



**Selim (Legal representative of the Estate of Kimutai A Selim) v Cheboi & 10 others
(Environment & Land Case 613 of 2013) [2023] KEELC 20623 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20623 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 613 OF 2013**

**A OMBWAYO, J
OCTOBER 5, 2023**

BETWEEN

**SELINA CHEPKOECH SELIM (LEGAL REPRESENTATIVE OF THE ESTATE OF
KIMUTAI A SELIM) PLAINTIFF**

AND

**EZEKIEL CHEBOI 1ST DEFENDANT
ROBERT 2ND DEFENDANT
ZEPHANIA KURGAT 3RD DEFENDANT
ALLAN OGUTA 4TH DEFENDANT
PIUS OKELLO ODERO 5TH DEFENDANT
SARAH MASOLO 6TH DEFENDANT
ANDREW 7TH DEFENDANT
HEZRON MAGAK OBUYA 8TH DEFENDANT
SAMUEL OSEE 9TH DEFENDANT
RICHARD KOSKEY 10TH DEFENDANT
KINARO NDUBI T/A EKEGOROSTATIONERIES SUPPLIES 11TH
DEFENDANT**

RULING

1. The defendants have come to this court with an application dated 26th July 2023 seeking orders that the honorable court be pleased to stay the execution of the judgment/decree herein delivered and dated the 29th June, 2023 and all the consequential orders thereto pending the hearing and determination of



- the intended appeal from the said judgment/decree herein to the Court of Appeal. Such other orders be made as is just and expedient in the interest of justice. Costs of this application abide in the intended appeal.
2. The application is based on grounds that the defendants/Applicants herein being aggrieved with the judgment/decree of the Honorable Court delivered on the 29th June, 2023 have lodged an appeal against the whole of the said judgment. Further the said intended appeal raises serious issues of law and has high chances of success hence ought to be heard on merit.
 3. That the defendants are genuinely apprehensive of the risk of being evicted from their respective residences which forms part of the suit property wherein they reside with their families and have constructed permanent houses and structures in line with the court's judgment delivered on 29th June 2023.
 4. According to the defendants, some of the applicants and or deponents were never parties to the suit and had no knowledge of the proceedings but still in terms of the judgment are in danger of being evicted. They intend to apply to be joined in the intended appeal as interested parties who were never heard in the suit but are affected adversely by the judgment.
 5. Defendants/Applicants believe that their appeal stands good chances of success and that the appeal will be rendered nugatory if stay of execution of the judgment/decree is not granted pending the intended appeal.
 6. Unless the orders sought herein are granted, the Plaintiff will shortly proceed to execute the said judgment subjecting the Respondent/Applicant herein to substantial and irreparable loss and damage and render the said intended appeal nugatory.
 7. According to the applicant, the respondent otherwise sued and obtained judgment as an administratrix of the estate of the late Kimutai Arap Selim. She stands to suffer no prejudice if the decree is stayed because she holds the decree in trust in respect of the estate which may not have been administered and her rights are merely beneficial.
 8. The decretal sum to be borne by the 11th defendant and payable to the plaintiff is a substantial and constitutes special circumstances under the monetary part of the decree may be stayed by the honorable court. The instant application has been brought with alacrity and without undue delay. In the interest of justice this application ought to be allowed and the honorable court has the jurisdiction and discretion to grant the prayers sought hereby.
 9. The application is supported by the affidavit of Kinaro Ndubi who states that the appeal raises serious weighty and triable issues of both fact and law. The appeal has high chances of success. The applicant risk being evicted and paying Kshs 2 million.
 10. He depones that the judgment affects many people some are not parties. the applicants lament that the appeal will be rendered nugatory if stay is not granted. The parties have developed the property massively and are likely to suffer substantial loss if they are evicted. Their houses are irreplaceable and therefore they are likely to suffer substantial loss. Whereas the plaintiff will suffer no substantial loss if stay is granted and the appeal does not succeed. The applicant is willing and ready to deposit security as the court shall order. The application is supported by further affidavit of the judgment debtor and interested persons who were not parties to the suit.
 11. In the replying affidavit of Selina Chepkoech Selim, she states that the applicant has not adequately or sufficiently demonstrated that he will suffer substantial loss in the event that stay is not granted and



- they succeed on appeal. She states that the judgment debtor can compensate the applicant in case they succeed on appeal having failed to obtain an order of stay of execution pending appeal.
12. The respondent states that the applicant should deposit security for costs of Kshs.6,220,000 being the bill of costs and 2,000,000 being damages for trespass. The respondent argues that the applicant should deposit Kshs208,220,000 as security.
 13. In the supplementary affidavit Kinaro Ndubi states that the replying affidavit was filed out of time without leave of the court. He states that requiring the applicants to deposit Kshs208,220,000 as security for costs will be denying them access to justice and will defeat the proposed appeal.
 14. The applicants submit that the application is merited as they have demonstrated that if stay is not granted and they succeed on appeal they will suffer substantial loss and that the appeal will be rendered nugatory because they are in possession of the suit property and are likely to be evicted from the suit property when they live with their families.
 15. The applicants argue that another aspect of substantial loss is the fact that there are very many families that were not party to the suit but are affected by the judgment and are likely to be evicted some intended to the suit. The applicants argue that recovering the decretal amount from the respondent will be a herculean task as the same would have been shared among the beneficiaries. The applicants argue that the right of appeal is a constitutional right and that the applicants should be allowed to enjoy this right.
 16. Moreover, the applicants argue that the application was filed timeously. Judgment was made on 29th June 2023, Notice of Appeal was filed on 4th July 2023 and the application was lodged on 29th July 2023. The applicants argue that the application was filed timeously. The applicant argue that they are ready to furnish security as will be ordered by the court. The respondent on their part submit that the applicants have not sufficiently demonstrated that they are likely to suffer substantial loss if stay orders are not granted and they succeed on appeal and that they are trespassers. No loss or prejudice has been demonstrated on security the respondent submit that the applicants should deposit security of Kshs2,000,000 being general damages for trespass, Kshs200,000,000 being the value of the land and Kshs6,220,000 being costs of litigation. I have considered the application, affidavit on record and rival submissions and do find that the applicants have come to court timeously that is within one month of delivery of judgment, filing of the Notice of Appeal and request for proceedings.

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.

17. This court finds that the application has been made without unreasonable delay.

18. On substantial loss this court has perused the supporting affidavit and it is not disputable that the applicants have made massive developments on the suit property. The applicants live on the suit property with their families and it is evident that evicting the applicants and the persons who were not part to the suit will cause an economic hardship on them and the same can be described as substantial loss.

19. One of the locus classicus legal authority on the issue of substantial loss is the case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the *Shell case* are especially pertinent. These are that:

- “ 1.
- 2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
- 3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
- 4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”

20. The decision of Platt Ag JA, in the *Shell case* set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Platt Ag JA (as he then was) stated *inter alia* that:

“The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages... It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the *Civil Procedure Rules* was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts... (emphasis added)”



21. The learned Judge continued to observe 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 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.” (Emphasis added)

22. Earlier on, Hancox JA in his ruling observed that

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would,... render the appeal nugatory. This is shown by the following passage of Cotton L J in *Wilson v Church* (No 2) (1879) 12ChD 454 at page 458 where he said:-

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.”

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

23. The court finds that the applicant has satisfied the principle that if stay is not granted, the applicant will suffer substantial loss because they will be evicted.

24. On whether the appeal is arguable, I do find that this is not a ground envisaged under Order 42 rule 3(1). Moreover, this court cannot sit on appeal on its own decision.

25. On security, I do find that there is a judgment of Kshs 2,000,000 against the 11th defendant being exemplary, and general damages for trespass. Moreover the court issued an order of eviction of the applicants from the suit property. The court is of the view that the most sufficient security would be to order the applicants to deposit all titles to the suit property which are in their possession in court within the next 90 days and a cash deposit of Kshs 5,000,000/= as security for costs or in the alternative, to deposit a security of the value of Ksh 5, 000,000 failure of which the application stands dismissed. Costs of the application to be in the appeal.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 5TH DAY OF OCTOBER, 2023.

A O OMBWAYO

JUDGE

