



**Edward v Mugambi (Environment and Land Appeal
E128 of 2021) [2022] KEELC 3816 (KLR) (4 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3816 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E128 OF 2021**

**CK NZILI, J
MAY 4, 2022**

BETWEEN

ROBERT KIRIMI EDWARD APPELLANT

AND

ANDREW MBUTHIA MUGAMBI RESPONDENT

RULING

A. The application

1. By an application dated December 23, 2021, the court is asked to issue a stay of execution of the lower court decree, set aside the order made on November 17, 2021, order for the reopening of the case, and direct that the matter be heard afresh. The application is supported by affidavit sworn on the even date by Robert Kirimi Edward. The grounds upon which the application is based are: that his erstwhile advocates on record failed to notify him of the progress of the case only for it to be determined in absentia and was condemned to pay cost; the application for setting aside the decree and seeking for an opportunity to defend the suit was also dismissed in his absence; the court failed to determine his application on merits but instead delved into both the application and the main suit at a go; justice was not served on him; he is likely to suffer substantial loss; and was is in the interest of justice to allow the application.

B. Grounds of opposition

2. The application was opposed through a replying affidavit sworn by Andrew Mbuthia Mugambi the respondent on June 25, 2022.
3. The respondent's view was that, the trial court had lawfully given the applicant all the opportunity to prepare, attend and prosecute his case but unfortunately, he did not exercise his rights as required on time or at all, hence the court had no option but to dismiss the suit for non-prosecution.



4. Secondly, the respondent stated it took the applicant one year and eight months since the suit was dismissed to make an application for setting aside which by itself, was inordinately long period of time.
5. Thirdly, it is averred the applicant took six months to prosecute the aforesaid application till it was dismissed on November 10, 2021.
6. Fourthly, the costs were assessed, notice to pay served and thereafter a notice to show cause was served on the March 25, 2021 yet the applicant failed to show up. Lastly, the respondent averred the applicant land was distinct from the respondent's land as per attached gazette notice, chief's letter and title deed, marked as AMM 4-7 respectively. Instead, the applicant resorted to taking away or claiming the respondents land due to land acquisition process that was underway, in order to be compensated by the Government of Kenya.
7. Sixthly, the respondent averred the applicant had Parcel No. Abothuguchi L-Kaongo/1388, which he was occupying and utilizing. It was the respondent's view therefore; that the applicant has misrepresented facts and therefore not met the threshold for the grant of the orders sought.

C. Threshold of stay

8. For an applicant to be entitled to stay of execution, Order 42 Rule 6 Civil Procedure Rules requires such a party to demonstrate substantial loss likely to be incurred if the application is not allowed; that there has been no inordinate delay in seeking for the orders sought and lastly, that there has been an offer for security for the due performance of the decree, should the appeal fail.
9. Courts have also held that, over and above the three parameters provided under Order 42 Rule 6 Civil Procedure Rules, the court should also consider whether it was in the interest of justice to grant the orders sought in line with Sections 1A, 1B & 3A of the Civil Procedure Act and Article 159 of the Constitution.
10. In this matter, the appeal before the court is one dated December 17, 2021. On the face of it, the appellant does not specify whether he is appealing against a decree or an order and in particular, the date of the decree or order appealed against.
11. Be that as it may, substantial loss has been defined as what the applicant was likely to suffer over and above the ordinary consequence of executing a decree since such a process is lawful.
12. In the instant case, the applicant says he was condemned unheard and his application for setting aside or varying the decree was also dismissed without being considered on merits. Further, he says the trial court dismissed the application without his knowledge and only came to know about the outcome later during the execution for costs.
13. The applicant therefore says he filed this application for stay late since he was not aware of the ruling date.
14. On the other hand, the respondent has refuted the allegations by the respondent and insists that there was enough notice for both the hearing to his former advocates on record and thereafter about the costs leading to a warrant of arrest being issued against him as per the proceedings attached to the replying affidavit. Unfortunately, other than the ruling issued on November 17, 2021, the applicant has not attached a certified copy of the decree or order appealed against. He has therefore not demonstrated that there is an impending execution.
15. The court can only see the certificate of costs dated August 19, 2020 and a notice to show cause dated January 27, 2021 for Kshs.88,675/=. There is no warrant of arrest attached to the application. The



applicant has not offered to deposit the aforesaid costs before the court as a condition precedent to the grant of stay.

16. The applicant has not refuted the averments by the respondent over the status of the locus in quo and the allegations that he is laying claiming to land which does not belong to him. This goes to the very core of the suit which was dismissed.
17. The applicant has also sought for two drastic prayers namely setting aside the ruling dated November 17, 2021 and the re-opening of the lower court suit and for it to start denovo.
18. My major concern is why a party would appeal against a ruling and judgment and at the same time before the appeal is heard and determined, seek through an interlocutory application order for such drastic interim orders and or prayers alongside an application for stay. These are the same prayers sought in the memorandum of appeal.
19. In order not to prejudice the main appeal, I decline to grant prayers 3 and 4 of the application.
20. In the premises, I find the application was filed without delay.
21. In the interest of justice, I order a stay of execution for a period of six months on the condition that the applicant deposits Kshs.82,000/= as security before the court within 7 days from the date hereof failure of which the orders of stay shall lapse.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 4TH DAY OF MAY, 2022

In presence of:

Orimbo for respondent

Kaaria holding brief for Munene for appellant

HON. C.K. NZILI

ELC JUDGE

