



REPUBLIC OF KENYA



**KENYA LAW**  
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**Osoi v Pere (Environment and Land Appeal 3 of 2017)  
[2022] KEELC 3606 (KLR) (11 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3606 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT AND LAND APPEAL 3 OF 2017**

**MN KULLOW, J  
JULY 11, 2022**

**BETWEEN**

**TIMINA LEKENI OSOI ..... APPLICANT**

**AND**

**ISAAC PERE ..... RESPONDENT**

**RULING**

**INTRODUCTION**

1. By notice of motion dated May 20, 2021 and filed under a certificate of urgency dated on the even date, the respondent/ applicant sought the following orders: -
  - a) Spent
  - b) The honourable court be pleased to issue an order of eviction against the respondent/ appellant or any other trespassers over land parcel No CIS Mara/ Oleleshwa/ 3931
  - c) The honourable court be pleased to facilitate entry of the applicant into her land parcel No CIS Mara/ Oleleshwa/ 3931 by directing the OCS Narok Police Station to provide security to the applicants while evicting the respondent/ appellant or any other trespassers from the land parcel during the process.
  - d) Costs of the application be provided.
2. The application is premised on the 10 grounds thereof and the supporting affidavit sworn by applicant on May 20, 2021. It is the applicant's contention that the respondent filed a suit against him seeking an order of permanent injunction prohibiting the applicant from transferring, charging, leasing or in any other way interfering with the suit parcel. The case was heard and determined *vide* a judgment delivered on June 27, 2013 whose effect was to dismiss the respondent's suit with costs.



3. Aggrieved with the said judgment, the respondent herein filed an appeal against the decision of the trial court and *vide* a judgment dated July 2, 2019, the said appeal was equally dismissed. Subsequently, the respondent filed an application for stay of execution pending appeal to the Court of Appeal.
4. The applicant now contends that the court *vide* its ruling delivered on the November 19, 2019, granted a conditional stay of 60 days effective from the date of the ruling whereupon the respondent was directed to file his appeal to the Court of Appeal within the time frame failure to which the stay would automatically lapse.
5. It is his claim that it has been over 2 years since the order of stay lapsed and no appeal has ever been instituted. He thus seeks the court's assistance to facilitate his entry onto the land parcel by enforcing the decree and to give him an opportunity to reap the fruits of the judgment that was entered in his favor.
6. The application was opposed. The respondent filed his replying affidavit sworn and dated August 9, 2021. It is the respondent's assertion that the application is frivolous, vexatious, an abuse of the court process and the same is marred with half-truths aimed at misleading the court.
7. He denied the allegations contained in the applicant's supporting affidavit at paragraphs 8,9 & 10 and maintained that he had already lodged an appeal at the Court of Appeal *vide* Nakuru Civil Appeal No 43 of 2020 which is pending for hearing and determination before the Court of Appeal. He annexed a copy of the notice of appeal lodged on July 11, 2019 and a letter dated March 13, 2020 from the Court of Appeal registry in Nakuru in support of the said averments.
8. Consequently, it was his contention that that the stay of execution is still in force since the appeal was filed within the timelines directed by the court and therefore the same cannot be said to have lapsed as alleged by the applicant. He thus urged the court to dismiss the application.
9. This court issued directions on the disposal of the application herein by way of written submissions on May 27, 2021. The applicant filed his submissions dated June 28, 2021 which I have read and considered and I have taken the same into account in arriving at my decision. The appellant/respondent on the other hand did not file any submissions despite being given time to do so. Be that as it may, I will proceed to determine the application as hereunder;
10. Having taken into account the entire application, affidavit in support and annexures thereto and replying affidavit and annexures thereto together with the submissions by the applicant, it is my considered view that the solitary issue arising for determination is;
  - a. Whether the application dated May 20, 2021 is merited.

### **Analysis And Disposition**

11. Section 38 of the [Civil Procedure Act](#) provides for powers of the court to enforce execution. It provides as follows:

“Subject to such conditions and limitations as may be prescribed, the court may, on application of decree holder, order execution of the decree–

....

- (f) in such other manner as the nature of relief granted may require.



12. It is the applicant's grievance that the decree has remained unexecuted whereas it has been over 2 years since the lapse of the conditional order of stay of execution issued by the court on November 19, 2019. The applicant contends that the court issued a conditional stay of execution with strict timelines within which to lodge the appeal at the Court of Appeal failure to which the order for stay of execution would automatically lapse. Thus, it is his claim that the no appeal had been lodged as directed by the court and therefore the stay of execution has since lapsed. He urged the court to allow the application and give him an opportunity to reap the fruits of the judgment entered in his favor.
13. The respondent on the other hand dismissed the allegations made by the applicant as frivolous and marred with half-truths aimed at misleading the court. He maintained that he had already lodged his notice of appeal, which was done within the strict timelines issued by the court and that the appeal *vide* Nakuru Civil Appeal No 43 of 2020 is pending for hearing and determination before the Court of Appeal. It is thus his claim that the application is filed is premature for the fact that the order for stay of execution is still and further that the matter is pending for hearing and determination at the Court of Appeal. He urged the court to dismiss the application.
14. I have perused the court record and I do note that the decree sought to be executed was issued by trial court *vide* its Judgment issued on June 27, 2013. The same was affirmed by the judgment on appeal which was delivered on July 2, 2017 and whose effect was to dismiss the appeal by the respondent and uphold the judgment of the trial court.
15. Being aggrieved by the judgment of this the applicant made an application seeking to stay the execution of the said judgment pending the hearing and determination of the intended appeal at the Court of Appeal. The same was heard and *vide* a ruling issued on November 19, 2019, the application was allowed and an order for stay of execution was accordingly issued.
16. A stay order halts or suspends a legal action until a certain condition is fulfilled or a particular event occurs; in this case, the hearing and determination of the appeal lodged at the Court of Appeal. It delays the enforcement of a judgment against a person. This therefore denotes that no party or entity or interested individual can take an action during the existence of the stay orders. See [Republic v Kenya Urban Roads Authority & 3 others Ex-parte Cytonn Investments Management Limited](#) [2018] eKLR.
17. Therefore, guided by the above principles and examining my ruling on stay of execution application delivered on the November 19, 2019, it is my humble view that the respondent met the conditions set therein. For avoidance of doubt; I wish to restate the said condition on the order for stay which read in part as follows; -

“ ..... I am of the view that the appellant may suffer substantial loss if the orders sought are not granted and in the circumstances, I do exercise my discretion and I do grant the appellant a stay of execution of the judgment dated July 2, 2019 subject to the appellant filing the intended appeal within 60 days of this ruling.”
18. The respondent has demonstrated through the annexures in his replying affidavit marked IP-1 and IP-2 being a copy of the notice of appeal dated July 8, 2019 and a copy of a letter dated March 13, 2020 from the Deputy Registrar of the Court of Appeal acknowledging receipt of the copies of the record of appeal. It is therefore clear that the respondent duly complied with the conditions of stay as set and that there is a pending appeal at the court of appeal. I thus find that the allegations made by the applicant that it has been 2 years since the order for stay of execution was issued and there has been no appeal lodged at the Court of Appeal as false and further find that the application has been filed prematurely.



## **Conclusion**

19. In the premises, therefore, I accordingly find that the application dated May 20, 2021 is not merited and is hereby dismissed. Each party shall bear its own costs of the application.

It is so Ordered.

**DATED, SIGNED AND DELIVERED IN VIRTUALLY AT MIGORI ON 11TH DAY OF JULY, 2022.**

**MOHAMMED N. KULLOW**

**JUDGE**

**Ruling delivered in the presence of: -**

Nonappearance for the Applicant

Nonappearance for the Respondent

**Tom Maurice - Court Assistant**

