



**Nyakora v Chiambe (Environment & Land Case 38 of 2021)
[2022] KEELC 13263 (KLR) (6 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13263 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 38 OF 2021**

AY KOROSS, J

OCTOBER 6, 2022

BETWEEN

GEORGE WERE NYAKORA PLAINTIFF

AND

FREDRICK ODHIAMBO CHIAMBE DEFENDANT

RULING

1. Pursuant to the provisions of sections 1A, 1B and 63 (c) and (e) of the *Civil Procedure Act*, order 22 rule 22 and order 42 rule 6 of the *Civil Procedure Rules*, the defendant filed a motion dated May 24, 2022 seeking several reliefs. Some are spent and the reliefs pending determination are as follows;
 - a) Pending hearing and determination of the intended appeal, there be a stay of execution of the judgment, decree, taxation and orders issued by this court on March 28, 2022; and
 - b) Costs be in the cause.
2. The motion is supported by grounds set out on its face and on the supporting affidavit of the defendant Fredrick Odhiambo Chiambe dated May 24, 2022.
3. He contended that he was dissatisfied with the entire judgment and decree of this court and had filed a notice of appeal dated April 11, 2022. He averred that the plaintiff intended to execute the orders of the court and had even filed a bill of costs dated April 22, 2022. He stated that he had an arguable appeal with prospects of success which would be rendered nugatory. He averred that he would suffer substantial loss which was not compensable by an award of damages. He was willing to furnish security.

Plaintiff's case

4. In opposition, the plaintiff filed a replying affidavit dated June 9, 2022. He averred *inter alia*, the motion was vexatious, frivolous and baseless; there was no evidence of an appeal hence the appeal was not arguable; the plaintiff had a right to execute the judgement; the defendant had failed to demonstrate



substantial loss; security was not an adequate compensatory measure; he should be allowed to enjoy the fruits of his judgment and finally that the motion should be dismissed with costs.

Defendant's written submissions

5. As directed by the court, the parties disposed of the motion by way of written submissions. By counsel Mr Sala, the plaintiff filed written submissions dated June 3, 2022. Counsel identified 3 issues for determination; (i) what criteria must be satisfied before a judgment can be stayed (ii) will the appeal be rendered nugatory if the motion was disallowed and (iii) was the defendant's motion frivolous, vexatious and an abuse of the due process of the law?
6. On the 1st issue, counsel submitted that the Court of Appeal settled the discretionary criteria in the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 which were; discretionary power, appeal should not be rendered nugatory, grounds proffered, special circumstances of the case and security.
7. On the 2nd issue, counsel asserted that the defendant had an arguable appeal with high chances of success and to this end he relied on the case of *Samvir Trustee Limited v Guardian Bank Limited Nairobi* (Milimani) HCCC 795 of 1997 where the court expressed itself that the yardstick is for the court to balance the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party enjoys the fruits of his judgment.
8. On the 3 issue counsel averred that the motion was neither frivolous, vexatious nor an abuse of the due process of law. He relied on the case of *Transcend Media Group Limited v Independent Electoral and Boundaries Commission* [2015] eKLR where the court defined the import of these terms.
9. Plaintiff's written submissions
Plaintiff's counsel Mr Oroo F filed written submissions dated June 17, 2022. Counsel identified one issue for determination; whether the defendant had demonstrated sufficient grounds to warrant the orders sought. Relying on order 43 rule 6 of the *Civil Procedure Rules*, counsel submitted that the defendant had not proved that he would suffer substantial loss and from the record, the plaintiff had been in occupation of the suit property for over 20 years. He relied on the case of *Charles Wahome Getbi v Angela Wairimu Getbi* [2008] eKLR where the court expressed itself that residence on a suit land was not sufficient to establish loss.
10. Counsel submitted that in the absence of a memorandum of appeal, the defendant had not shown that he had an arguable appeal. He admitted that the motion was filed in a timely manner. On security, counsel averred that a deposit of the title deed to the suit property could not suffice. To buttress his position, he relied on the case of *Aron C Sharma v Ashana Raikundalia T/A Rairundalia & Company Advocates*. Relying on *Butt v Rent Restriction Tribunal* (Supra), counsel asserted that the court had discretionary power.
11. In addition, counsel stated that there was no need to stay taxation as taxation would determine the amount of security the defendant needed to pay if stay of execution was granted. Counsel placed reliance on the case of *Pius Musimba Muasya & 15 others v Onesmus Ndolo Ngeta & 3 others* [2022] eKLR.

Analysis and determination

12. I have carefully considered the motion, its grounds, affidavits and respective parties' submissions and the issues falling for determination are; (i) whether the defendant's motion is frivolous, vexatious and an abuse of the due process of law and (ii) whether stay of execution should be granted. I will proceed to analyse the legal and jurisprudential frameworks on these issues.



I. Whether the defendant's motion is frivolous, vexatious and an abuse of the due process of law

13. Order 2 rule 15 of the [Civil Procedure Rules](#) provides clear principles that guide courts when exercising their discretionary powers on striking out pleadings if they are frivolous, vexatious or an abuse of the court process. This proviso states in the following terms;

- “ 15. At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
- a) it discloses no reasonable cause of action or defence in law; or
 - b) it is scandalous, frivolous or vexatious; or
 - c) it may prejudice, embarrass or delay the fair trial of the action; or
 - d) it is otherwise an abuse of the process of the court....and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”.

14. The case of [Dev Surinder Kumar Bij v Agility Logistics Limited](#) Civil Suit No 311 of 2013[2014] eKLR was cited with approval in the case of [Transcend Media Group Limited v Independent Electoral and Boundaries Commission](#) (Supra) where the court held, inter alia, that:

“For a pleading to be dismissed pursuant to the provisions of order 2 rule 15(1), it should be made clear and obvious that the issues raised by the plaintiff can neither be substantiated, nor disclose any reasonable or justifiable an action as against the defendant.”

15. The plaintiff failed to substantiate his assertion that the defendant's motion was frivolous, vexatious or an abuse of the court process. I have scrutinized the motion and I am at a loss to establish the basis upon which the plaintiff made such a serious allegation. Subject to the proviso of section 75 of the [Civil Procedure ACT](#), the defendant has a right to appeal against the decision of this court. Within the provisions of order 42 rule 6 of the [Civil Procedure Rules](#), this court has jurisdiction to grant an order for stay of execution pending appeal. This court takes cognisance that striking out a party's pleadings is not only drastic but draconian and courts of law are called upon to issue such orders sparingly.

II. Whether stay of execution shall be granted

16. Generally, the purpose of stay pending appeal is to preserve the substratum of the case. Preservation in land matters is paramount but one has to bear in mind the unsuccessful party's constitutional right of appeal and that of the successful party's right to enjoy the fruits of his judgment. An intended appeal does not automatically operate as a stay. Such donated powers have to be exercised with judicious discretion. See [RWW v EKW](#) [2019] eKLR, where the court stated thus;

“Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellants with those of the respondent.”

See also the case of [Kenya Power & Lighting Company LTD vs Esther Wanjiru Wokabi](#) [2014] eKLR where the court was of the view that discretion must be applied judiciously.

17. By order 42 rule 6, an applicant who seeks stay of execution pending appeal has to satisfy that;(i) he will suffer substantial loss (ii)he has moved the court without unreasonable delay and (iii)furnish security



for due performance. These principles are now an old hat and were settled in the case *Butt v Rent Restriction Tribunal* (Supra).

18. On whether the appeal is arguable or not, a copy of the memorandum of appeal was not proffered to this court and in its absence, I am constrained to satisfy myself that the appeal is arguable. In my view, this is a preserve of an appellate court.
19. On period of time, judgment was rendered by this court on March 28, 2022 and the motion filed on May 26, 2022. This is a period of close to two months and I do not consider there was delay.
20. On substantial loss, the defendant contended that he risked to “suffer irreparable loss and damage”. He advanced his loss on two fronts; one, the plaintiff intended to execute the judgment and two, he risked losing his only home which he had lived upon for over a decade.
21. Substantial loss is expressed as the cornerstone in determining whether a stay of execution should ensue. This was the position of the Court of Appeal in *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* [1986] eKLR and *Rhoda Mukuma v John Abuoga* [1988] eKLR. The case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR went further and stated:

“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”

22. The 1st front fails. On the 2nd front, the location of the defendant’s residence is a question of fact. The court resolved occupancy and possession upon hearing the parties. On my part, I would have been prepared to grant stay of execution if the defendant demonstrated that he would suffer substantial loss. In the case of *Charles Wabome Gethi vs. Angela Wairimu Gethi* [2008] eKLR, the Court of Appeal stated;

“... it is not enough for the applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The applicants must go further and show the substantial loss that the applicants stand to suffer if the respondent execute the decree in this suit against them.”

See also *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR and *Charles Wabome Gethi v Angela Wairimu Gethi*.

23. In the absence evidence of substantial loss, it would be a rare case that an appeal would be rendered nugatory by some other event. See *Kenya Shell Limited v Benjamin Karuga Kibiru* (Supra).
24. The defendant offered to deposit security for costs. Had he persuaded me that he would suffer substantive loss which he has not, I would have exercised my discretion and ordered that he deposits the sum of Kshs 189,950/- which is the total amount stated in the plaintiff’s bill of costs in a joint interest account of the advocates on record and that pending the determination of the appeal, restricted him from transacting on land parcel number South Sakwa/Barkowino/2730 and or interfering with its the register.
25. Ultimately, it is my finding that the motion is not merited and I hereby dismiss it. Because it is trite law that costs abide the event, I award the costs of this motion to the plaintiff.

DELIVERED AND DATED AT SIAYA THIS 6TH DAY OF OCTOBER 2022.

HON. A. Y. KOROSS



JUDGE

6/10/2022

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Mr. Ooro F for the plaintiff

Mr. Sala for the defendant

Court assistant: Ishmael Orwa

