



Shiramba & 27 others v County Government of Uasin Gishu & 3 others (Environment & Land Petition 14 of 2018) [2023] KEELC 21383 (KLR) (9 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21383 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND PETITION 14 OF 2018**

EO OBAGA, J

NOVEMBER 9, 2023

**IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 10, 20, 22, 27,
40, 46, 59, 67 AND 70 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE LANDS ACT, 2012

AND

**IN THE MATTER OF UNLAWFUL ACQUISITION OF
PRIVATE LAND AT KAPSOYA ESTATE - ELDORET**

BETWEEN

**FLORENCE CHIMOLI SHIRAMBA 1ST PETITIONER
JACKSON KIPRUTO NGETICH 2ND PETITIONER
ROBERT W. OMBAYO 3RD PETITIONER
RAHMA CHEPKORIR 4TH PETITIONER
JOSEPH NDUNGU KANYOKO 5TH PETITIONER
KIPROTICH AMDANY 6TH PETITIONER
BEATRICE M. GACHUBE 7TH PETITIONER
JULIUS K. KOLIL 8TH PETITIONER
BENSON MILIMU 9TH PETITIONER
CHARLES KIBUTHU 10TH PETITIONER
ESTHER MWIHAKI MWANGI 11TH PETITIONER
BEATRICE J. SAWE 12TH PETITIONER**



MUSA KIPCHUMBA KIYAI	13 TH PETITIONER
EUNICE CHEPKORIR LESAN	14 TH PETITIONER
JOSEPH TALLAM	15 TH PETITIONER
LUKAS K. CHEPTOO	16 TH PETITIONER
BONIFACE K. NDUNGU	17 TH PETITIONER
MARY NJERI	18 TH PETITIONER
DAVID KANYERIA	19 TH PETITIONER
PETERSON MWANGI	20 TH PETITIONER
ESTHER MWANGI	21 ST PETITIONER
BARNABAS K. KIBOS	22 ND PETITIONER
PAUL NJOROGE	23 RD PETITIONER
GRACE WANJIRU	24 TH PETITIONER
WAMBUGU IRUMBI	25 TH PETITIONER
WASHINGTON M. KARIUKI	26 TH PETITIONER
FRANCIS TARAR	27 TH PETITIONER
PAUL KOECH KIPSUM	28 TH PETITIONER

AND

COUNTY GOVERNMENT OF UASIN GISHU	1 ST RESPONDENT
NATIONAL LAND COMMISSION	2 ND RESPONDENT
CHIEF LAND REGISTRAR, UASIN GISHU COUNTY	3 RD RESPONDENT
ATTORNEY GENERAL	4 TH RESPONDENT

RULING

1. This is a ruling of a notice of motion dated 12.6.2023 in which the 1st Respondent/Applicant seeks stay of execution pending appeal. The Applicant contends that it has appealed against the judgment of this court which was delivered on 19.4.2023.
2. The Applicant argues that if the stay is not granted, it will suffer substantial loss and the appeal will be rendered nugatory. The Applicant's fear is that if execution is carried out and the appeal succeeds, the Petitioners/Applicant will not be able to refund the decretal sum as their source of income or even whereabouts is not known.
3. The Respondents opposed the Applicant's application based on grounds of opposition dated 12.7.2023. The Respondents contend that the Applicant's application is misconceived, untenable in law, devoid of merit and amounts to an abuse of the process of the court. They also argue that the applicant has failed to meet the threshold under order 42 rule 6 of the *Civil Procedure Rules*.



4. The Respondents also contend that stay of execution cannot be granted in a monetary decree and that a successful litigant should be let to enjoy the fruits of his judgment. They also state that in the event the court is inclined to grant stay, it should be on condition that half of the decretal sum be released to the Respondents and the other half be deposited in a joint interest earning account in the name of the Advocates for the parties.
5. The application was canvassed by way of written submissions. The Applicant filed submissions on 26/9/2023. The Respondent's filed their submissions on 22/9/2023. I have considered the Applicant's application as well as the opposition to the same by the Respondents. I have also considered the submissions filed by the parties. The only issues for determination are whether the Applicants has met the threshold for grant of stay of execution pending appeal. The other issue is on which order should be made on costs.
6. There are conditions which fetter the discretion of this court when it comes to an application for stay pending appeal. The application has to be brought without unreasonable delay. The Applicant has to demonstrate that if stay is not granted, the appeal will be rendered nugatory. There has to be security for costs as may ultimately be binding upon the Applicant on the decree.
7. In the instant case, judgment was delivered on 19.4.2023. There was a stay of execution granted for 30 days on delivery of judgment. This application was filed on 12.6.2023. The application was filed slightly below one month after the expiry of the initial 30 days stay which had been granted. I therefore find that the application was brought without unreasonable delay.
8. On whether the Applicant will suffer substantial loss, I notice that the 15 successful Respondents were given a total of Kshs 30,000,000/= in compensation. I also note that they were ejected from their plots. Their whereabouts or source of income is not known. If the decretal sum was to be released to them, it will be difficult to trace them for refund incase the appeal succeeds.
9. In the case of *National Industrial Credit Bank Ltd v Aguias Francis Wasike & another* (2006) eKLR, the Court of Appeal stated as follows:-

“This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegation that an appeal would be render nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya.

The 1st Respondent swore the replying affidavit in this matter and in paragraph 1 thereof, he swore that he is the Chief Executive Officer of and the Principal shareholder in the second Respondent. He did not disclose the value of his share-holding in the 2nd Respondent; nor did he say if he earns a salary and if so how much. In paragraph 11 of the replying affidavit, the 1st Respondent set out the contracts in which the 2nd Respondent was engaged in but the values of those contracts were not disclosed. We repeat that the decretal sum was awarded to the 1st Respondent, not the 2nd Respondent and all that the 2nd respondent is entitled to from the judgement are the costs of the Applicant's dismissed suit. The sum awarded to the 1st Respondent was on a counter-claim. On the material before us, the means or resources of the 1st Respondent remain wholly unknown and in those circumstances, we agree with Mr.



Laibuta that if the decretal sum was paid over to the 1st or even to the 2nd Respondents, the two might not be able to repay it back and in that case, if the Applicant's intended appeal were to succeed, that success would be rendered nugatory."

10. The Applicant has expressed genuine fear that if the decretal sum is paid to the Respondents, it will be difficult to get a refund. The moment this fear was expressed, it was incumbent upon the Respondents to demonstrate that they are capable of refunding the decretal sum if the appeal succeeds. They did not do this. I therefore find that the Applicant is likely to suffer substantial loss if stay is not granted.
11. I therefore grant stay of execution on condition that the Applicant deposits a sum of Kshs 2,000,000/= as security for costs in court within 14 days failing which the stay orders shall lapse. The costs of this application shall abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 9TH DAY OF NOVEMBER, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

M/s Kirimi for Mr. Mwangi fro 1st Respondent.

Court Assistant –Laban

E. O. OBAGA

JUDGE

9th NOVEMBER, 2023

