



Kimani v Mutua (The administrator of the Estate of the Late Titus Mutua Kilome (Deceased) & another (Environment & Land Case 121 of 2009) [2023] KEELC 20477 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20477 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 121 OF 2009
JO MBOYA, J
OCTOBER 5, 2023**

BETWEEN

SIMON KANG'ETHE KIMANI PLAINTIFF

AND

SAPHINA MULEE MUTUA (THE ADMINISTRATOR OF THE ESTATE OF THE LATE TITUS MUTUA KILOME (DECEASED)) 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

RULING

Introduction And Background

1. The Plaintiff/Applicant herein entered into and executed a sale agreement dated the June 9, 2004 with Florence Ndinda Mutua and John Mutio Mutua, now deceased, respectively; and in respect of which the Plaintiff/Applicant sought to purchase and/or acquire all that property otherwise known as L.R No. 12251/31 (Original Number 12251/6/16).
2. Pursuant to and by dint of the Sale Agreement dated the June 9, 2004, the Parties agreed at a purchase price or a consideration of Kes.4, 000, 000/= only. Furthermore, it was an express term of the named agreement that the Applicant herein was to pay a stakeholder's sum of Kes.400, 000/= only, which sum was admittedly paid to and acknowledged by the vendors, now deceased.
3. Be that as it may, the transaction at the foot of the sale agreement dated the June 9, 2004; collapsed and/or failed to materialize and as a result, the Applicant herein filed and/or mounted the instant suit seeking a plethora of reliefs, inter-alia Specific performance of the sale agreement and contract in question.



4. Subsequently, the suit by and on behalf of the Applicant herein was disposed of vide Judgment of the court rendered on the May 29, 2023; and wherein the court found and held that the Applicant had failed to prove his claim to the requisite standard. Consequently, the court proceeded to and dismissed the Applicant's suit.
5. On the other hand, the court proceeded to and decreed that the Applicant herein shall vacate and hand over vacant possession of the suit property to the 1st Defendant within 120 days; and that in default, the Applicant to be evicted therefrom.
6. Arising from the Judgment of the court, the Applicant herein has filed the Notice of Motion Application dated the August 28, 2023; and in respect of which same now seeks the following reliefs;
 - i.Spent
 - ii. The Honorable court be pleased to order a stay of execution of the judgment delivered by the court on the May 29, 2023, pending the hearing and determination of the instant application.
 - iii. The Honorable court be pleased to order stay of execution of the judgment delivered by the court on the May 29, 2023 pending the hearing and final determination of appeal dated the July 28, 2023 against the Judgment and decree of the court delivered on the May 29, 2023.
 - iv. The costs of the Application be provided.
7. The instant Application is anchored and/or premised on numerous grounds which have been enumerated at the foot of the Application. Additionally, the Application is supported by the affidavit of the Applicant herein sworn on the August 28, 2023.
8. Instructively, upon being served with the instant Application, the Respondent herein filed a Replying affidavit sworn on the August 31, 2023; and wherein same has attached/annexed two documents.
9. It is worth noting that the instant Application came up for hearing on the September 20, 2023, whereupon the advocates for the respective Parties covenanted to canvass and/or dispose of the Application by way of written submissions. Consequently and in this regard, the court proceeded to and circumscribed the timeline for the filing and exchange of the written submissions.

Parties' Submissions:

Applicant's Submissions:

10. The Applicant herein has adopted the grounds contained in the body of the Application and thereafter reiterated the averments contained in the supporting affidavit thereto. Furthermore, the Applicant has thereafter highlighted, canvassed three (3) pertinent issues for consideration by the Honourable court.
11. Firstly, Learned counsel for the Applicant has submitted that the Applicant herein entered into and executed a Sale agreement dated the June 9, 2004, pertaining to and concerning the suit property. In addition, Learned counsel for the Applicant has contended that pursuant to and upon execution of the named agreement, the Applicant proceeded to and paid out the sum of Kes.400, 000/= Only, being the stakeholders sum as agreed by the Parties.
12. Additionally, Learned counsel for the Applicant has also submitted that even though the balance of the purchase price amounting to Kes.3, 600, 000/= only has not been paid to date; the vendors, now deceased, subsequently allowed the Applicant to enter upon and take possession of the suit property.



13. It was the further submissions of Learned counsel for the Applicant that upon taking of possession of the suit property, the Applicant herein carried out and undertook substantial developments and/or investments on the suit property. In this regard, it has been contended that the Applicant derives the sum of Kes.1, 000, 000/= per annum, from the suit property; which constitutes the Applicant's only source of income.
14. Arising from the foregoing, Learned counsel for the Applicant has therefore contended that the Applicant herein has acquired lawful rights to and or over the suit property and therefore if the orders of the court issued on the May 29, 2023, are not stayed, then the Applicant shall suffer substantial loss.
15. To this end, Learned counsel for the Applicant has cited and relied on the holding in the case of *Kenya Shell Ltd v Benjamin Karuga Kibiru & Another* (1986)eKLR, wherein the Court discussed and elaborated upon the importance of substantial Loss in an application for stay of Execution.
16. Secondly, Learned counsel for the Applicant has submitted that the current Application, which seeks stay of execution pending the hearing and determination of the appeal before the court of appeal, has been mounted without inordinate and undue delay, whatsoever.
17. Furthermore, Learned counsel for the Applicant has submitted that the Application could not been made earlier, insofar as the court had granted to the Applicant a grace period of 120 days; from the date of delivery of the Judgment; which translated to a stay.
18. In support of the contention that the Application has been filed without undue delay, Learned counsel for the Applicant has cited the case of *Jaber Mohsen Ali & Another v Pricila Boit* (2014)eKLR and *Chania Shutle Bus & Rebeca Mbogo (Suing as the legal representative of the Estate of Joseph Mwanyika Mbogo, (Deceased))*, (2016)eKLR.
19. Thirdly, Learned counsel for the Applicant has submitted that the Applicant is ready and willing to abide by and/or comply with any orders/directions that the Honorable court may give as pertains to security for the due performance of the decree that may arise upon the determination of the appeal pending before the Honorable Court of appeal.
20. Nevertheless, Learned counsel for the Applicant has also submitted that even though same is ready and willing to abide by the terms and conditions set by the court, same however contends that the court should not decree provision of security insofar as the subject dispute does not relate to and/or concern a monetary decree.
21. In support of the submissions that no provision of security ought to issue and/or be granted where the matter does not involve a monetary decree, Learned counsel for the Applicant has cited and relied on inter-alia the case of *Sarah N Sakwa v Elizabeth Wamwanyi T/a Namukosi Ltd & Another* (2017)eKLR and *Praksedis Okutoi v Medical Practitioners & Dentists Board* (2008)eKLR.
22. In the alternative, Learned counsel for the Applicant has submitted that if the court is minded to grant an order for provision of security for the due performance of the decree that may ensue, then the court should decree deposit of the sum of kes.1, 000, 000/= only, which should be deposited in an Escrow account in the names of the advocates for the respective Parties.
23. In view of the foregoing, Learned counsel for the Applicant has therefore submitted that the Applicant has established and demonstrated sufficient cause and/or basis to warrant the grant of stay of execution pending hearing and determination of the Appeal before the Court of Appeal.



Respondent's Submissions:

24. The Respondent herein adopted the contents of the Replying affidavit sworn on the 31st August 2023; and thereafter proceeded to and highlighted three (3) salient issues for consideration by the Honourable court.
25. First and foremost, Learned counsel for the Respondent has submitted that the suit property, which is being disputed over between the Parties herein is currently the subject of succession proceedings before the High court; and wherein the question of distribution of the original property is being dealt with.
26. Additionally, Learned counsel for the Respondent has submitted that to the extent that the suit property is the subject of succession proceedings, which proceedings are known to the Applicant herein; the Applicant herein shall not suffer any substantial loss or at all.
27. Conversely, Learned counsel for the Respondent has submitted that it is the Respondent and by extension the estate of Titus Mutua Kilome, now deceased, who are disposed to suffer substantial loss and prejudice, if any adverse orders are issued in respect of the instant matter.
28. In support of the submissions that it is the Respondent and by extension the Estate of Titus Mutua Kilome, Deceased, who will suffer substantial loss, Learned counsel for the Respondent has cited and relied on the case of *Re- Estate of Churko Stephen alias Richard Churko Kuyo (deceased)* (2021)eKLR.
29. Secondly, Learned counsel for the Respondent has submitted that the instant Application has been made with undue and inordinate delay and hence the Honorable court ought not to countenance the delay attendant to the filing of the application.
30. Thirdly, Learned counsel for the Respondent has submitted that in the event that the court is inclined to grant an order of stay pending the hearing and determination of the appeal; then the court should decree provision of security for the due performance of the decree that may ultimately arise upon the determination of the Appeal before the Honorable Court of Appeal.
31. In this respect, Learned counsel has contended that the extent of security to be ordered and decreed by the Court should be gauged as against the balance of the purchase price which ought to have been paid, but which was never paid. Besides, Learned counsel has also contended that such security, should also take into account the appreciation in the value of the suit property for the last 19 years; when the Applicant herein has benefited from the Suit Property, to the detriment of the Estate of the deceased.
32. Be that as it may, Learned counsel for the Respondent has submitted that the Applicant herein has however, neither met nor established the requisite ingredients to warrant the grant of the orders of stay of execution pending the hearing and determination of the appeal or at all.
33. Arising from the foregoing, Learned Counsel has invited the court to find and hold that the Application is devoid of merits and thereafter to proceed and dismiss the Application under reference.

ISSUES FOR DETERMINATION:

34. Having evaluated and reviewed the instant Application and the Response thereto; and upon consideration of the written submissions filed by the respective Parties; the following issues do emerge and are thus worthy of determination;
 - i. Whether the Applicant has demonstrated and/or established the existence of sufficient cause/Basis.
 - ii. Whether Substantial loss is likely to arise and/or accrue, if the orders sought are not granted.



- iii. What security, if any, ought to be granted in the circumstances of this case.

Analysis And Determination

Issue Number 1 Whether the Applicant has demonstrated and/or established the existence of sufficient Cause/ Basis..

35. It is instructive to note that the instant suit was filed and/or commenced by and at the instance of the Plaintiff/Applicant herein. Furthermore, the Applicant herein sought for a plethora of reliefs, inter-alia specific performance pertaining to and in respect of the suit property.
36. Subsequently the suit herein was heard and thereafter disposed of vide Judgment rendered on the 29th May 2023. For good measure, the court found and held that the Applicant had failed to prove his case to the requisite standard and thus the Applicant was not entitled to any of the reliefs sought at the foot of the operative Plaintiff.
37. Following the rendition of the Judgment, the Applicant herein felt aggrieved and/or dissatisfied with the Judgment and resultant decree of the court. Consequently, the Applicant proceeded to and filed a Notice of appeal in line with the provisions of Rules 75 of the Court of Appeal Rules, 2010.
38. Additionally, the Applicant herein has also demonstrated that same has since filed and/or lodged a substantive Appeal to the Court of Appeal vide Civil Appeal Number E575 of 2023; wherein same is challenging the entire Judgment and decree of this court.
39. Instructively, the Applicant herein contends that the appeal that has been filed before the Honorable Court of Appeal, (details in terms of the preceding paragraph) raises veritable grounds of appeal, with overwhelming chances of success. In any event, the Applicant herein has thereafter enumerated in the body of the application a total of 27 grounds of appeal, which same intends to canvass and ventilate before the Honorable Court of Appeal.
40. Whether or not the grounds of appeal which have been raised before the Court of Appeal have overwhelming chances of success or otherwise (which can only be determined by the court of appeal), what is important for this court is that an appeal has since been filed before the Court of Appeal.
41. Consequently and in this regard, there is no gainsaying that the Applicant herein has therefore demonstrated the existence of sufficient cause in terms of proving that same has indeed filed a substantive appeal before the Court of Appeal.
42. Be that as it may, it is also important to underscore at this juncture, that whenever a litigant, the Applicant not excepted, proffers an appeal to the Court of Appeal; it is deemed that an appeal ought only to be filed, if same, raises arguable issues and not otherwise.
43. Having made the foregoing remarks, I beg to point out that the fact that an appeal has been filed before the Honorable Court of Appeal, in my humble view, demonstrates sufficient cause. At any rate, all that the Applicant herein was expected to show was that same has since filed a Notice of appeal, which by dint of Order 42 Rule 6(4) of the *Civil Procedure Rules*, 2010, is deemed to constitute appeal for purposes of an Application for stay of execution.
44. Consequently and in view of the foregoing, I come to the conclusion that the Applicant has demonstrated the existence of sufficient cause. However, it is not lost on this court that proof of a sufficient cause is just, but one ingredient in the process of justifying the necessity to grant/obtain an order of stay of execution pending Appeal. See the Provisions of Order 42 Rule 6(2) of the *Civil Procedure Rules*, 2010.



Issue Number 2 Whether Substantial loss is likely to arise and/or accrue, if the orders sought are not granted.

45. The dispute beforehand touches on and/or concerns the sale of the property otherwise known as L.R No. 12251/31 (Original Number 12251/6/16), which was the subject of the sale agreement dated the 9th June 2004.
46. According to the Applicant, same paid the sum of Kes.400, 000/= only being the stakeholders sum, to and in favor of the vendors, now deceased. Furthermore, the Applicant has contended that pursuant to the terms of the sale agreement, the balance of the purchase price was to be paid upon completion of the transaction, which in any event, was stated to be 90 days from the date of the execution of the sale agreement.
47. Additionally, the Applicant herein has contended that despite the sale agreement having a completion date, same was never completed within the contractual timelines. However, the Applicant avers that the completion dates/timelines, were variously adjusted at the instance and request of the vendors, now deceased.
48. Other than the foregoing, the Applicant has further averred that despite the fact that the sale was not concluded within the stipulated timelines, the vendors thereafter allowed the Applicant to enter upon and take possession of the suit property. Consequently and in this regard, the Applicant contends that same indeed entered upon and took possession of the suit property and has remained therein to date.
49. Premised on the foregoing, the Applicant now avers that if the orders of stay sought are not granted, then same shall stand evicted from the suit property and his investment therein, shall be destroyed. In this regard, the Applicant contends that same shall suffer substantial loss.
50. On the other hand, the Respondent contends that even though the Applicant had entered into and executed a sale agreement dated the 9th June 2004, the sale agreement in question was not concluded and hence same collapsed.
51. Furthermore, the Respondent has further submitted that the suit property, which is claimed by the Applicant herein, is actually the subject of succession proceedings and wherein the question of distribution of the Estate of Titus Mutua Kilome, deceased, is being addressed.
52. In view of the foregoing position, the Respondent herein contends that the Applicant, who has acquired no legitimate rights to the suit property, shall not suffer any substantial loss, if the order sought are granted.
53. To the contrary, the Respondent submits that it is the Respondent herein and by extension the Estate of the Deceased, who shall be exposed to suffer undue prejudice and substantial loss, s if the order sought are granted.
54. Consequently and in the premises, the Respondent herein has invited the court to find and hold that the Applicant has not placed before the court plausible material to enable the court to find that substantial loss shall accrue and/or ensue.
55. Despite the rivaling submissions, (details in terms of the preceding paragraphs), I beg to point out that the suit herein and by extension the appeal before the court of appeal, gravitates upon whether or not the Applicant herein is entitled to ownership of the suit property, either on account of specific performance; adverse possession, constructive trust or resulting trust, which were impleaded at the foot of the amended Plaint before this Honourable Court.



56. Whereas this court in a considered Judgment found and held that the Applicant did not establish and/or prove his claim to the suit property, there is no gainsaying that the Court of Appeal may affirm the decision of this court or overrule same.
57. Whichever way the Court of Appeal determines the appeal which has since been filed before itself; if the court of appeal were to find and hold that this court was wrong in arriving at the conclusions enumerated at the foot of the Judgment, then a contrary position would ensue.
58. Without doubting the competence of the Judgment which was rendered by this court and whose justiciability is hereby vouched for; it is important to underscore that if the court were to decline to grant stay and thereafter the suit property (if at all same exists), is alienated; then the substratum of the appeal would be defeated.
59. In such a situation, there is no gainsaying that the Applicant's Right of access to justice, in terms of Article 48 of the *Constitution*, 2010; would no doubt have been compromised, if not negated. In this regard, I am convinced that substantial loss, is likely to arise and/or accrue, if the orders of stay are not granted.
60. At any rate, it is worth pointing out that substantial loss is the cornerstone to the grant and issuance of an order of stay of execution pending the hearing and determination of an appeal. Consequently, it is the loss that must be abated and averted by the grant of an order of stay of execution.
61. In respect of the foregoing observation, it is appropriate to take cognizance of the holding of the Court of Appeal in the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR, where the court stated as hereunder;

It is usually a good rule to see if order XLI rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone 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.

62. Arising from the foregoing and taking into account the dictum in the decision (*supra*), my answer to issue number two is to the effect that the Applicant herein has placed before the court plausible evidence to warrant a finding that substantial loss, in its various perspectives, is bound to arise and/or ensue, if the orders sought are not granted.

Issue Number 3 What security, if any, ought to be granted in the circumstances of this case.

63. Having come to the conclusion that the Applicant herein is disposed to suffer substantial loss, in the event that the suit property is alienated and/or otherwise disposed of during the pendency of the appeal; it is imperative to state that the court is still under a duty to consider and proclaim the provision of security for the due performance of the decree that may ensue.
64. Arising from the circumstances of this matter, it is important to recall, that the Applicant herein only paid the sum of kes.400, 000/= only, being the stakeholders sum alluded to in the body of the agreement dated the 9th June 2004.
65. Further and in addition, it is not in dispute that the Applicant herein has not paid the balance of the purchase price amounting to Kes.3, 600, 000/= only. For good measure, the Applicant himself admits and acknowledges that the balance of the purchase price remains owing and unpaid to date.



66. Other than the forgoing, there is evidence that the Applicant herein entered upon and took possession of (sic) of the suit property and has remained in occupation thereof for the last 19 years, even though the balance of the purchase price has never been paid and/or otherwise tendered, in whatsoever form.
67. Furthermore, the Applicant averred that same has been deriving profits amounting to kes.1, 000, 000/= annually from the suit property.
68. In my humble view, the benefits being extracted by the Applicant from the suit property, despite not tendering the balance of the purchase price, in whatsoever form, may exhibit some degree of social injustice and inequity.
69. Consequently and in view of the foregoing, this is a matter that calls for provision of security for the due performance of the decree, which may ultimately ensue from the determination of the appeal before the Court of Appeal.
70. Having come to the foregoing conclusion, the next question that must be determined is the quantum of security to be decreed and/or ordered in the circumstances and which in any event, is likely to safeguard the rights and interests of both Parties, during the pendency of the Appeal.
71. To my mind, the suitable and appropriate security to be decreed, taking into account the totality of the circumstances herein, is by directing that the balance of the purchase price (read Kes.3, 600, 000/= only) be deposited in a Joint interest earning account in the names of the respective advocates. For clarity, the deposit herein has nothing to do with payment or tender of the balance of the purchase price; but same shall relate to security in terms of Order 42 Rule 6(2) of the *Civil Procedure Rules* 2010.
72. Furthermore, security which ought to be granted, should be one that is capable of realization at the tail end of the appeal, albeit without much ado. For clarity, the import and tenor of what constitutes security, was adverted to and elaborated upon in the case of *Arun C. Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others* [2014]eKLR, where the court observed and held thus;

“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.”

Final Disposition:

73. From the discourse, (whose details are captured in the preceding paragraphs), it is evident and apparent that the court has come to the conclusion that the Application beforehand is meritorious.
74. Consequently and in the premises, the Application dated the 28th August 2023; be and is hereby allowed on the following terms;
 - i. There be and is hereby granted an order of stay of execution of the Judgment and decree issued on the 29th May 2023; pending the hearing and determination of Civil appeal number E575 of 2023.
 - ii. The Applicant herein shall deposit the sum of Kes.3, 600, 000/= only in a Joint interest earning (Escrow) account in the names of the advocates for the respective Parties and same to be



deposited within Thirty (30) days from the date hereof; as condition for the grant of the Order of Stay hereof.

- iii. In default to comply with clause (ii) hereof, namely, deposit in the Escrow account within the set timeline, the order of stay granted in terms of clause (i) shall lapse automatically.
- iv. In the event of failure and upon lapse of the order of stay, the Respondent shall be at liberty to execute the decree of this court.
- v. Costs of the Application shall abide the outcome of the appeal to the Court of Appeal.

75. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF OCTOBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant.

Ms. Mutisya – Otieno for the Applicant.

Ms. Waweru for the 1st Respondent.

N/A for the 2nd Respondent.

