



REPUBLIC OF KENYA



Nyundo & 2 others v Kinda & 2 others (Environment & Land Case 204 of 2017) [2024] KEELC 1684 (KLR) (20 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1684 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 204 OF 2017
FM NJOROGE, J
MARCH 20, 2024**

BETWEEN

**WILSON BAYA NYUNDO 1ST PLAINTIFF
PAUL THOYA BAYA 2ND PLAINTIFF
EMMANUEL SIFA NYUNDO (SUING IN THEIR CAPACITY AS
THE ADMINISTRATORS OF THE ESTATE OF WILSON BAYA
NYUNDO) 3RD PLAINTIFF**

AND

**MWANGOME RODGERS KINDA 1ST DEFENDANT
ANTHONY KINDA MWANGOME 2ND DEFENDANT
ANTHONY KINDA MWANGOME 3RD DEFENDANT**

RULING

1. For determination is the Applicants' Notice of Motion dated 7th November 2023 seeking the following orders:
 1. Spent;
 2. That pending the inter partes hearing and determination of the application, the court be pleased to stay the execution of the judgment delivered herein on 11th October 2023;
 3. That pending the hearing and determination of the appeal filed in the Court of Appeal against the judgment delivered on 11th October 2023, the court be pleased to stay the execution of the said judgment;
 4. That costs of the application be provided for.



2. The application is founded on the grounds set out on its face and the supporting affidavit of Anthony Kinda Mwangome the 3rd Defendant who stated that judgment was delivered on 11th October 2023 against the defendants; that the defendants being dissatisfied with the said judgment preferred an appeal; that he has requested for certified copies of proceedings and judgment of the court and a Notice of Appeal has already been filed; that the Plaintiff sent a letter dated 27th October 2023 with a copy of a draft decree with view to executing the judgment and that if execution proceeds the defendants will be evicted from the suit land yet he and his family have no alternative place to live in.
3. The application was opposed vide the replying affidavit of Paul Thoya Baya one of the administrators of the estate of Wilson Baya Nyundo who stated that judgment was delivered in favour of the plaintiffs on 11th October 2022 and that the court should not grant the orders for stay sought as the same will amount to curtailing the plaintiff's right over the suit property. Further, he stated that the defendants have not demonstrated that they stand to suffer any substantial loss if the orders sought are not granted.

Disposition

4. The application was canvassed by way of written submissions. I have considered the rival affidavits, the submissions by the parties as well as the authorities relied on. The issue for determination is whether the order of stay of execution sought is merited.
5. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides:
 - 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. Further to the above, stay may only be granted for sufficient cause, and the Court, in deciding whether or not to grant the stay and the light of the overriding objective stipulated in Sections 1A and 1B of the [Civil Procedure Act](#), is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the [Civil Procedure Act](#) (CPA) or in the interpretation of any of its provisions.
7. Section 1A (2) [CPA](#) provides as follows:

“The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective”.
8. Under Section 1B [CPA](#) some of the aims of the said objectives are:

“the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
9. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result



to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See [Antoine Ndiaye v African Virtual University](#) [2015] eKLR.

10. 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.”

11. 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.”

12. Guided by the foregoing, I need examine the allegations of the applicants to see if they support the grounds set out above.

13. First the applicants state that they have filed a notice of appeal. I have seen the notice of appeal in the file as well as the letter bespeaking the certified copies relevant to the filing of the record of appeal and I am satisfied that for the purposes of the instant application an appeal is in place.

14. Concerning substantial loss the applicants state that they have lived for a lengthy period of time on the suit land and even interred some of their deceased kin on it whom they would have to exhume in the event the judgment is executed. Mere length of stay, however long is not sufficient to support a claim that they would suffer substantial loss. however perchance the applicants have to execute all the works of exhuming the remains of the deceased and move their physical developments out of the land there is reason to believe that these processes may occasion them substantial loss yet the outcome of the appeal can not be prognosticated at present. If the appeal succeeds their efforts would be in vain and would amount to irrecoverable loss. In the circumstances I am of the view that they may suffer substantial loss if the orders are not issued.

15. As to whether the application has been made without any unreasonable delay I note that the impugned judgment was delivered on 11/10/23 and the motion at hand was lodged on 7/11/2023 and I am



satisfied that the intervening period between those two dates which amounts to about 28 days or thereabouts can not be termed as unreasonable delay.

16. Lastly I note that the applicants have expressly rendered themselves subject to this court's decision regarding conditions that it may impose on them for the due performance of the decree and as the applicants have satisfied the other conditions for stay of execution, this court is inclined to issue such a condition herein.
17. In the upshot I am of the view that the applicants have satisfied the conditions for the grant of stay of execution and their application has merit.
18. That said, I allow the application dated 7/11/2023 as prayed in prayer no (c) thereof. I also impose the condition that the applicants shall within 60 days of this order file and serve the record of appeal upon the respondents in default of which the orders of stay of execution herein granted shall automatically lapse and execution shall proceed against the applicants.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 20TH DAY OF MARCH 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

