



**Sigei v Tanyaag (Environment & Land Case E021 of 2021)
[2022] KEELC 2304 (KLR) (5 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2304 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E021 OF 2021**

CG MBOGO, J

JULY 5, 2022

BETWEEN

**TANYAAG SHINANAI JACKSON (SUING ON BEHALF OF THE ESTATE OF
SOMET OLE TANYAAG) PLAINTIFF**

AND

JULIUS SIGEI DEFENDANT

RULING

1. Before this court for determination is the notice of motion dated 28th March, 2022 filed by the applicant/defendant and expressed to be brought under Order 42 Rule 6 of the *Civil Procedure Rules* seeking the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That this honourable court be pleased to stay the execution of the orders of the court issued on 24th April, 2022 pending the hearing and determination of the intended appeal.
 - d. That costs of this application be in the cause.
2. The application is premised on the grounds inter alia that this court delivered a ruling on 24th March, 2022 and being aggrieved by the said ruling, he intends to appeal as he has occupied 94 acres of the suit property from the year 1996 to date and has put structures on the same and the said ruling has the effect of evicting him from the suit property. The application is supported by the affidavit of the defendant/applicant sworn on 28th March, 2022. The defendant/applicant deposed that being aggrieved by the ruling of this court delivered on 24th March, 2022 he intends to appeal against the said ruling for the reasons that he has been in occupation of 94 acres of the suit land from the year 1996 to date and has made developments thereon and further, that the plaintiff/ respondent has never lived on the suit land



and the effect of the orders is that he will be evicted from the same. The defendant/applicant further deposed that his advocates filed written submissions to the application dated 4th November, 2021 on 11th February, 2022 and served the same upon the plaintiff/respondent.

3. The application is opposed by the replying affidavit of the plaintiff/ respondent sworn on 14th February, 2022. The respondent deposed that the application is a total departure from the pleadings that were filed by the application and this court cannot assume original jurisdiction over the matters it already adjudicated and cannot also arrogate itself jurisdiction exceeding that which is conferred on it by law. The plaintiff/respondent further deposed that the applicant/defendant was afforded a fair hearing in response to the application dated 4th November, 2021 and he cannot seek to reopen the application as that would be abuse of court process and further that for the applicant to seek to introduce new set of facts in an application which seeks to stay the order issued is to tilt the court's mind after a litigious process that finally yielded the impugned order which in this case is an afterthought. Further, that an application for stay to succeed, the applicant/defendant must fulfil the conditions under Order 42 Rule 6 (1) and most importantly show that he will suffer substantial loss. The respondent/plaintiff further deposed that the applicant/defendant has not demonstrated how the orders issued by this court amounted to eviction orders and that the issue of eviction must fail and it is premature to delve into this issue at this stage.
4. The applicant/defendant filed a further affidavit sworn on 6th May, 2022 in reply to the respondent's/ defendant's replying affidavit. The applicant/defendant deposed that this court has jurisdiction to hear and determine the application herein which does not introduce any new set of facts and that being in occupation of his portion of the suit property, issuance of an order restraining him from among other actions, trespassing onto the suit property amounts to evicting him at the interlocutory stage which he stands to suffer irreparable loss as he has been in occupation of the same for more than 20 years.
5. The applicant/defendant further deposed that sometime in April, 2022, the respondent/plaintiff called him requesting for a meeting to discuss the settlement out of court which he later refused to respond to. Further, that upon inquiry from the Assistant County Commissioner, Mulot Division on whether he presided over a meeting on 23rd June, 2021, the said officer denied presiding over the meeting and the same was forgery.
6. The applicant/defendant filed a further affidavit sworn on 11th May, 2022 by James Nderitu Ndungu- the Assistant County Commissioner, Mulot Division. Mr. James Nderitu Ndungu deposed that following an inquiry on the authenticity of minutes of the meeting held on 23rd June, 2021, he confirmed that he never presided over any meeting and neither did he delegate the same and the initials on the alleged minutes do not represent his signature and the rubber stamp is not authentic. He further deposed that he presided over three other meetings between the parties which touched on occupation of an alleged 147 acres as opposed to 94 acres and in all these meetings, he has never recorded any minutes.
7. The applicant/defendant filed written submissions dated 24th May, 2022. The applicant raised 3 issues for determination as follows: -
 - i. Whether the court has jurisdiction to hear and determine the application.
 - ii. Whether the applicant has met the threshold for grant of stay of execution.
 - iii. Who bears the cost of the application.



8. On the first issue, the applicant/defendant submitted that this court has jurisdiction to grant stay of execution for sufficient reason pending appeal from its decision in which case the court exercises original jurisdiction as opposed to appellate jurisdiction.
9. On the second issue, the applicant/defendant submitted that he will seriously suffer loss if the orders are not granted because he will be restrained from further cultivating, planting, selling, leasing, alienating, trespassing onto the suit land which he has been in occupation of a portion of the same and has been utilising the same to rear livestock and cultivate. The applicant relied on the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR and *Patrick Kithaka Borici & Another v Shadrack Nyaga Njeru* [2019] eKLR and *Richard Kiprotich Kenduywo v Daniel Muchanga Nyakuri* [2015] eKLR. The applicant/defendant further submitted that he filed a statement of defence and counter claim which demonstrates that his prayers therein stand high chances of success as he has been in uninterrupted occupation for more than 20 years.
10. The applicant/defendant further submitted that the instant application is well within the timelines and therefore brought without unreasonable delay. The applicant relied on the case of *Trattoria Limited v Joaminah Wanjiku Maina* [2013] eKLR. On security for due performance of the decree, the applicant/defendant submitted that the court gives orders on the security to be paid so to speak and all the applicant has to do is show willingness which the applicant is willing to submit to the orders of the court as far as security is concerned. The applicant/defendant relied on the case of *John Odongo v Joyce Irungu Mubatia* [2014] eKLR.
11. The respondent/plaintiff filed written submissions dated 24th May, 2022. The respondent/plaintiff submitted that under Rule 5 (2) (b) of the *Civil Procedure Rules*, the court has jurisdiction to grant stay of execution, stay of further proceedings and an order of injunction and by dint of Rule 41 the court exercises original, independent and discretionary jurisdiction. The respondent/plaintiff relied on the case of *Equity Bank Limited v West Link Mbo Limited* as cited in the Court of Appeal at Nairobi in *Oliver Collins Wanyama v Engineers Board of Kenya* [2019] eKLR and *Board of Governors Moi High School Kabarak & Another v Malcom Bell* Supreme Court Petitions No.s 6 and 7 of 2013 (unreported).
12. On the issue of authenticity of the letter dated 23rd June, 2021, the respondent/plaintiff submitted that this is a matter that requires full trial and in any case, the court does not have jurisdiction to reopen the interlocutory application as that would invite the court to sit on an appeal of its own. The respondent/plaintiff further submitted that there is no evidence that the applicant/defendant will suffer substantial loss which is a condition for grant of stay of execution orders. The respondent/plaintiff relied on the case of *RWW versus EKW* [2019] eKLR. The respondent/plaintiff further submitted that the applicant/defendant has not demonstrated how the orders issued by the court amounts to eviction orders. The respondent/plaintiff relied on the case of *Jeremiah Thuku Nganga & Another v John Waitbaka Aidan* [2019] eKLR and *Jaj Super Power Cash and Carry Limited v Nairobi City Council & 20 Others* CA 11/2002.
13. I have analysed the application, replies thereof and the written submissions filed by both parties and the issue for determination is whether the application dated 28th March, 2022 is merited.
14. The principles upon which the court assesses such an application are laid down in Order 42 Rule 6 of the *Civil Procedure Rules* which provides as follows: -
 - (2) No order for stay of execution shall be made under subrule (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.”

15. It will be seen that the above provisions are couched in mandatory terms and three conditions must thus be satisfied before an applicant succeeds on an application for stay pending appeal. First, the court must be satisfied that substantial loss will be occasioned to the applicant unless the order of stay is made. Secondly, the application for stay pending appeal must be made without unreasonable delay; and finally, there must be security for the due performance of the decree.

16. I will begin with unreasonable delay. This court delivered a ruling on 24th March, 2022. The applicant herein filed the instant application on 28th March, 2022 and a Notice of Appeal dated 25th March, 2022. I am satisfied that application has been brought without unreasonable delay, the applicant has fulfilled one of the conditions as required under Order 42 Rule 6 of the Civil Procedure Rules. In the case of Butt V Rent Restriction Tribunal (1982)KLR 417 the Court of Appeal held as follows:-

1. “The power of the court to grant or refuse an application for stay of execution is discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the Judge’s discretion.
3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put in security for costs as ordered will cause the order of stay of execution to lapse.”

On whether substantial loss will be occasioned in the event the orders sought are not granted, I have not seen any demonstration of substantial loss that the applicant stands to suffer. In fact, the applicant has not stated what this “substantial loss” is going to be if stay is not granted. It is not for this court to speculate for an applicant what loss such applicant stands to suffer. The onus is on the applicant to state what loss he stands to suffer and show how that loss is substantial.

17. However, what in my view has come out clearly is the fact that the effect of the orders issued on 24th March, 2022 is not to evict the applicant/defendant from the suit property. I wish to reproduce here the orders issued on 24th March, 2022. Paragraph 15 of the ruling reads as follows,

“...It would be in the interest of justice to allow for preservation of the suit land and as such, this court allows prayer 3 of the notice of motion application dated 4th November, 2021...”



18. Prayer 3 of the notice of motion application dated 4th November, 2021 reads as follows,

“That pending the hearing and determination of this suit, a temporary order of injunction do issue restraining the defendant/respondent whether by himself or representatives, servants, agents, and/ or assigns from howsoever further cultivation, planting, selling,leasing, alienating, trespassing onto, and/or in any other manner whatsoever interfering with or otherwise dealing with the property known as parcel number NArok/Cis-Mara/Ololulunga/1143 measuring 165.00 Ha, the suit property herein.

19. A reading of the above paragraph does not in any way imply eviction, the court in this case and based on the interest of justice, deemed it fit to grant temporary orders of injunction restraining the applicant/ defendant from dealing in the suit property pending hearing and determination of the suit. It should also be noted that in the proceedings recorded in this court on 6th December, 2021 and while extending the interim orders, this court upon request by counsel for the applicant/defendant further directed that the interim orders are limited to the applicant/defendant being allowed to harvest his crops from the suit property upon which he will be restrained form further cultivation until the determination of the application. The special circumstances in this case are that although the applicant/defendant claims to have been in occupation of the suit property for more than 20 years, there is no evidence of any developments on the suit property as he claims. It is upon the applicant to support his claim and not leave it to the court’s imagination that he has made developments thereon.
20. I agree with Counsel for the plaintiff/respondent that the defendant/ applicant in this case is seeking to introduce new set of facts by creating his own understanding of the order 3 granted in the application dated 4th November, 2021 which in my view must fail. I believe an order for eviction arises out of a formal application which has been heard in court and judgment passed as opposed to inferring as presented by the applicant in this case.
21. On the issue of the authenticity of the minutes of the meeting held on 23rd June, 2021.I believe the same requires to be conclusively addressed during trial and not at this stage.
22. Arising from the above, I find that the notice of motion application dated 28th March, 2022 lacks merit and the same is dismissed with no orders as to costs. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON 5 TH JULY, 2022.

MBOGO C.G

JUDGE

5/7/2022

In the presence of: -

CA: Timothy Chuma

