



REPUBLIC OF KENYA



**Ngeywa v Seme (Environment & Land Case 138 of 2015)
[2022] KEELC 2690 (KLR) (13 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2690 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 138 OF 2015
FO NYAGAKA, J
JULY 13, 2022**

BETWEEN

CLEOPAS NGEYWA PLAINTIFF

AND

DINAH NAFULA SEME DEFENDANT

RULING

1. The Plaintiff was dissatisfied with this Court's judgement delivered on 25/11/2021. Consequently, he filed Notice of Appeal on 29/11/2021, with intent to appeal against the whole of the judgment. He then filed the present Application dated 29/12/2021, three weeks later, that is to say, on 17/01/2022 seeking the following:
 - (1) ...spent.
 - (2) ...spent.
 - (3) This Honorable Court be pleased to stay execution of the judgment and decree in this suit delivered on 25/11/2021 and any other consequential orders pending the hearing and determination of the appeal.
 - (4) Costs of the Application be in the cause.
2. The Application was premised on the grounds on its face and further supported by the Plaintiff's Affidavit. The Plaintiff contended that he was dissatisfied with the Court's judgment and intended to appeal against the whole decision. He annexed to the Affidavit the judgment and marked it as CN-1. He added that if the orders sought were not granted, he would suffer substantial loss. He expressed willingness to abide by any conditions set by the court in terms of furnishing security. For this presupposition, he annexed a copy of his title deed namely Kitale Municipality Block 15/



Koitogos/3925 that he marked CN-2. Finally, he deposed, it was in the interest of justice that the Application be allowed as prayed.

3. In opposition thereto, the Defendant filed her Replying Affidavit filed on 10/02/2022. It raised some fourteen (14) grounds in opposition to the Application. She averred that the Plaintiff had failed to fulfill the conditions precedent set out for grant of stay of execution. She maintained that the Application fettered her right to enjoy the fruits of the judgment. In response to the title (annexed CN-2) to be furnished as security, the Defendant stated that the same was inadequate as the Defendant claims interest in that land and lives on it. This title was the subject of the proceedings at trial. Furthermore, the Defendant averred that she had lodged a caution on the property. The Certificate of Official Search was marked DNS1. She urged this Court to dismiss the Application.

Submissions

4. In his submissions dated 24/04/2022 and filed on 25/04/2022, the Plaintiff submitted that he had met the threshold for grant of the orders sought. He added that he had proffered sufficient security in compliance with Order 42 Rule 6 of the *Civil Procedure Rules*. Finally, that notwithstanding the provisions of Section 94 of the *Civil Procedure Act*, the Application was filed in an ordinate timeous manner.
5. The Defendant's submissions dated 22/03/2022 and filed on 23/03/2022 maintained that the Plaintiff had failed to meet the threshold for grant of the reliefs sought as enshrined in Order 42 Rule 6 of the Civil Procedure Rules. She submitted that since neither a decree had been drawn nor any assessment of costs in the suit done, the Application was premature and in violation of Section 94 of the *Civil Procedure Act*. She was of the view that the Application was filed with unreasonable and inexcusable delay. The Defendant added that since the Plaintiff intended to furnish security on the suit land, he was not being candid; that he was furnishing the security with actuated malice. On this ground alone, she urged this court to dismiss the Application with costs.

Analysis & Disposition

6. The Application seeks to stay execution pending the hearing and determination of the Appeal to the Court of Appeal. The Plaintiff relied on Order 42, Rule 6 of the Civil Procedure Rules which provides that an Applicant must satisfy the following conjunctive requirements:
 - (i) The Application has been made without unreasonable delay;
 - (ii) Substantial loss may result to the Applicant unless the order is made; and
 - (iii) That the Applicant is willing to furnish such security as the court order for the due performance of such decree.
7. The discretionary power to grant stay mandates the Court to evaluate every circumstance on a case by case basis. I will now proceed to determine the Application under the following heads:

(i) Whether the Application has been filed timeously

8. This court on 25/11/2021 delivered its judgment. Four (4) days later, that is 29/11/2021, the Plaintiff put the Defendant on notice of his intention to Appeal against the whole judgment. The present Application was filed on 17/01/2022. Although the Defendant rebutted that the Application was filed with unreasonable delay, I find no justification in those allegations. I am satisfied and do so find that the Application was filed without unreasonable delay.



9. In any event it defeats logic for the Respondent to argue on the one hand that the Application is premature since neither decree has been drawn nor costs taxed yet on the other hand she contends that the Application was brought with undue delay. This Court is not a place of theatrics where each party plays its game just for a show. It is advisable that when a party takes a position about issues he/she sticks to that. He cannot abate and reprobate.

(ii) Whether the Applicant will suffer substantial loss

10. On substantial loss, the Plaintiff stated that he was likely to suffer substantial loss. This view was, similarly, rehashed in his submissions. On the other hand, the Defendant pointed out that the Plaintiff had failed to demonstrate that he was likely to suffer substantial loss for two (2) reasons; firstly, the decree had not been drawn and no assessment of costs had taken place, breaching Section 94 of the *Civil Procedure Act*. Secondly, the Plaintiff had failed to enunciate what substantial loss he was likely to suffer.
11. On whether the Plaintiff is in violation of Section 94 of the *Civil Procedure Act*, my answer to it is in the negative. The said provision simply gives the court wide discretion to allow execution of a decree before taxation. The said provision has no direct or substantial relation to the issues before me. Notably however, as rightly pointed out by the Defendant, the Plaintiff mentioned solely that he was likely to suffer substantial loss. He did not expound further the manner the substantial loss would occur or affect him. How will a court ascertain in that regard whether the Plaintiff will suffer substantial loss?
12. In the case of *James Wangalwa & Anr -Vs- Agnes Naliaka* Misc. Application No 42 of 2011[2012] eKLR, the Court 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 4 Rule 6 of the CPR. This is so because execution is a lawful process”.
13. It was for the Applicant, who was the Plaintiff, to demonstrate that he would suffer substantial loss. The mere indication or statement of likelihood is not sufficient. It was incumbent upon the Plaintiff to go an extra mile and ably demonstrate the nature and extent of substantial loss. I therefore find that the mere statement of likelihood of suffering substantial loss did not qualify as to his demonstration of the loss. Consequently, I am satisfied that no substantial loss would be suffered by the Applicant.

(iii) Whether the Applicant is willing to furnish security

14. The Applicant expressed willingness to furnish security for the due performance of the decree. In this regard, he produced a copy of the title namely Kitale Municipality Block 15/Koitogos/3925 registered in his name. The Defendant opposed the use of such security. She annexed a certificate of official search maintaining that whilst the said property had been registered in the name of the Plaintiff, the said property was the subject of the proceedings the Plaintiff intended to Appeal against. Secondly, she demonstrated through the said certificate of official search, that she had lodged a caution on the strength of the fact that she had claimed interest in the property as purchaser.
15. I have looked at the court’s judgment. A cursory perusal reveals that indeed the said title was one of the suit lands that was at the kernel of the dispute between these parties in the primary suit. The court, in its wisdom and judgment, declared that the Defendant was in lawful use and possession of a portion of the said property. In that regard, I find that the security furnished by the Plaintiff insufficient, unfeasible



and illegal since the same is the subject of the appeal that the Plaintiff intends to prosecute. To use or even attempt to proffer the subject of the instant suit as a security for due performance of the decree is at best a smack on the face of the Court and contemptuous. It shows how the Plaintiff takes the Court lightly in its business or orders. I therefore hold that the Plaintiff has failed to establish this ground.

16. The conditions precedent set out in Order 42 Rule 6 of the Civil Procedure Rules are not disjunctive in nature. The elements must all be fulfilled for a successful party to succeed on its merits. Consequently, since I find that the Plaintiff has failed to establish two (2) of the three (3) conditional requirements, I find that the Application must suffer its fate which is dismissal. It is hereby dismissed with costs to the Defendant.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 13TH DAY OF JULY, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

