



**Kipsoi v Chelagat & 2 others (Environment and Land Appeal  
E008 of 2023) [2024] KEELC 1713 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1713 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KABARNET  
ENVIRONMENT AND LAND APPEAL E008 OF 2023**

**L WAITHAKA, J**

**MARCH 7, 2024**

**BETWEEN**

**OSCAR KIPSOI ..... APPELLANT**

**AND**

**KIGEN KIPKEBUT CHELAGAT ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR, BARINGO ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the appellant/applicant's notice of motion/application dated 18th December, 2023. Through the application, the appellant/applicant seeks stay of execution of the decision (Ruling/order) made in Kabarnet CMC ELC Case No.9 of 2018-; Kigen Kipkebut Chelagat V. Oscar Kipsoi & 2 others.
2. The circumstances leading to the filing of the application are that on 27th November 2023, the lower court allowed the 1<sup>st</sup> respondent's application dated 14<sup>th</sup> November 2022, in which the 1<sup>st</sup> respondent sought leave of the court to execute the judgment and decree issued in his favour in Karbanet CMC ELC Case No. 9 of 2018 mentioned herein above by evicting the appellant /applicant from the suit property.
3. The appellant/applicant had opposed the application on the ground that the 1st respondent/applicant had not complied with the applicable law and procedures in seeking to evict him from the suit property.
4. Aggrieved by the decision of the lower court the appellant/applicant appealed to this court. Besides, appealing to this court, the appellant filed an application before the lower court, dated 4<sup>th</sup> December 2023, seeking stay of execution of the ruling/order appealed from pending the hearing and determination of the appeal.



5. On 11<sup>th</sup> December 2023, the lower court dismissed the applicant's application for stay pending on appeal on the ground that it was a delaying tactic aimed at forestalling execution of a judgment duly delivered and which had not been set aside.
6. After his application for stay was denied, the appellant filed the instant application seeking orders similar to those he sought in the application dated 4<sup>th</sup> December 2023, which were denied by the lower court.
7. The application is premised on the grounds on its face and supported by the affidavit of the appellant sworn on 18<sup>th</sup> December 2023 in which the grounds on the face of the application are reiterated. In particular, the appellant contends that the lower court failed to apply the law applicable to an application for stay thereby greatly prejudicing him for he risks being evicted from the suit property before his appeal, which he claims has high chances of success, is heard and determined.
8. The appellant urges this court to grant him the orders sought as the application has been made without unreasonable delay and that he is willing to abide by such conditions as the court may give for issuance of the orders sought.
9. In reply and opposition to the application, the 1st respondent's counsel, Mike K. Chebii, has through the affidavit he swore in response of the application, given an account of the circumstances leading to making of the decision/order of the court appealed from and contended that the appeal and the instant application are an abuse of the process of the court as the judgment on which the appealed decision/order is premised has not been appealed from.
10. Terming the appeal and the instant application without merit and a delaying tactic meant to obstruct and/or frustrate the 1<sup>st</sup> respondent from enjoying the fruits of his judgment, the 1<sup>st</sup> respondent's counsel states avers that granting the orders sought would be prejudicial to the 1<sup>st</sup> respondent as he will be prevented from regaining possession of the suit property yet he is the registered owner.
11. When the application came up for hearing, the parties retaliated their position/contentions highlighted herein above.

### **Analysis and Determination**

12. As pointed out herein above, the appellant filed this application after the lower court dismissed its earlier application for stay pending appeal.
13. Despite the lower court having dismissed the applicant's application, this court is clothed with jurisdiction to hear and determine a fresh application for stay, the fact that the lower court dismissed the former notwithstanding. In that regard see the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules and the case of *Car House Limited & another v Erastus Kavita Musyoka* (2022) eKLR where Odunga J. (as he then was), quoted a number of cases on the concurrent jurisdiction of the trial and appellate court to hear and determine applications for stay pending appeal. He stated/held:-

“It is therefore clear that under the said provision (Order 42 rule 6(1) of the *Civil Procedure Rules*), whether the application for stay was granted was refused by the trial court, this court is at liberty to consider such application and make such order thereon as it deems just.”
14. Turning to the merits of the application, it is not in dispute that the appellant is the one in possession of the suit property; It is also not in dispute that the 1<sup>st</sup> respondent is the registered proprietor of the suit property; that the 1<sup>st</sup> respondent obtained a judgment against the appellant which judgment has not been appealed from.



15. It is also noteworthy that the appellant's appeal is against consequential orders issued in the judgment issued in favour 1<sup>st</sup> respondent. That being the case, an issue of law arises concerning whether or not the appellant's appeal has merit given that the judgment on which the order is premised has not been appealed from. Be that as it may, since the question as to whether the appeal has merit is not one of the conditions this court considers in determining an application for stay of execution pending appeal, I will restrict myself to whether or not the appellant has met the conditions for being granted an order of stay pending appeal namely; substantial loss may result to the applicant unless the order of stay is made; the application was made without unreasonable delay; and such security as the court orders for due performance of such decree or order as may ultimately be binding on him has been given by the applicant. In that regard, see Order 42 Rule (6) (2) of the Civil Procedure Rules and the case of Kiplangat Kotut v Rose Jeborkipngok (2015)e KLR where it was held:-

“.....in an application for stay, there are always two competing interests that must be considered, these are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced. ... In a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal. I do not see why the same should not be applicable in this case.”

16. In Masisi Mwita v. Damaris Wanjiku Njeri (2016)e KLR, Mativo J (as he then was) states as follows:-

“The cornerstone of jurisdiction of the court under order 42 of the civil procedure rules is that substantial loss would result to the applicant unless stay of execution is granted.”

17. Regarding the issue of substantial loss Gikonyo J. in the case of James Wangalwa & Another v Agnes Naliaka Chesoto Bungoma HC Misc Application No. 42 stated:-

“...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 civil procedure rules. 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. this is what substantial loss would entail....”

18. In applying the principles espoused in the above cited cases to the circumstances of the instant case/ application, although the applicant is the one in possession of the suit property, he has not presented any evidence of the loss or prejudice he stands to suffer if the decree issued against him is executed.

19. I note that his claim is noted that his case is premised on the claim that the 1<sup>st</sup> respondent did not adhere to the applicable law and procedures in seeking to evict him from the suit property. Whilst the alleged none adherence with the law may form a good ground for purposes of arguing the appellant's appeal, it is not proof that the appellant stands to suffer substantial loss if stay pending appeal is denied.

20. In determining the appellant's application for stay pending appeal, this court is supposed to balance the right of the appellant to appeal against the impugned decision/order with the 1<sup>st</sup> respondent's right as the successful party.



In balancing the interest of the plaintiff who is not only the registered proprietor of the suit property but also has a judgment issued in his favour against those of the appellant who merely insists on compliance of the procedure of eviction contemplated in Section 152 of the Land Act, despite having had an opportunity to present his defence, if any, in the suit instituted against him by the 1st respondent, I am not persuaded that the appellant stands to suffer more than the 1<sup>st</sup> respondent if the order of stay sought is denied.

21. That being my view of the matter, despite the application having been filed timeously (without undue delay) and the applicant having expressed willing to provide security for performance of such obligation as may ultimately attach to him, I decline to exercise the discretion vested in this court in his favour.
22. The upshot of the foregoing is that the appeal has no merit. Consequently, I dismiss it with costs to the 1<sup>st</sup> respondent.
23. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ITEN THIS 7<sup>TH</sup> DAY OF MARCH 2024**

**L. N. WAITHAKA**

**JUDGE**

**Ruling read virtually in the presence of:-**

N/A for the appellant

M.K Chebii for the 1<sup>st</sup> respondent

N/A for the 2<sup>nd</sup> & 3<sup>rd</sup> respondents (nor parties in the lower court matter)

Court Asst.: Christine

