Ethics & Anti-Corruption Commission v Mwidani & 3 others (Environment & Land Case 203 of 2007) [2025] KEELC 4540 (KLR) (18 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4540 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 203 OF 2007

SM KIBUNJA, J

JUNE 18, 2025

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION ..... PLAINTIFF

AND

AHMED MWIDANI ..... 1ST DEFENDANT

JUMA SWALEH ..... 2ND DEFENDANT

KIUN COMMUNICATION LIMITED ..... 3RD DEFENDANT

VECTORCON PEST CONTROL & SUPPLIES LTD ..... 4TH DEFENDANT

RULING

1. The 4th defendant filed the notice of motion dated the 11th December 2024 seeking for inter alia stay of execution of the judgement and all consequential orders pending the hearing and determination of the intended appeal to the Court of Appeal. The application is premised on the eight (8) grounds on its face marked (a) to (h) and supported by the affidavit of Miradam Adam, director, sworn on 7th December 2024, inter alia deposing that the 4th defendant had purchased the suit property from the 3rd defendant in 2000 for valuable consideration of Kshs.800,000 after carrying out due diligence; that the 4th defendant took possession of the suit property and through a loan from Imperial Bank, to whom the property is charged, constructed a warehouse, store rooms and offices valued at Kshs.40,000,000; that this suit was then filed in August 2007 by the plaintiff claiming the suit property was illegally or fraudulently excised from access road, and vide the judgement delivered on 23rd October 2024 in favour of the plaintiff, the 4th defendant was ordered to vacate from the property in ninety (90) days; that the 4th defendant was aggrieved by the judgement and filed the notice of appeal on 28th October 2024, and sought for certified proceedings and judgement vide letter dated 14th November 2024; that if the stay of execution order is not granted, the 4th defendant is apprehensive the plaintiff will have it evicted from the suit premises, which it has occupied for over 24 years, exposing it to substantial loss.

2. The application is opposed by the plaintiff through the replying affidavit of Dedan O. Okwama, investigator, sworn on the 21st January 2025, inter alia deposing that the 4th defendant's application has not met the threshold set under Order 42 Rule 6 of Civil Procedure Rules; that the plaintiff has not extracted the decree or taken steps to execute; that 4th defendant has not shown that the plaintiff would be unable to compensate it should they be successful on appeal after execution; that to grant the stay order would amount to further delay for members of the public to enjoy the fruits of the judgement and the application should be dismissed.

3. On the 14th January 2025, the court issued directions on filing and service of replies and submissions and also granted interim stay order of execution in terms of prayer 2. Subsequently, the learned counsel for the plaintiff and 4th defendant filed their submissions dated the 20th January 2025, and 30th January 2025, respectively which the court has considered.

4. The issues for determinations by the court are as follows:

    a. Whether the 4th defendant has met the threshold for issuance of stay of execution order pending appeal.

    b. Who pays the costs?

5. The court has considered the grounds on the application, the affidavit evidence, submissions by both counsel, superior courts decisions cited thereon, the record and come to the following conclusions:

    a. The application has invoked among others, Order 42 Rule 6 of the Civil Procedure Rules that provides for stay in case of appeal as indicated on the margin note. Sub-rule (2) thereof sets the threshold an applicant for stay of execution order has to meet 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.

6. As submitted by the learned counsel for the 4th defendant, the court in the case of Matata & Another versus Rono & Another [2024] eKLR, summarized the conditions the court must satisfy itself before granting stay orders under Order 42 Rule 6 as follows:

    a. that substantial loss may result to the applicant unless the order is made.

    b. Application has been made without undue delay.

    c. Security as the court orders for the due performance.

    d. The record confirms that the court delivered its judgement on the 23rd October 2024 and Notice of Appeal dated 25th October 2024, was filed on that very day, followed by the letter dated 14th November 2024, that was filled on 15th November 2024, seeking for certified copies of proceedings and judgement. The instant application dated the 11th December 2024, was then filed on the same date. On the test of timeous filing of the stay of execution pending appeal

application, the 4th defendant has submitted that the application was filed without undue delay. Even though the application was evidently filed over one and a half months after the judgement was delivered, I have noted that the plaintiff has in its submissions conceded the application was "timeously made" and I see no need to belabour that point.

e. On the test of substantial loss, the learned counsel for the 4th defendant relied on the following five (5) cases: firstly, the case of Tropical Commondities Suppliers Ltd & Others versus International Credit Ltd [In Liquidation] [2004] 2 EA 331, where the court held that:

> " Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal."

7. Secondly, the case of James Wangalwa & Another versus Agnes Naliaka Cheseto [2012] eKLR, in which the court stated that:

> " .....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."

8. Thirdly, the case of Matata & Another versus Rono & Another [supra], where the court held that:

> " The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing and determination of the appeal so that the appeal is not rendered nugatory....."

9. Fourthly, the case of Antoine Ndiaye versus African Virtual University [2015] eKLR, where the court stated that:

> " On the issue of substantial loss, this is a matter dealing with land as the substratum of the suit. ownership and possession will be at the core of the appeal."

10. Fifthly, the case of RWW versus EKW [2019] eKLR, where the court held that:

> " The purpose of an application for stay pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory."

11. And submitted inter alia that should the 4th defendant be evicted from the suit property and its development thereon demolished, it will suffer substantial loss and the action would irreparably affect its business. Therefore, counsel submitted, the 4th defendant should be given another chance to be heard as was held in the case of Gathua versus Nyarogo & 2 Others [2024] eKLR.

12. The learned counsel for the plaintiff submitting on the question of substantial loss cited the decision cited by the 4th defendant's counsel of the case of Antoine Ndiaye versus African Virtual University

[supra], and the case of James Wangalwa & Another versus Agnes Naliaka Cheseto, [supra], where the court stated as follows on substantial loss:

> " 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."

13. The court proceeded to cite the cases of Silverstein versus Chesoini [2002] 1 KLR 867 and Mukuma versus Abuoga [1988] KLR 645, and in the latter case, the Court of Appeal emphasized the centrality of substantial loss and stated that:

> " .....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."

14. The counsel submitted that the as 4th defendant has not shown that the plaintiff has started the execution process and the nature of the substantial loss it is likely to suffer if execution is carried out has not been specified, then the application should not be granted.

14. Having considered the facts presented by both sides through their depositions and the submissions by counsel in their totality, I am in agreement with the plaintiff that there is no evidence presented to suggest that it had started or was in the process of commencing the execution process by the time the 4th defendant filed its application. This does not in any way mean that the plaintiff would stay for ever without pursuing execution in the event the 4th defendant failed to give vacant possession. The 4th defendant cannot therefore be faulted for filing the application in an attempt to protect or ensure the status quo continues for as long as possible by warding off execution. However, for the 4th defendant to succeed in its application under Order 42 Rule 6, it needed to show or establish that it stands to suffer substantial loss if the order sought was not granted and execution is carried out by evicting it and demolishing its development worth Kshs.40,000,000 when the application was filed. While the value attached to the development through the application is Kshs.40,000,000, the statement of defence filed by the 4th defendant had at paragraph *5(g)* placed the cost of putting up the warehouse complex at Kshs.6,000,000. There is no explanation tendered to back the value of the development that was Kshs.6,000,000 at the time of filing the defence to Kshs.40,000,000 when the application was filed. Whatever the value of the development on the suit property could end up being determined to be, the plaintiff, being a constitutional commission, was acting on behalf of the Government of Kenya, and the 4th defendant has not shown the plaintiff could be unable to compensate it should it be successful on the appeal and execution had been carried out. I therefore, agree with the plaintiff that other than stating that it would suffer substantial loss, the 4th defendant has not been specific on the nature of the loss as no particulars have been presented to enable the court weigh whether it would amount to substantial loss. The 4th defendant fails on the substantial loss/injury test.

f. On the security test, I have perused the grounds on the notice of motion and the supporting affidavit and there is no offer to tender security for the due performance that has been made. The plaintiff has submitted that the 4th defendant had at ground (e) of the application indicated it is in financial constraints and on the verge of going bankrupt, which was an indication it could not afford to tender security. However, the 4th defendant has at paragraph 19 of its submissions expressed preparedness to tender security as may be prescribed by the court within thirty (30) days from the date of the ruling. The fact that no security had been offered

through the application on its own would not be fatal to an application of this nature so long as the applicant expresses preparedness to tender it if so required as the 4th defendant has done through the submissions. The nature of the security is determined by the court after the applicant succeeds in establishing the test of substantial loss and timeous filing of the application. In this case the 4th defendant has failed in the substantial loss test, and though it had succeeded in the timely filing of the application, there is no need to address the nature or quantum of the security, as the notice of motion is for dismissal.

g. Under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the event unless where otherwise directed by the court on good cause being shown. In this instance, the costs shall follow the event.

1. Flowing from the above conclusions on the notice of motion dated the 11th December 2024, the court finds and orders as follows:

a. The application is without merit.

b. The application is dismissed with costs.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 18TH DAY OF JUNE 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

IN THE PRESENCE OF:

PLAINTIFF : M/s Songole

DEFENDANTS : Mr. Kongere for 3rd Defendant

M/s Joma for Mutubia for 4th Defendant

SHITEMI-COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.