



REPUBLIC OF KENYA



**Maritim v Malit & 8 others (Environment & Land Case 156 of 2014)
[2023] KEELC 22636 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 22636 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 156 OF 2014
JM ONYANGO, J
OCTOBER 12, 2023**

BETWEEN

JOSEPH KIPKEMOI MARITIM PLAINTIFF

AND

WILLIAM MALIT 1ST DEFENDANT

JAMES KIPSANG CHIRCHIR 2ND DEFENDANT

SAMWEL MALAKWEN KIPYA 3RD DEFENDANT

JOHANA KIPROP BETT 4TH DEFENDANT

WILSON KIPLAGAT KIPRONO 5TH DEFENDANT

WILLIAM KIMUTAI BUSIENEI 6TH DEFENDANT

KIPLAGAT KATAM 7TH DEFENDANT

JOSEPH KIPROTICH TERGECH 8TH DEFENDANT

BARNABA KIMUTAI BIWOTT 9TH DEFENDANT

RULING

1. By a Notice of Motion dated 8th June 2023 the Defendants filed an application seeking an application for stay of execution pending appeal against the judgment of this court delivered on 18th May 2023. The grounds upon which the application is predicated are enumerated on the face of the Notice of Motion and replicated in the affidavit of William Malit, the 1st Defendant/Applicant herein sworn on 8th June 2023.
2. In his Supporting affidavit, the 1st Defendant deposes that the Defendants are dissatisfied with the judgment delivered by this court on 18th May, 2023 and they have preferred an appeal to the Court



of Appeal. He is of the view that the appeal raises weighty legal issues and that it has high chances of success. He adds that if the judgment is executed before the appeal is heard and determined, the Applicants will suffer loss and their appeal shall be rendered nugatory. That the Applicants have been residing on the suit land since early 2000 and they are now in danger of being evicted.

3. In opposing the application, Vincent Kipyego Kemboi, the administrator of the estate of Joseph Kipkemboi Martim filed a Replying Affidavit sworn on 15th June 2023 in which he avers that the Applicants have not met the conditions for stay of execution.
4. In particular, the Respondent avers that the Applicants ought to pay the sum of Kshs.331,000 being the Plaintiff's costs in respect of Kapsabet SPMCC No. 161 of 2007 as evidence of their commitment to obey court orders and that they should furnish security for costs.
5. He contends that the appeal does not have any chance of success as Kapsabet SPMCC No. 161 of 2007 raises an estoppel against the Applicants who never appealed against the said judgment.
6. He deposes that the Applicants have not quantified the loss they will suffer and thus are not deserving of the order of stay of execution.
7. The application was disposed of through written submissions and both parties filed their submissions which I have carefully considered.
8. The only issue for determination is whether a stay of execution should be granted.

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.

9. In order to grant the order for stay of execution the court must be satisfied that the above three conditions have been met.
10. 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.”



11. In the case of Michael Ntouthi Mitheu v Abraham Kivondo Musau (2021) eKLR the Court relied on the case of *Samvir Trustee Limited v Guardian Bank Limited (Nairobi (Milimani) HCCC No.795 of 1997* where Justice Warsame (as he then was) held that:-

“....It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss.. At the stage of the application for stay of execution pending appeal, the court must ensure the parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the right and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions”

12. I will now proceed to determine if the Applicant has met the conditions for stay set out in Order 42 Rule 6 of the Civil Procedure Rules.
13. On the question of substantial loss, it is not in dispute that the Applicants have been occupying the suit property for periods ranging from 17 to 19 years and their eviction before their appeal is heard and determined would occasion them substantial loss. Their appeal would thus be reduced to an academic exercise.
14. It is also evident that the application for stay of execution was filed without undue delay as judgment was delivered on 18th May 2023 and the application was filed on 8th June 2023 which is a period of less than a month.
15. Regarding the question of security for costs, the Applicants have not offered any security for the due performance of the decree. 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 observed as follows:
- ‘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.’
16. In his Replying Affidavit, the Respondent pointed out that the Applicants have not demonstrated their commitment to obey court orders by paying the costs of Kshs.331,000 in Kapsabet SPMCC No.161 of 2007. It was therefore submitted by learned counsel for the Respondents that the Applicants should pay the sum of Kshs.1,000,000/= being the costs in the lower court, this court and the Court of Appeal.
17. On the other hand, learned counsel for the Applicants seemed to suggest that there was no need for the Applicants to furnish security for costs as they are still staying on the suit property. As clearly stated in the case of Arun Sharma (supra) the purpose of a 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 the appeal. The Applicants therefore cannot get away by arguing that they are still staying on the land.



18. In the interest of justice and so as to ensure that the interests of both parties are taken care of, I grant a stay of execution pending appeal on condition that the Applicants deposit the sum of Kshs.350,000 in court within 30 days failing which the order for stay shall automatically lapse.

Dated, signed and delivered this 12th day of October 2023

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J.M ONYNAGO

JUDGE

In the presence of;

SUBPARA 1.

Dr. Chebii for the Plaintiff/Respondent

SUBPARA 2.

No appearance for the Defendants/Applicants

Court Assistant: A. Oniala

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