



**Pyrethrum processing Company Limited v KICH Agricultural Company Limited & another
(Environment & Land Case 107 of 2013) [2022] KEELC 13377 (KLR) (4 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13377 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 107 OF 2013
FM NJOROGE, J
OCTOBER 4, 2022**

BETWEEN

PYRETHRUM PROCESSING COMPANY LIMITED PLAINTIFF

AND

KICH AGRICULTURAL COMPANY LIMITED 1ST DEFENDANT

ROGER SHAKO NGOO 2ND DEFENDANT

RULING

1. This is a ruling with respect to the 1st defendant's notice of motion application dated June 13, 2022. It has been brought under sections 1, 1A, 3, 3A of the [Civil Procedure Act](#), Order 42 Rule 6 and Order 51 Rule 1 of the [Civil Procedure Rules](#) which seeks the following orders;
 - a. ...Spent
 - b. ...Spent
 - c. That this honorable court be pleased to issue an order of stay of execution of the judgement and consequential decree and orders delivered by Hon Justice Mwangi Njoroge on the May 11, 2022 in this matter pending hearing and determination of the intended appeal.
 - d. That the costs of this application be provided for.
2. The application is supported by the grounds on the face of the application and the affidavit sworn by Gideon Kiptarus Toroitich the manager of the 1st defendant herein. He deposed that the 1st defendant is the registered owner of land parcel No LR 11322/3 Oljororok since the year 2003; that the 1st defendant purchased the suit property from the plaintiff *vide* the sale agreement dated February 21, 2002; that upon payment of the entire purchase price, the suit property was transferred to the 1st defendant; that the plaintiff later approached the court to have the transaction declared null and void; that upon service of the plaint and summons the 1st defendant entered appearance and filed



its statement of defence which was later amended on March 31, 2009; that the court on May 11, 2022 rendered its judgement in the matter and allowed the plaintiff's claim while dismissing the 1st defendant's counterclaim with costs; that 1st defendant being dissatisfied with the said judgement lodged its notice of appeal before the court on the May 25, 2022; that on the face of the said judgement, the 1st defendant was ordered to transfer the land to the plaintiff at its own costs within 30 days which property has been in its name for the past 19 years; that even though the court acknowledged that the 1st defendant had paid the plaintiff a sum of Kshs 30,500,000/= towards the purchase of the suit property, it did not address how the money was to be recovered upon transfer of the property to the plaintiff as was directed in the judgement; that the 1st defendant has since requested for typed proceedings and wishes to lodge an appeal expeditiously; that in the circumstances, it is clear that unless the honorable court intervenes, the 1st defendant stands the risk of losing its property before its appeal is heard and determined; that unless stay of execution of the judgement is granted by this court, the 1st defendant's intended appeal will be rendered nugatory and that the 1st defendant is ready and willing to deposit any security regarding the subject matter to the court and/or abide by any conditions that the court may impose in consideration to this application.

3. In response to the application, the plaintiff's Company Executive Officer Mary M Ontiri filed a replying affidavit sworn on July 8, 2022 and filed on July 13, 2022. She deposed that the application is frivolous, vexatious, and an abuse of the court process and should be dismissed with costs; that if execution is likely to be put in motion, it does not amount to substantial loss upon the applicant since execution is a lawful process through which a successful litigant enjoys the fruits of litigation; that allowing this application would be prejudicial to the plaintiff herein; that without prejudice, if the court exercises its discretion in favor of the applicant, then an order for the transfer of the title in the name of the plaintiff should be immediately undertaken and the title deposited in court as security in addition to the payment of the costs awarded together with interest within 30 days; that the applicant in its draft memorandum of appeal has not demonstrated any arguable element in the intended appeal that would render the appeal nugatory if allowed; that the 1st defendant had entered into a sale agreement with the plaintiff on February 21, 2002 for the purchase of LR No 11322/3 Ol-Jororok measuring 331.1 hectares at a sum of Kshs 30,500,000/= which agreement was rescinded by virtue of a breach by the 1st defendant; that the court rightfully noted that the registration that was done in favor of the 1st defendant was fraudulent as the 1st defendant had refused to return the original title documents, land board consents and deed plan upon being notified of the rescission of the contract; that this was done despite threatened court action and the revocation letter dated March 1, 2002 which fact the applicant was well aware; that the 1st defendant only intends to continue deriving benefits from the illegal action of registration and that it is in the interest of justice that this court orders the registration to take place with a caution pending the hearing and determination of the intended appeal.
4. The application was canvassed by way of written submissions. The 1st defendant filed its submissions dated July 15, 2022 on July 18, 2022 while the plaintiff filed its submissions dated August 4, 2022 on August 12, 2022.
5. The 1st defendant in its submissions relied on the case of *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR and submitted that the jurisdiction to grant stay is discretionary as what would constitute as sufficient cause is dependent on the facts and circumstances of each case.
6. The 1st defendant also relied on Order 42 rule 6(2) of the *Civil Procedure Rules* and the case of *Tropical Commodities Suppliers Ltd vs International Credit Bank (in Liquidation)* Kampala Miscellaneous Application No 379 of 2003 among other cases and submitted that the pecuniary loss it is likely to suffer is captured in the judgement as it is likely to lose Kshs 30,500,000/= to the plaintiff as the court



- did not address the repayment of the same after the suit property has been transferred back to the plaintiff.
7. The 1st defendant further submitted that the suit property was worth Kshs 30,500,000/= in the year 2002 and that it has appreciated since then and therefore transferring it to the plaintiff pending the hearing and determination of the appeal would occasion substantial loss to it. On the issue of costs, the 1st defendant submitted that the court has the discretion to set the security that it considers reasonable and just in the circumstances and it is ready to deposit such security as the court may direct. The 1st defendant concluded its submissions by seeking that the orders it seeks in its application be allowed as prayed.
 8. The plaintiff in its submissions identified the following issues for determination:- whether the appeal is arguable, whether the application was made without unreasonable delay, whether substantial loss may result upon the applicant unless the order is made and whether security for due performance of the decree has been given.
 9. On the first issue, the plaintiff relied on the cases of *Commissioner of Customs vs Anil Doshi* [2007] eKLR, *African Cotton Industries Ltd vs Patrick Wambua Ikusya* [2021] eKLR and submitted that the 1st defendant's draft memorandum of appeal demonstrates that the intended appeal is not arguable and it will not be rendered nugatory if the stay is not granted.
 10. The plaintiff also submitted that the 1st defendant argued that the court despite noting that it had paid Kshs 30,500,000/= as the purchase price did not make a determination on the repayment of the same and stated that nowhere in the pleadings did the 1st defendant pray for any refund as the court would not grant orders not sought for. It was the plaintiff's submissions that the appeal will not be rendered nugatory as transfer of property is a reversible process and it being a statutory body, it is capable of paying damages if the appeal is successful.
 11. Regarding the second issue, the plaintiff submitted that judgement in this matter was delivered on May 11, 2022 while the application for stay of execution was filed June 13, 2022 which was 32 days after the delivery of judgement and therefore consists of inordinate delay as provided for under Order 42 rule 6 of the *Civil Procedure Rules*. The plaintiff also submitted that the decree indicated that execution was to occur within 30 days of the judgement but the 1st defendant did not seek substantive orders of stay during that period and that it is therefore only seeking the stay orders to frustrate it.
 12. On the third issue, the plaintiff relied on the case of *Kenya Ports Authority vs Fadhil Juma Kisuwa* [2017] eKLR and submitted that the 1st defendant claims that it is likely to suffer substantial loss by alleging that once the property is registered as directed, the plaintiff is likely to sub-divide it and sell it to third parties thereby making it difficult to recover the same but did not attach any proof in support of the claims.
 13. The plaintiff also relied on other cases and submitted that the 1st defendant had failed to demonstrate any substantial loss that it will suffer should the court declined to grant stay orders.
 14. Regarding the fourth issue, the plaintiff submitted that an applicant cannot succeed in an application for stay of execution pending appeal unless they give security for due performance of the decree as was held in the case *Elena D Korir vs Kenyatta University* [2012] eKLR. The plaintiff also submitted that the 1st defendant has not demonstrated that they are ready and willing to adhere to such conditions regarding security as the court may order. The plaintiff concluded its submissions by stating that the 1st defendant has failed to meet the mandatory requirements for grant of stay of execution pending appeal.



Analysis and Determination

15. After considering the application, the supporting affidavit and the submissions, the only issue that arises for determination is whether the court should grant stay of execution of its judgement pending the hearing and determination of the 1st defendant's intended appeal.
16. Order 42 rule 6(2) of the *Civil Procedure Rules* provides as follows:
 - (2) No order for stay of execution shall be made under sub rule (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.
17. The 1st defendant has to demonstrate that it has an appeal and has attached a notice of appeal to its supporting affidavit which in my view is clear evidence of an appeal for the purposes of a stay of execution application.
18. The 1st defendant must also demonstrate that it moved the court expeditiously. The judgement in this matter was delivered on May 11, 2022 while the application under consideration was filed on June 16, 2022 which is in my view would have been considered timeous in ordinary circumstances. However, in the present case where a re-transfer of the land, which in my view is execution in itself was ordered to be undertaken within 30 days and the defendant's refusal or neglect to comply with that order denied the plaintiff the fruits of its Judgment, this court thinks that an order of stay of application was sought too late in the day. The present application was therefore not timeously lodged in court for those reasons.
19. On whether substantial loss would result if the stay is not granted, the 1st defendant argued that if stay is not granted and the suit property is transferred to the plaintiff's name then the same can be subdivided and sold which suit property it has held for the past 19 years. The plaintiff on the other hand submitted that the 1st defendant did not produce any evidence in support of its claims.
20. The court in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR discussed substantial loss as follows:

“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 42 rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
21. The court has to balance between the interests of the 1st defendant seeking stay of execution pending the hearing and determination of the appeal so that it is not rendered nugatory and the interest of the plaintiff who has the right to enjoy the fruits of its judgement. This court in its judgement found that the transfer of the suit property to the 1st defendant was fraudulent as the contract had been terminated vide the letter dated March 1, 2022 and ordered that the same be transferred back to the plaintiff within 30 days of the judgement.



22. It is my view that the 1st defendant has not demonstrated the substantial loss that it will likely suffer in the event that the present application is not allowed. Merely stating that the property has appreciated in value over time is not sufficient to establish likelihood of substantial loss. The court in the case of *Samvir Trustee Limited Vs Guardian Bank Limited Nairobi* (Milimani) HCCC No. 795 of 1997 held as follows:

“For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...”

23. In conclusion therefore, I find that the 1st defendant’s application dated June 13, 2022 lacks merit and it is hereby dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 4TH DAY OF OCTOBER, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

