



Cheruiyot & 51 others v Morogo & 7 others (Environment & Land Case 488 of 2013) [2024] KEELC 353 (KLR) (31 January 2024) (Ruling)

Neutral citation: [2024] KEELC 353 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 488 OF 2013**

**A OMBWAYO, J
JANUARY 31, 2024**

BETWEEN

KIPRONO CHERUIYOT & 51 OTHERS PLAINTIFF

AND

GEORGE K MOROGO & 7 OTHERS DEFENDANT

RULING

1. George K Morogo and 7 other have come to court for orders that:

The application is based on facts that the plaintiffs are now camping in the land's offices seeking to enforce the judgment of the court. Consequently, the defendants/Applicants stand to suffer substantial loss should the plaintiffs/respondents proceed to execute and the intended appeal will be rendered nugatory. The application is supported by the affidavit of George K Morogo that basically reiterates the grounds.

2. In the replying affidavit of Hon. Joseph Kipkato Korir and Joel Biwott state that there is nothing to stay and that the applicant have been occupying the property illegally and have been generating new titles despite court order. The respondent contend that they have been barred from taking possession despite the judgment. The respondents argue that the contended enjoinder of the ill-gotten property should be penalized.

3. I have considered the application and submissions on record and do find that the applicable provision of law is Order 42 rule 6 (2) of the Civil Procedure Rules that provides: -

6. Stay in case of appeal [Order 42, rule 6.]

(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.
- 4. The 1st issue to be determined is whether the applicants will suffer substantial loss if stay is not granted. Substantial loss meaning has been explained in various decisions of the courts as follows:-
- 5. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“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.”
- 6. I do find that the applicants have demonstrated substantial loss if the judgment is implemented and decree executed because they are in possession of some parcels of land and that they are likely to be evicted.
- 7. The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an 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. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

 - 9. 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 Appellant with those of the Respondent.”
- 8. On the element as to whether the application was filed without unreasonable delay. I do find that judgment was delivered on 22nd September 2023 and the application was filed on 31st October 2023 39 days after judgment hence the delay cannot be said to be unreasonable. The applicant are willing to deposit security of any nature as ordered by the court.
- 9. I have considered the application in totality and in consideration of the fact that the Court of Appeal may reach a different decision and I am inclined to grant stay of execution pending appeal in the nature of a status quo order for a period of 360 days from today on condition that the applicants deposit in court security for costs of Kshs500, 000/= within the next 30 days. Status quo herein meaning



no person to be evicted from the property occupied and that no further development on the suit properties until the expiry of 360 days. Costs of this application in the appeal.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 31ST DAY OF JANUARY 2024.

A O OMBWAYO

JUDGE

