not to prevent an appeal. That if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judgment.
 15. Parties had also agreed on the status quo to be maintained pending the hearing of this application and the Plaintiff's counsel had told the court that they had not started the process of execution. Further that they were ready to give the Defendants the 1 acre that they were in occupation of.
 16. It is also trite that the purpose of stay pending appeal is to preserve the substratum of the case especially in land matters where the character of the suit property may be changed while the appeal is pending. The execution of the impugned judgment would involve eviction and potential demolition of the Defendant's home within the suit property, which in effect will change the character of the suit property. The Applicant would suffer substantial loss.



17. The application though was brought within two months after the judgment; this would be excusable delay as the Applicant obtained a certificate of delay from the Deputy Registrar. The Respondents also have not objected to the filing of the application within this period.

18. I find that the application has merit and is hereby allowed as prayed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF OCTOBER 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

