



Nyabande & another v Mumbo & another (Environment and Land Appeal E010 of 2023) [2023] KEELC 20663 (KLR) (9 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20663 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E010 OF 2023
SO OKONG'O, J
OCTOBER 9, 2023**

BETWEEN

GABRIEL OYIEKO NYABANDE 1ST APPELLANT

ROSE ANYANGO OMONDI 2ND APPELLANT

AND

CONSOLATA AOKO MUMBO 1ST RESPONDENT

NICHOLAS OLELA MUMBO 2ND RESPONDENT

RULING

1. At all material times, the appellants were the registered owners of all that parcel of land known as Kisumu/Wathorego/455 (hereinafter referred to as “the suit property”). Sometime in 2020, the appellants filed a suit against the respondents at the Senior Principal Magistrate’s Court at Winam namely, Winam SPMELC No 10 of 2020 (hereinafter referred to as “the lower court”). In the lower court, the appellants sought an order for the eviction of the respondents from the suit property claiming that they were trespassers thereon. The respondents filed a defence and a counter-claim against the appellants. The respondents sought among other reliefs, an order for specific performance of the agreements for sale of the suit property between the appellants and the 1st respondent dated 13th May 1984 and 6th July 2018 and an order compelling the appellants to transfer the suit property to the 1st respondent.
2. The lower court heard the appellants' suit and the respondents' counter-claim. In a judgment delivered on 15th August 2023, the lower court dismissed the appellants’ suit and entered judgment for the respondents for specific performance. The lower court ordered the appellants to transfer the suit property to the 1st respondent in default of which the executive officer of the court was authorised to execute all necessary documents on behalf of the appellants to facilitate the transfer of the suit property to the 1st respondent. The respondents were also awarded the costs of the suit and the counter-claim.



3. The appellants were dissatisfied with the said judgment of the lower court and filed this appeal on 17th August 2023. In their memorandum of appeal dated 16th August 2023, the appellants challenged the decision of the lower court on several grounds. Together with the memorandum of appeal, the appellants filed a Notice of Motion application dated 17th August 2023 seeking an order of a temporary stay of execution of the lower court judgment and decree pending the hearing and determination of their appeal by this court. This is the application before the court.
4. The application was brought on the grounds set out on the face thereof and on the supporting affidavit of the 1st appellant sworn on 17th August 2023. The appellants averred that the lower court ordered them to transfer the suit property which was ancestral land to the 1st respondent. The appellants averred that they would suffer substantial loss if the stay sought was not granted. The appellants averred that their appeal had a high chances of success. The appellants averred that it was in the interest of justice that they were allowed to exhaust all the options available in the judicial system to safeguard their interest in the suit property. The appellants averred that the application had been brought without unreasonable delay. The appellants averred that they were ready to expeditiously prepare the appeal for hearing.
5. The application was opposed by the respondents through a joint replying affidavit sworn on 4th September 2023. The respondents averred that the appellants' application was brought in bad faith and was only meant to delay and/or deprive the respondents of the fruits of the judgment entered in their favour. The respondents averred that the stay sought by the appellants was subject to the provision of security. The respondents averred that the appellants should be ordered to furnish security for the costs that were awarded to the respondents by the lower court. The respondents averred that the said security should be deposited in a joint bank account pending the hearing of the appeal. The respondents averred that the appellants' appeal had no prospects of success and that was the more reason why security for costs should be provided. The respondents averred that they had no objection to the orders sought being granted subject to the provision of security of costs by the appellants.
6. The application came up for hearing on 28th September 2023. The respondents' advocate informed the court that the respondents had no objection to the stay sought provided the appellants furnished security for costs. The respondents' advocate informed the court that the respondents had filed a bill of costs in the lower court for taxation in the sum of Kshs 558,520/-.
7. On their part, the appellants who appeared in person submitted through the 1st appellant that they were seeking a stay of execution of the lower court judgment. On the issue of security, the appellants informed the court that they had no money and as such were unable to raise any form of security. In a rejoinder, the respondents' advocate submitted that the grant of stay was subject to the furnishing of security. He submitted that the respondents would be prejudiced if the appellants did not provide security.
8. I have considered the appellants' application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the respondents in opposition to the application. The appellants' application should have been brought under Order 42 Rule 6 of the *Civil Procedure Rules*. Order 42 Rule 6(2) of the *Civil Procedure Rules* provides that:

“(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 ultimately be binding on him has been given by the applicant.”

9. In *Kenya Shell Limited v Karuga* (1982 – 1988) I KAR 1018 the court stated that:

“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 cornerstone 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.”

10. I am persuaded that the appellants’ application has met the threshold for granting an order for a stay of execution. The appellants are the registered proprietors of the suit property. The lower court has ordered them to transfer the property to the 1st respondent. If the decree of the lower court is executed and the suit property is transferred to the 1st respondent, there is no assurance that the 1st respondent would not transfer the property to a third party or that she will not encumber the same. If the property is transferred to a third party and the appellants succeed in their appeal, their success would be futile. The suit property which is the subject matter of the appeal would be beyond their reach. The respondents have not contested this fact. I am satisfied in the circumstances that the appellants would suffer substantial loss if the stay sought is not granted.

11. I am also satisfied that the application before the court was filed without delay. On the issue of security, the same is a condition for granting a stay. The respondents have submitted that the appellants be ordered to deposit a sum of Kshs 558,520/- in a joint interest-earning bank account as “security for costs”. The respondents submitted that they had filed a bill of costs in the lower court in the sum of Kshs 558,520/- for taxation and that their costs are likely to be assessed at that amount. I am of the view that security to be ordered by the court must relate to the decree the subject of the appeal because the security is for the “due performance of such decree”. As I mentioned earlier, the appellants were ordered to transfer the suit property to the 1st respondent. They were also condemned to pay the costs of the suit and the counter-claim. The decree therefore has two limbs to be executed against the appellants. The first limb is that requiring the transfer of the suit property to the 1st respondent while the second limb is for the payment of costs. The respondents’ costs are yet to be assessed. Having looked at the bill of costs filed by the respondents in the lower court, I am of the view that it would not be safe to base security for costs on the same. I wonder why the respondents have sought instruction fees for the main suit and the counter-claim against each appellant separately while the suit was filed by the appellants jointly and likewise the counter-claim by the respondents against the appellants. I am not persuaded that the said bill of costs would be taxed as drawn. To ensure that the suit property is available for transfer to the 1st respondent should the appellants lose the appeal, I will order that a restriction be placed against the title of the suit property and that the original title be deposited in court.



12. Due to the foregoing, I find merit in the appellants' application dated 17th August 2023. The application is allowed on the following terms;

1. Pending the hearing and determination of this appeal, the execution of the judgment and decree issued in Winam SPMEELCC No 10 of 2020, Gabriel Oyieko Nyabande & another v Consolata Aoko Mumbo & another is stayed.
2. The stay shall last for a period of 1 year from the date hereof or until the appeal is heard and determined whichever comes earlier unless extended by the court for good reason.
3. Pending the hearing and determination of the appeal, there shall be an inhibition inhibiting the registration of any other or further dealings with all that parcel of land known as Kisumu/Wathorego/455.
4. The appellants shall deposit in court as security the original title deed for all that parcel of land known as Kisumu/Wathorego/455 within 14 days from the date hereof.
5. The cost of the application shall be in the cause.

DELIVERED AND DATED AT KISUMU ON THIS 9TH DAY OF OCTOBER 2023

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

The Appellants in person

Mr. D.Odhiambo for the Respondents

Ms. J.Omondi-Court Assistant

