



**Ogato v Nyaguthii & another (Environment & Land Case  
625 of 2013) [2023] KEELC 20584 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20584 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 625 OF 2013  
A OMBWAYO, J  
OCTOBER 5, 2023**

**BETWEEN**

**JULIUS OGATO ..... PLAINTIFF**

**AND**

**JENIFFER NYAGUTHII ..... 1<sup>ST</sup> DEFENDANT**

**PAULINE RUTO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application before this court is dated 24<sup>th</sup> July 2023 whereas the applicant judgment debtor seeks an order of status quo currently obtaining on suit land to be maintained pending the hearing and determination of the appeal. The application is based on grounds that by a judgment delivered on 29<sup>th</sup> June 2023 the Court upheld the 2<sup>nd</sup> Defendant's title over that parcel of land known as Njoro/ Ngata Block 1/6182 which is a subdivision of Njoro/Ngata Block 1/6182 purchased by the Plaintiff and dismissed the Plaintiff's suit.
2. Aggrieved by the said judgment and decree, the Plaintiff has lodged a notice of appeal against the whole of the said decision. The Notice of Appeal and a letter bespeaking typed proceedings have been duly served upon all the parties. The Plaintiff is currently in occupation of the suit land which he has developed including by erecting a perimeter wall, constructing a pit latrine and a site house and by growing graveria trees and banana plants which have matured.
3. Following the delivery of judgment herein, prospective buyers have been visiting the suit property to view it with a view to purchasing it. The Plaintiff is genuinely apprehensive that following delivery of the judgment herein the 2<sup>nd</sup> Defendant may commence eviction proceedings against the plaintiff or dispose of the suit property to third parties any time from now if an order conserving the status quo is not made immediately.



4. If the plaintiff is evicted from the suit property or the suit property is disposed of to third parties, the intended appeal, which has high chances of success, will be rendered nugatory and the Plaintiff will suffer substantial loss. The Plaintiff is willing to give any security which the court may order for the due performance of the decree. The application has been filed without unreasonable delay.
5. In the supporting affidavit the applicant reiterates the grounds of the application. In the supplementary affidavit the applicant states that there has always been an order of status quo before judgment was delivered and that upon delivery of judgment, the order of status quo expired and therefore there is a likelihood of eviction. That he had been served with an eviction order. He is likely to suffer substantial loss if the order of status quo is not granted. In the replying affidavit the respondent states that he does not intend to sell his land and that the mere apprehension by the applicant does not warrant the grant of the order sought. The respondent states that the court should not allow the applicant to continue enjoying the benefits of his property having enjoyed the same for 10 years.
6. I have considered the application, affidavit and record and do find that the order granted is negative thus a dismissal of the suit and therefore incapable of being stayed pending appeal. Courts have time and again held that a negative order cannot be stayed thus: -
7. In *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR where the Learned Judges stated thus:
 

“what is there to be executed under the judgment, the subject of the intended appeal” The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.”
8. Similarly, in *Raymond M. Omboga v Austine Pyan Maranga Kisii* HCCA No 15 of 2010, Makhandia, J (as he then was) stated thus:
 

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise..”
9. On whether an order of status quo can be granted order 42 rule 6 provides:-
 

Stay in case of appeal [Order 42, rule 6.]

  - (1) 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.

- (2) 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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

10. The provisions of order 42 rule 6 (6) do not envisage an order of status quo pending appeal being issued by this court in an order emanating from the court but the same can be issued if the court is exercising appellate jurisdiction. The order and rule only provide for a temporary injunction to be granted by the court where it is acting in its appellate jurisdiction. This court can only grant an order of status quo or temporary injunction in its appellate jurisdiction. I do find the application without merit and the same is dismissed with costs.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 5<sup>TH</sup> DAY OF OCTOBER 2023.**

**A O OMBWAYO**

**JUDGE**

