



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Omondi v Ecosse Sacco Ltd & 3 others (Environment and Land Appeal
E022 of 2023) [2024] KEELC 3512 (KLR) (29 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3512 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E022 OF 2023**

**A NYUKURI, J
APRIL 29, 2024**

BETWEEN

HON. WILLIAM OPONDO OMONDI APPELLANT

AND

ECOSE SACCO LTD 1ST RESPONDENT

SAMSON ONCHIRI 2ND RESPONDENT

MOSES OBAIGWA OBAI 3RD RESPONDENT

SAMUEL NYAKUNDI 4TH RESPONDENT

*(Being an appeal against the Judgment and Orders of Hon. E.
Kimaiyo Suter (PM) delivered on the 30th day of March 2023 at
Mavoko Law Courts in Mavoko ELC Misc. Appl. No. E001 of 2021)*

RULING

1. Vide an application dated 17th April 2023, the appellant sought the following orders;
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That at interpartes hearing of the application, the honorable court be pleased to grant an order of stay of execution of injunction preventing and barring the respondents from dealing with suit property LR 29818 in anyway pending the hearing and determination of the appeal.
2. The application is based on grounds on the face of it and supported by the affidavit of William Opondo Omondi, the appellant. He deposed that his case in the lower court was straight forward and that he



was surprised by the turn of events, as the trial court erred by being biased and misconstruing the law. He maintained that his appeal has high chances of success and if the orders sought are not granted the same will be rendered nugatory. He stated that as he had together with William Kyengo already bought the suit property from one Paul Matheka, what remained was transfer to them. He stated that Kyengo and himself were paid some money and that money was also paid to the agents who brought the 1st respondent to purchase the suit property. According to him, the trial court ignored his submissions and only considered the respondents submissions. He also filed several documents from page 1 to 163 attached to his application; which he did not identify, but which the court has considered.

3. The application is opposed. The respondents filed grounds of opposition dated 29th May 2023, listing the following grounds;
 - a. That the applicant has not disclosed any good reason or grounds for appeal with chances of success to prompt the court the grant a stay.
 - b. That the applicant has failed to prove to the honourable court the damages he is likely to suffer since he was not the owner of the property.
 - c. That the applicant failed to prove specific performance of the contract and no evidence exists in record to prove the contract.
 - d. That all necessary documents to commence the appeal are available hence this application is merely a delaying tactic by the intended appellant.
 - e. That the application be dismissed with costs.
4. Further, Samson Okiaga Onchiri, the 2nd respondent and chairman of the 1st respondent, filed a replying affidavit dated 29th May 2023. He averred that the application for stay of execution was a delay tactic by the applicant as no ground of appeal had been disclosed. The deponent stated that the appellant had failed to prove his claim and that there was no specific performance of the contract on his part and that the stay sought was an abuse of the court process.

Analysis and determination

5. The court has carefully considered the application, the supporting affidavit and the response thereto. Among the annexures filed is the memorandum of appeal, a copy of part of the lower court judgment and other documentary evidence which were not identified. The applicant sought for an order “of stay of execution of injunction preventing and barring the respondents from dealing with suit property LR 29818”. Therefore, it is not clear whether the applicant wants stay of execution of the lower court judgment or an order of injunction restraining the respondents from dealing with the suit property.
6. The law providing for the jurisdiction of the court to grant stay of execution is enshrined in Order 42 Rule 6 of the [Civil Procedure Rules](#) which provides as follows;
 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.
 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.
7. On the other hand, the power to grant an injunction by this court sitting as an appeal court is provided for in Order 42 Rule 6 (6) as follows;

Notwithstanding anything contained in sub rule (1) of this Rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
8. Therefore, in the exercise of its appellate jurisdiction, this court has power to grant both stay of execution pending appeal and injunction pending appeal. To obtain stay pending appeal, an applicant must demonstrate that they stand to suffer substantial loss if execution proceeds. And to prove injunction, an applicant must demonstrate a prima facie case, by demonstrating that they have an arguable appeal with chances of success and that if the injunction is not granted they may suffer loss that may not be compensated in damages.
9. Although the annexed judgment is incomplete, lacking page 2 and ending at page 7, hence not having the trial court's reasoning and determination, what I gather from paragraph 1 of that judgment, is that the appellant herein who was the plaintiff in the lower court, sought for specific performance for payment of Kshs. 1,620,000/= or in the alternative return of all title documents given to the purchasers. The court found that the applicant produced the last page of an alleged agreement with Paul Matheka, which did not have particulars of the property sold or parties' obligations and that therefore he failed to prove having purchased the suit property from Paul Matheka who was not called as a witness in the matter. The court also found that the applicant having admitted owing Paul Matheka a sum of Kshs. 118,000/=, he failed to prove to have performed his obligations and therefore he had no capacity to transact on the property in the name of Paul Matheka. As the attached judgment was incomplete, this court cannot ascertain what the trial court said concerning the prayer for specific performance.
10. I have considered the lengthy supporting affidavit of the applicant. While he laments that the trial court was biased, he does not attempt to answer the findings of the trial court on whether he had an agreement with Paul Matheka, the terms of that agreement and whether he complied with his obligations under that agreement. The applicant herein sought for specific performance for payment to him of a sum of Kshs. 1,620,000/=. He also stated that he was paid Kshs. 385,000/=. His partner William Kyengo was paid Kshs. 305,000/=. While his advocate was paid Kshs. 270,000/=. Having considered the supporting affidavit, I do not find any evidence to demonstrate that if stay is not granted he stands to suffer substantial loss. On whether he has proved entitlement to a temporary injunction pending appeal, I find that since his prayer is monetary and he has conceded to having received part of the said amount and has not asserted the existence of an agreement between him and Paul Matheka, or that he had capacity to transfer the suit property to the purchasers who are the respondent, my view is that at this preliminary stage, I am not convinced that he has an arguable appeal regarding grant of the equitable relief of specific performance.
11. In the premises I find and hold that the appellant/applicant has not met the threshold for grant of orders of stay of execution or injunction pending appeal or both. As the applicant's prayer is for an "order of stay of execution of injunction preventing and barring the respondents from dealing with suit property LR 29818" which is unknown in law, the same is declined.



12. The upshot is that the application dated 17th April 2023 lacks merit and the same is hereby dismissed with costs to the respondents.

13. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 29TH DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Omino for appellant/applicant

No appearance for respondents

Court assistant – Abdisalam

