



**Saka & 2 others v Otieno & 2 others (Environment & Land Case
25 of 2021) [2023] KEELC 21184 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21184 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 25 OF 2021**

AY KOROSS, J

NOVEMBER 2, 2023

BETWEEN

JOAN LUDIA SAKA 1ST PLAINTIFF

DENNIS OCHIENG SAKA 2ND PLAINTIFF

JASSON WILFRED MUMBO SAKA 3RD PLAINTIFF

AND

PAMELA GETRUDE OTIENO 1ST DEFENDANT

HABAKUK ONYANGO ABOGNO 2ND DEFENDANT

**ESTATE OF ABUOR NYASEME ALIAS AGER NYASEME
(DECEASED) 3RD DEFENDANT**

RULING

2nd Defendant's Case

1. The notice of motion dated 2/05/2023 that is the subject for determination is brought within the provisions of Sections 1A, 1B, 3, 3A, 63 (c) and 79G of the *Civil Procedure Act* and Order 42 Rule 6 (1) of the *Civil Procedure Rules*. The 2nd defendant has sought the following reliefs;
 - a. Spent.
 - b. Spent.
 - c. That there be a stay of execution of the judgment and decree of this honourable court pending the hearing and final determination of the appeal by the 2nd defendant to the court of appeal.
 - d. That costs of this application be provided.



2. The motion is premised on the grounds particularised on its face and on the annexed affidavit of the 2nd defendant Habbakuk Onyango Abogno sworn on even date.
3. It was his case he was aggrieved by the decision of this court and had filed a notice of appeal. The appeal would be rendered nugatory. He would be exposed to unwarranted substantial loss, damage and inconvenience if the plaintiffs execute the judgment before the hearing and determination of the appeal as he is in occupation of East Gem/Ramula/206; ('the suit land').
4. Further, he risked eviction if the suit land was registered in the plaintiffs' name. He had filed the motion without unreasonable delay, he had chances of success and it would only be fair and just for him to be given the opportunity to exhaust his constitutional right to appeal.

Plaintiffs' case

5. In opposition, the plaintiffs' counsel, Ms. Ruth Otieno, swore a replying affidavit deposed on 17/05/2023. It was counsel's position the motion was incompetent, frivolous and misconceived and thus the orders sought could not be granted, the 2nd defendant had not tendered a memorandum of appeal to demonstrate the appeal had high chances of success, the plaintiffs were in occupation hence the 2nd defendant would not suffer loss and the 2nd defendant was the one who was interfering with the plaintiffs' quiet possession of the suit land. She sought for costs.

Parties' submissions

6. Despite being given stringent timelines by this court, none of the parties filed their respective written submissions. If at all they will be filed, this court will consider them as having been filed out of time and will disregard them.

Analysis And Determination

7. I have carefully considered the 2nd defendant's motion, affidavits and annexures tendered and the only issue falling for determination is whether the 2nd defendant has demonstrated he should be granted stay of execution pending appeal.
8. My invitation to intervene on behalf of the 2nd defendant has been invoked by the legal framework for stay of execution pending appeal which is founded in Order 42 Rule 6 of the *Civil Procedure Rules* which provides as follows: -

“(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.

1. 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 giving interpretation of this proviso, the Learned Judges of the Court of Appeal in the case of *Halai & another v Thornton & Turpin (1963) Ltd* [1990] stated as follows: -

“Application for stay of execution is made to this court under rule 5(2)(b) of the *Court of Appeal Rules* and this court’s discretion under that rule is unfettered but the Superior Court’s discretion is fettered by three conditions. Firstly, the Applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the Applicant must furnish security. The application must, of course, be made without unreasonable delay.” Emphasis added.
10. Being a court against whose decision an appeal had been preferred, its judicious discretion is essentially limited to such conditions as substantial loss, security and unreasonable delay. However, at times the court is called upon to give effect to the overriding objective of the *Civil Procedure Act* as set out in its Sections 1A and 1B thereof.
11. 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 party. The court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrives within the corridors of the court. The purpose of stay of execution is to preserve the substratum of the case.
12. The import of stay pending appeal was well enunciated in the decision of G V Odunga J (as he then was) in *Michael Ntouthi Mithen v Abraham Kivondo Musau* [2021] eKLR where the Learned Judge expressed himself as follows; -

“What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice.”
13. On application of these principles of law, the plaintiffs have not rebutted the 2nd defendant’s averment that the motion was filed timeously. No doubt, that is the position. Judgment was delivered on 20/04/2023 and the instant motion was filed close to two weeks thereafter. There is no evidence the decree of this court has been executed.
14. Substantial loss is the cornerstone upon which an application for stay of execution can be granted. In the instant case, the 2nd defendant stated that he will suffer substantial loss as the suit land, which is in his name, will be transferred to the plaintiffs. He is apprehensive the plaintiffs’ may evict him. It appears there is some interference subsisting on the suit property. Accordingly, I am satisfied the 2nd defendant is deserving of stay pending appeal. See *Samvir Trustee Limited vs. Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997.



15. On security, the 2nd defendant has left it to the court's judicious discretion. In assessing security, the court has to balance between adequately protecting the plaintiffs who were the successful party vis a vis the 2nd defendant who should not be disadvantaged. Put in another way, it should be fair and reasonable. See *Ndubiu Gitabi and Another v Anna Wambui Warugongo* [1988] 2 KAR which was cited with approval in *Elijah Njagi & another v Yvonne Ndunge* [2021] eKLR where the court held: -

“The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required.”

16. The 2nd defendant has in good faith and in compliance with the law, willingly submitted that he is inclined to furnish security. In exercise of its discretion and having considered the circumstances of the case, a deposit of kshs. 200,000/- as security to be paid in a joint interest earning account of parties' counsels on record should suffice.

17. Accordingly, I find that the motion dated 2/05/2023 is merited and hereby allow it. Costs shall abide the outcome of the appeal. I hereby issue the following disposal orders: -

- a. Stay of the execution of the judgment/decreed herein is granted pending hearing and determination of the 2nd defendant's intended appeal.
- b. The 2nd defendant shall within 21 days from the date of delivery of this ruling, deposit security of kshs.200,000/= in a joint interest earning account of both parties' counsel. In default, the stay orders shall automatically lapse.
- c. Costs shall be in the course.

18. It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 2ND DAY OF NOVEMBER 2023.

HON. A. Y. KOROSS

JUDGE

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

M/s Otieno for the plaintiffs

N/A for the defendants

