



REPUBLIC OF KENYA



**Wasike alias Dorika Indombi Wasike v Khisa & 5 others (Environment & Land
Case 33 of 2014) [2023] KEELC 21250 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21250 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 33 OF 2014
EC CHERONO, J
NOVEMBER 2, 2023**

BETWEEN

DORCAS INDOMBI WASIKE ALIAS DORIKA INDOMBI WASIKE PLAINTIFF

AND

**BENSON WAMALWA KHISA 1ST DEFENDANT
ERNEST MUTUNGI KHISA 2ND DEFENDANT
JULIUS ASHIKANGA ALUTA 3RD DEFENDANT
JOHN NALIANYA SANYA 4TH DEFENDANT
JOHN NYONGESA NASIUMBA 5TH DEFENDANT
ABDALLA MUSA ABDI 6TH DEFENDANT**

RULING

1. The applicants have moved this Honourable court vide a Notice of Motion application under Certificate of Urgency dated 11th August, 2023 seeking the following orders:
 1. (Spent)
 2. That the firm of Anya Kalwa & Co. Advocates be granted leave to come on record for the defendants/Applicants after judgment.
 3. That there be a stay of execution of the Judgment herein pending the hearing of this application inter-parties.
 4. That the Notice of Appeal be deemed duly filed as per the copy attached herewith.
 5. That alternatively time be extended for the filing of the Notice of Appeal.



6. That the plaintiff/Applicants be issued with certified copies of the proceedings for appeal purposes.
 7. That there be a stay of execution on of the judgment herein pending the hearing and determination of the lodged/intended appeal.
 8. That the costs of this application be in the cause.
2. The application is based on grounds apparent on the face of the said application supported by an affidavit sworn on 11th August, 2023 by Benson Wamalwa Khisa and a supplementary sworn by the said Benson Wamalwa Khisa on 18/9/2023. The two affidavits are supported by numerous annexures.
 3. By way of a response, the plaintiff/respondent filed a replying affidavit sworn 7th September 32023 opposing the said application. The replying affidavit also contains numerous annexures in further opposition to the said application.
 4. When the said application came up under certificate of urgency on 14/8/2023, the duty Judge directed that the same be served upon the respondent who was granted leave to file and serve her response within 14 days upon service. The duty Judge also directed the said application be canvasses by written submissions.

Appellants'applicants' Summary Of Facts

5. In his supporting affidavit sworn on 11th August 2023, the applicant deposed that they were aggrieved by the judgment issued herein on 25/07/2023 and wish to prefer an appeal to the Court of Appeal. The deponent further stated that they had requested certified copies of proceedings and await the same and that their counsel, upon coming on record shall follow up the same.
6. The applicant also stated that they have a arguable appeal and should not be denied their undoubted right Of appeal. He further deposed that land is unique and getting an equivalent is impossible and that there is risk of the plaintiff/respondent whose financial capacity is unknown disposing of the suit land thereby rendering the intended appeal nugatory. In a supplementary affidavit sworn on 18/9/2023, the applicant stated that their hitherto firm of Advocates M/S Gicheru & Company Advocates has been served/notified of this application and that this honourable court has jurisdiction to grant the orders sought. That the delay to file Notice of appeal in time is caused in seeking a new counsel to acquaint themselves before formally acting in the matter.

Respondent'ssummary Of Facts

7. While opposing the application, the respondent in her replying affidavit sworn on 7th September 2023 stated that although Benson Wamalwa Khisa was registered as the owner of the 5.3 acres in question, he does not presently own any portion thereof since he sold the entire lot to his co-defendants and therefore his plea for stay is devoid of any merit. She stated that the judgment of 25th July 2023 was in line with the judgment of the Court of Appeal of 12th November 2010 in Eldoret Civil Appeal No. 87 of 2004 and an invite that this Honourable Court to second guess the decision of the Court of Appeal and that this Honourable Court has no jurisdiction to do so.
8. The respondent further stated that the decision by the Court of Appeal in essence addressed the injustice visited upon her and her family by the High Court when it took away the portion of land measuring 5.3 acres that belonged to the family of her husband, the late Peter Wasike which they owned since the early 1960s upon allocation by the Settlement Fund Trustees. She said that her family had



built the homestead thereat and even interred the remains of Peter Wasike there but that judgment notwithstanding, , the 1st defendant caused her family home to be destroyed and evicted therefrom.

9. She also stated that the present application is yet another endeavour by the 1st applicant to delay her from enjoying the fruits of her judgment in this cause

Defendants'/Applicants' Submissions.

10. The defendants through the Firm of Anya Kalwa & Company Advocates submitted on the following three issues;
- i. Whether time may be enlarged to file the appeal
 - ii. Whether execution may be stayed pending determination of the appeal.
 - iii. Costs and
 - iv. Conclusion
11. As regards the first issue, the learned counsel submitted that the defendant/applicants filed a Notice of Appeal on 11/08/2023 and wish that time is enlarged to admit/lodge the said Notice of Appeal. Counsel also submitted that the guiding principles in exercise of its discretion for extension of time was laid down by the supreme court in Nicholas Kiptoo Arap Salat V IEBC & 7 Others (2014)Eklr. She also cited the case of Leo Sila Mutiso v Hellen Wangari Mwangi(1995) 2EA 231
12. On the second issue, the learned counsel submitted that the impugned judgment among other orders directed that the defendants/applicants give vacant possession and transfer title to the plaintiff/respondent. She submitted that if the impugned judgment is executed, there is the risk of the plaintiff/respondent disposing of the suit property to the detriment and substantial/irreparable loss of the defendants/applicants.
13. The learned counsel further submitted that the financial capacity/status of the plaintiff/respondent is unknown and that there is therefore the further risk that following disposal of the suit property the successful appeal shall be rendered nugatory.
14. She relied on the following cases; Mukuma v Abuoga (1988) KLR 645; Consolidated Marine v Nampijja & Another, Civil App. No. 93 of 1989(Nairobi); Butt v Rent Restriction Tribunal (1982) KLR 417.
15. As records costs, the learned counsel submitted that costs follow the event and urged the court to grant the applicant costs.
16. In conclusion, counsel for the applicant submitted that the applicant has demonstrated adequate grounds for this honourable court to allow the application.

The Plaintiff/Respondent's Submissions

17. The plaintiff/respondent through the Firm of Amolo and Kibanya Advocates as per the prayers sought in the application dated 11th August 2023.
18. On the first prayer for the firm of Anya Kalwa & Company Advocates to come on record for the defendants/Applicants in place of the hitherto firm of Gicheru & Co. Advocates, the learned counsel submitted that the plaintiff has no objection provided the defendants can demonstrate that they have complied with the applicable law, in particular Order 9 Rule 9 CPR.



19. As regards the Notice of Appeal to be deemed to have been duly filed, the learned counsel opposed on grounds that it offends the law and that the honourable court cannot issue such an order as it is not open to the court to issue an order that is not in accordance with the terms of a written law. He referred to Rule 75 of the Court of Appeal Rules which prescribes what a party to a suit who is dissatisfied with the judgment of the Honourable court will do as concerns a Notice of Appeal. He further averred that the prayer to have the notice of appeal deemed as duly filed is also opposed because it is not as has been contemplated by section 7 of the [Appellate Jurisdiction Act](#)
20. Concerning the prayer for issuance with certified copies of proceedings for purposes of an appeal and while opposing the prayer, the learned counsel submitted that the application seeks an order that is already addressed by the proviso to Rule 82(1) read with Rule 82(2) of the Court of Appeal Rules and that it is not for the Honourable court to come to the aid of an indolent litigant.
21. On whether a stay of execution should be granted, the learned counsel submitted that the facts of the case are clear cut to the effect that the plaintiff/respondent is aged eighty one years and that the Honourable court needs to have the grace to allow her to enjoy the fruits of her judgment.
22. Secondly, Counsel also submitted that when the 1st defendant/applicant sued the plaintiff/respondent in KITALE HCCC NO. 7 OF 1997(Original Eldoret HCCC NO. 27 OF 1996), Benson Wamalwa Khisa & Another V Dorcas Indombi Wasike. The plaintiff/respondent was 54 years old and widowed. He submitted that she was by reason of the judgment that was upset by the Court of Appeal in Civil Appeal NO. 87 of 2004 Dorcas Indombi Wasike V Benson Wamalwa Khisa & Another evicted from her home and property were destroyed and she had to build another home elsewhere.
23. The learned Counsel submitted that now, there exists a final pronouncement by the Court of Appeal reversing the decision of the superior Court which erroneously and on the basis of a non-existent trust gave Benson Wamalwa Khisa 5.3 acres excised from L.R No. Bungoma/Naitiri/83. He averred that the Court of Appeal's decision was never challenged on appeal to the Supreme Court under Section 14(4) and (5) of the [Supreme Court Act](#) No.7 of 2011.
24. It is further submitted that the judgment of the Court of Appeal could not be executed as contemplated by section 4 of the [Appellate Jurisdiction Act](#) Cap. 9 Laws of Kenya because the 1st defendant/applicant had already executed the impugned judgment, excised the 5.3 acres portion from L.R No. Bungoma/Naitiri/119 and selling off portions thereof to the Defendants/Applicants. He submitted that the effect of the Court of Appeal's decision was to take Dorcas Indombi Wasike and Benson Wamalwa Khisa back to the position prior to the decision in Kitale HCCC NO.7 of 1997
25. In conclusion, the learned Counsel submitted that the Notice of Motion application dated 11/08/2023 is devoid of any merit and doomed to fail and that the same should be dismissed with costs.

Legal Analysis And Decision

26. I have considered the Notice of Motion application dated 11/08/2023, the supporting and supplementary affidavits, the replying affidavit, the annexures to the said affidavits, the rival submissions and the relevant law. The applicants are seeking a substantive order(s) for stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure which provide 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.

- (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 undue 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”

27. It is trite that before an order for stay of execution or proceedings is granted, an applicant must establish the triple conditions, to wit;

- i. Substantial loss may result to the applicant unless the order is made;
- ii. The application has been made without undue delay; and
- iii. Such security as the court orders for the due performance of such decree/order as may ultimately be binding on him has been given.

28. The Superior Courts have pronounced themselves on numerous occasions on the guiding principles for the grant of stay of execution or proceedings pending appeal. In case of first appeal from the subordinate courts and Tribunals to the High Court and Court of Courts of concurrent jurisdiction/ Equal status, the applicable law is Order 42 Rule 6 of the Civil Procedure Rules while second appeals from the Superior Courts and Courts of concurrent jurisdiction/equal status to the Court of Appeal is provided for under Rule 5 as read with Rule 75 and 82 of the Court of Appeal Rules.

29. On the issue of substantial loss, the Court in *Silverstein v Chesoni*(2002)1KLR 867 held thus;

“The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such a loss would render the appeal nugatory.”

30. Again in the case of *Machira T/A Machira & Co. Advocates v East African Standard* (No.2) (2002)2KLR 63, Kuloba J (as he then was) held;

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars.. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay.”

31. Further, in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR, Gikonyo J (as he then was) held;

“No doubt, in law, the fact that the process of execution has been put in motion , or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the



case here, does not in itself amount to substantial loss under order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

32. In the instant case, the applicants have stated that there is the risk of the plaintiff/respondent whose financial capacity is unknown disposing off the suit property and that land is unique and getting an equivalent is impossible. The applicants’ apprehension that the respondent may dispose off the suit property is unfounded and secondly, they have not provided the unique features/details of the suit property which they cannot obtain from any other property. In my view, the applicants have not established any substantial loss they stand to suffer unless the stay order is granted.
33. It is not in dispute that the applicants were aggrieved by the judgment/decree of this Honourable Court delivered on 25th July, 2023 which they now wish to prefer an appeal to the Court of Appeal.
34. Rule 75 of the Court of Appeal Rules provides as follows;
 1. Any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the Registrar of the Superior Court.
 2. Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”
35. From the above provisions of the law, it is clear that if the applicants desired to prefer an appeal to the Court of Appeal, they ought to have done so within fourteen days from 25/07/2023 which lapsed on 8th August, 2023. I agree with Counsel for the Respondent Mr. Amolo that this Court is bereft of jurisdiction to determine an application for leave to file notice of Appeal out of time as that is a preserve of the Court of Appeal under the Court of Appeal Rules, Even, assuming that this Court has power to grant leave to the applicant to file notice of appeal out time, no sufficient cause has been shown/given for the delay which in my view is inordinate. The applicants have not also given security for the due performance as may be ultimately be binding on them.
36. Suffice to say that where a party seeks to stay execution of a judgment/decree/order, the court must balance between the rights of a successful litigant to enjoy the fruits of his/her judgment which has crystallized and the future right of the appellant as a successful party. Before granting a stay of execution of a judgment/decree/order, the applicant must demonstrate to the satisfaction of the court any factors that may negate or render the appeal nugatory as a successful party. In my respective view, the applicants have not shown any of this factors.
37. Taking all the aforementioned matters into account, I find that the Notice of Motion application dated 11th August, 2023 is devoid of merit and the same is hereby dismissed with costs.

READ, DATED DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 2ND NOVEMBER, 2023.

HON. E.C CHERONO

ELC JUDGE

In the presence of;

1.Applicants/Advocate-absent



2.Respondent/Advocate-absent

3.Okwaro C/A-present.

