



Kiptui & another v Mburu & 3 others (Environment & Land Case 105 of 2012) [2024] KEELC 289 (KLR) (30 January 2024) (Ruling)

Neutral citation: [2024] KEELC 289 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 105 OF 2012
MAO ODENY, J
JANUARY 30, 2024**

BETWEEN

ISAAC KIBET KIPTUI 1ST PLAINTIFF

**BRIAN KIPKEMOI CHUMO T/A BRICKEM COMMERCIAL & GENERAL
INSURANCE 2ND PLAINTIFF**

AND

JOSEPH MBURU 1ST DEFENDANT

HELLEN WANJIRU ONDIEKI 2ND DEFENDANT

JOHN KIIRU NGARI 3RD DEFENDANT

**ESTHER WANGUI MURAYA (SUED AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF JOHN MURAYA GITHINJI) 4TH DEFENDANT**

RULING

1. This ruling is in respect of a Notice of Motion dated 23rd October 2023 by the Plaintiff/Applicants seeking the following orders:
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of the intended appeal, this Honorable court be pleased to issue an order of stay execution of the judgment delivered on 22nd September 2023 and the consequent orders thereto.
 - d. That in the alternative to prayer 3 above, this Honorable court be and is hereby pleased to order that pending the hearing and determination of the intended appeal, the status quo on land parcel number Nakuru/ Municipality Block 29/409 (Rhonda) be maintained in that the 1st,



2nd and 3rd respondents shall remain in possession and use of the said land but shall not dispose it, charge, lease, develop or in any way part with possession of the said property.

- e. That costs of the appeal be provided for.
2. The application was supported by the annexed affidavit of Brian Kipkemoi Chumo sworn on 23rd October, 2023 where he deponed that on 22nd September 2023 this court delivered a judgment in this matter in favour of the defendants which they seek for stay of execution pending the hearing and determination of an intended appeal.
 3. The Applicant further deponed that being dissatisfied with the judgment, they filed and served a Notice of Appeal and also applied for certified copies of proceedings for purposes of preparing a record of appeal. That they stand to suffer substantial loss if the defendants execute the said decree as it would render the intended appeal nugatory.
 4. He further stated that the intended appeal has high chances of success and that it is only fair and just that the application be allowed as prayed.
 5. The 1st Defendant/Respondent filed a replying affidavit on 4th December 2023 and deponed that judgment in this matter was delivered on 22nd September 2023 where the plaintiffs' case was dismissed and the defendants counterclaim allowed.
 6. He also deponed that the defendants are yet to initiate the execution of the said judgment and that the defendants have been in occupation of the suit property since they acquired it hence the court held that they were beneficial owners.
 7. It was the Respondent's case that the Plaintiffs have never been in occupation of the suit property therefore cannot claim that they will suffer any substantial loss should they proceed and execute the judgment and decree.
 8. The Respondent also stated that the Plaintiffs have not met the threshold for grant of stay of execution orders and further deponed that if the court is inclined to grant an order of stay of execution, then it should order that the plaintiffs do offer security that could include depositing the taxed costs in a joint interest earning account in the name of their advocates pending the hearing and final determination of the intended appeal.

Plaintiffs' submissions

9. Counsel submitted that the issue for determination is whether the plaintiffs have met the conditions for grant of orders for stay of execution and relied on the case of *Desbro (Kenya) Limited v General Printers Limited; NCBA Bank Kenya PLC & another (Objectors)* [2021] eKLR which was cited with approval in the decision of *Tropical Commodities Suppliers Ltd Vs International Credit Bank (in Liquidation)* Kampala Miscellaneous Application No. 379 of 2003 and submitted that substantial loss does not represent any particular mathematical formula rather that it is a qualitative concept.
10. It was also counsel's submissions that the plaintiffs are apprehensive that if the defendants execute the decree, then they will suffer substantial loss and relied on the case of *Consolidated Marine vs Nampijja & another*, Civil App. No. 93 of 1989 (Nairobi) which was cited with approval in the case of *Teresiah Wairimu v Wanjiku Mwangi Mwangi* [2018] eKLR. Counsel further relied on the case of *Bashir Godana vs Fatuma Godana Tupi* [2018] eKLR in support of the Plaintiff's application for stay.



11. Counsel submitted that the application was filed thirty days after the delivery of the judgment hence filed without inordinate delay and relied on the case of *Susan Wanjiru & another v Lucy Gathoni & another* [2015] eKLR on the issue of filing an application without inordinate delay.
12. Counsel further submitted that the plaintiffs were ready and willing to provide security for costs and relied on the case of *David Kihara Murage v Jacinta Karuana Nyangi & another* [2015] eKLR.

Defendants' submissions

13. Counsel relied on Order 42 Rule 6 of the *Civil Procedure Rules* and submitted that the plaintiffs have to satisfy the court that they will suffer substantial loss if the orders of stay of execution are not granted, that their application was filed without undue delay and that they are ready to offer security for costs.
14. Counsel submitted that the plaintiffs have not placed anything before the court to demonstrate that they will suffer any substantial loss if the orders sought are not granted. That the plaintiffs are not in occupation of the suit property and therefore they are not likely to suffer any substantial loss.
15. It was counsel's submission that the Applicants have not met the threshold for grant of the orders sought and relied on the cases of *Charles Kariuki Njuri vs Francis Kimaru Rwaru (Suing as Administrator of Estate of Rwaru Kimaru alias Benson Rwaru Kimaru (Deceased)* [2020] eKLR and *James Wangaiwa & another vs Agnes Naliaka Cheseto* [2012].
16. On whether the plaintiffs filed their application without unreasonable delay, counsel submitted that judgment was delivered on 22nd September 2023 while the plaintiffs filed their application on 23rd October 2023. Counsel relied on the case of *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] eKLR and submitted that the plaintiffs have not given an explanation for the delay and that their application is only meant to prevent the defendants from enjoying the fruits of their judgment.
17. On the issue of security for due performance of the decree, counsel relied on the cases of *Gianfranco Manenthi & another vs Africa Merchant Assurance Company Ltd* [2019] eKLR, *Arun C Sharma vs Ashana T/A Ruirundalia & Co. Advocates & 2 Others* [2014] eKLR and submitted that the plaintiffs have not offered any security as provided for under Order 42 Rule 6 of the *Civil Procedure Rules*.

Analysis And Determination

18. The issue for determination is whether the plaintiffs have met the threshold for grant of stay of execution as provided for under Order 42 Rule 6 of the *Civil Procedure Rules*. Order 42 Rule 6 (2) 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.”
19. The court in *Consolidated Marine. vs. Nampija & Another*, Civil App.No.93 of 1989 (Nairobi) held as follows on the purpose of stay of execution:

“The purpose of the Application for stay of execution pending Appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of Appeal are safeguarded and the Appeal if successful is not rendered nugatory”



20. The Applicant filed this application on 23rd October 2023, the Notice of Appeal on 3rd October 2023 and the Judgment was delivered on 22nd September 2023. The issue of an application being filed timeously is one of the limbs to be satisfied an applicant. I find that the application was filed without undue delay.
21. In the case of *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] the court held that:
- “The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.”
22. On whether the plaintiffs will suffer substantial loss if the orders sought are not granted. The plaintiffs have not satisfactorily addressed this issue of what substantial loss they will suffer if such orders are not granted. Both parties agree that the plaintiffs are not in occupation of the suit land. In the case of *Elisaphan Omollo Nyasita v Gradus Atieno Othim & another* [2019] eKLR held as follows:
- “11. It is trite law that it is not merely sufficient for the applicant to state that he or rather she is likely to suffer substantial loss if the application for stay of execution sought is not allowed. The applicant has not shown the damage or loss that he is likely to suffer if the order sought in the application is not granted. Moreover, to grant the order aforesaid would deny a successful litigant (respondent) the fruits of his Judgment as held in Kenya Shell Ltd case.”
23. In the case of *Siegfried Busch vs MCSK* [2013] eKLR, the court held that:
- “A superior court to which an application has been made must recognize and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment...”
24. The court has to balance the rights of the successful litigant and the one who wants to appeal the decision so that justice is served without denying a party the enjoyment of the fruits of a judgment or the one who has a right to appeal through the hierarchy of courts.
25. The Applicant is ready and willing to offer security for the due performance of the decree and the Respondent has submitted that the Applicant should deposit the costs of the suit in a joint interest earning account of both advocates for the parties.
26. In the case of *Selestica Limited v Gold Rock Development Ltd* [2015] the court held as follows:
- “In my view, the rule gives the court unfettered discretion to issue any orders as to preserve the subject matter pending the hearing of the appeal. I have no doubt therefore that I have the power to order such security for the due performance of decree or order, and that the appellant did not have to furnish such security upfront before arguing the application for stay pending appeal. In any event, where the court orders for security deposit and there is default, then the orders for stay are rendered useless for a defaulting party.”
27. The orders sought are discretionary but the court should exercise the discretion judiciously. This is a non-monetary decree and I therefore order that the Respondent should not part with the possession of the suit land pending the hearing and determination of the Appeal.



28. Costs of the application to the respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 30TH DAY OF JANUARY 2024.

M. A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure

