



**Kiplagat v Masit & 6 others (Environment & Land Case 930 of 2012)  
[2023] KEELC 20590 (KLR) (11 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20590 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 930 OF 2012  
JM ONYANGO, J  
OCTOBER 11, 2023**

**BETWEEN**

**LORNA JEBIWOT KIPLAGAT ..... PLAINTIFF**

**AND**

**RHODA MASIT ..... 1<sup>ST</sup> DEFENDANT**

**ESTHER CHERUIYOT ..... 2<sup>ND</sup> DEFENDANT**

**WINNIE KIBISACH (SUED AS TRUSTEES OF MOSOP MANCHOR WOMEN  
GROUP OF CHEKORIO) ..... 3<sup>RD</sup> DEFENDANT**

**JW ODUOR ..... 4<sup>TH</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR ..... 5<sup>TH</sup> DEFENDANT**

**THE COMMISSIONER OF LANDS ..... 6<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

1. What is before me for determination is the defendants' Notice of Motion dated July 12, 2022 seeking a stay of execution pending appeal. The grounds upon which the application is predicated are set out on the face of the Notice of Motion. The main ground is that the applicants have filed an appeal against the judgment delivered on July 8, 2022 and unless a stay of execution is granted, the Applicants and other members of Mosop Marichor Women Group of Chepkorio who are in occupation of the suit property will suffer substantial loss. The applicants have also averred that their appeal raises weighty legal issues and it has high chances of success.
2. The application is also based on the supporting affidavit of Esther Cheruiyot, the 2<sup>nd</sup> defendant/ application sworn on July 12, 2022 in which reiterates the grounds stated in the Notice of Motion.



She adds that execution would mean cancellation of the Certificate of title issued to the Applicants and physical reinstatement of the Plaintiff/Respondent on the suit property which action would completely alter the status of the subject parcel before the appeal is heard and determined. This is because the Respondent may decide to develop the suit property or even sell it thus rendering the appeal nugatory. She deposes that execution would affect about 200 women who would suffer great prejudice. She further avers that the applicants are willing to abide by any conditions that the court may impose.

3. The application is opposed by the respondent through her replying affidavit sworn on the November 30, 2022. She deposes that she has been kept away from her land for almost 17 years and the applicants who are of basic means may not be able to compensate her for the prejudice she has continue to suffer upto the time the appeal is heard and determined. She further contends that the applicants have not satisfied the grounds for stay of execution as they have failed to demonstrate that their appeal shall be rendered nugatory if a stay is not granted.
4. The application was canvassed by way or written submissions but as at the time of writing this ruling only the respondent had filed her submissions.
5. The singular issue for determination is whether the Applicants have satisfied the conditions for stay pending appeal.
6. Order 42 Rule 6 of the *Civil Procedure Rules* sets out the conditions that one should meet in order to qualify for an order of stay pending appeal. In particular Order 42 Rule 6(2) provides as follows:
  - (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 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.
7. In order to grant the order for stay of execution the court must be satisfied that the above three conditions have been met.
8. The first condition is that the applicant must demonstrate that if the stay is not granted, he shall suffer substantial loss. As to what amounts to substantial loss the court in *James Wangalwa & another vs. Agnes Naliaka Cheseto* [2012] eKLR observed as follows:

“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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”



Further in the case of *RWW-Vs-EKW* (2019) eKLR the court held as follows:-

“...the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguard and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award costs...”

“.....indeed to grant or refuse an application for stay or execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the Appellant with those of the Respondent...”

9. In the present case, the applicants have alleged that they are in possession of the suit property and they fear that if their title is cancelled, the plaintiff may decide to sell and or develop the property before their appeal is heard and determined thus rendering their appeal nugatory. It has been stated that about 200 of the members of the Women group are in occupation of the suit property and if they are evicted before their appeal is heard and determined, they will suffer great loss and prejudice.
10. On her part, the respondent has intimated that she has not been able to utilize her property for the last 17 years that the case has been in court. It is therefore clear that she intends utilize the suit property as soon as possible. Depending on how she chooses to deal with the suit property, it is possible that the appeal may be rendered an academic exercise. I am therefore of the view that the Applicants’ fears are not far-fetched and they have satisfied the first condition for stay pending appeal.
11. The second condition speaks to the question of delay. The judgment was delivered on July 8, 2022 while the application was filed on July 22, 2022 thus there was no delay.
12. The last condition is security for costs. In her supporting affidavit, the Second defedant/applicant deposed that the they are willing to abide by whatever condition the court may impose. In the case of *Arun C Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates, Nrb Misc. Civil Application No. 802 Of 2010*, the court stated:  

‘The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor...Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.’
13. The purpose of deposit of security is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant and this being a land matter such security serves to preserve the subject matter as the parties litigate on appeal. However, in doing so, the court has a duty to balance the interest of both parties; that of the applicants who seek to litigate on their appeal without having it rendered nugatory by virtue of the subject matter being disposed of or interfered with and that of the respondent who has a right to enjoy the fruits of his judgment.
14. All in all, I am of the view that the Applicants have met the conditions for stay. However, I need to balance the interests of both parties and doing the best I can, I grant a stay of execution pending appeal on condition that the Applicants deposit the sum of Kshs.250,000 in court as security for costs within 30 days failing which the order for stay shall automatically lapse.



15. The Applicants shall bear the costs of the application.

Dated signed and delivered virtually at Eldoret this 11<sup>th</sup> day of October 2023.

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J.M ONYANGO

JUDGE

In the presence of;

1. Miss Waweru for Mr. Katwa for the Respondent
2. No appearance for the Applicant

Court Assistant: A. Oniala

<b>ELC.930 OF 2012 RULING</b>	0
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