



**Dzila v Telcom [K] Ltd & another (Environment & Land Case 39 of 2021) [2024] KEELC 4143 (KLR) (22 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 4143 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 39 OF 2021**

**AE DENA, J**

**APRIL 22, 2024**

**BETWEEN**

**OMAR SEFU DZILA ..... PLAINTIFF**

**AND**

**TELCOM [K] LTD ..... 1<sup>ST</sup> DEFENDANT**

**KENYA POWER & LIGHTING CO LTD ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

- 1 On 2/10/2023, this court rendered its Judgement over the suit herein. A brief recap of the facts is necessary to put the issues to be later determined into context. Vide a plaint dated 12/4/2002 and amended on 29/10/2009, the Plaintiff herein sought for a declaration that he was the lawful proprietor of Land Parcel No Kwale/golini/1025 hereinafter referred to as the suit property. The Applicant further sought for orders restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from possession of the suit property with special damages as a result of their alleged illegal occupation of the same. The court in its Judgement dismissed the Plaintiff's suit for failing to prove to the required standard as against the Defendants herein. It was also ordered that the 1<sup>st</sup> Defendant be registered as the lawful proprietor of the suit property with the title in the Plaintiff's name to be cancelled forthwith.
- 2 Aggrieved by the said Judgement, the Plaintiff has filed the instant application and which is dated 24/10/2023. The same has been filed by the firm of Aboubakar Mwanakitina & Co Advocates for grant of the following orders;
  1. Spent
  2. This Honourable court do grant an order for the stay of the execution of the judgement and or orders given on 2<sup>nd</sup> October 2023 pending the hearing and determination of the appeal filed in respect thereof.



3. Spent
  4. Spent
  5. Costs of this application.
- 3 A supporting affidavit is sworn by the Applicant Omar Sefu Dzila. It is averred that the Applicant has filed an appeal which he considers arguable with high chances of success particularly on the grounds that the 1<sup>st</sup> Defendant were not in occupation of the property subject of this suit as they never objected to the registration of the Applicant herein as the proprietor and secondly that the 1<sup>st</sup> Defendant has no legal interest over the suit property having failed to lodge the objection under Section 26 of the [Land Adjudication Act](#).
- 4 The Applicant states the court was misled into believing that the 1<sup>st</sup> Defendant was in occupation of the suit property before his registration as proprietor of the property. That the 1<sup>st</sup> Defendant having realised their illegal encroachment on the suit property have moved out. The applicant lastly stated that he is bound to suffer irreparable loss in the event that the orders sought are not granted.
- 5 In opposing the application, the 2<sup>nd</sup> Defendant's legal officer Lynn Owano filed a replying affidavit before court on 2/11/2023. It is alleged that the application for stay is fatally defective the Applicant having failed to annex a copy of the judgement/decree and the Notice of Appeal to show the intention to appeal. It is further averred that having an arguable appeal is not one of the considerations for grant of stay under Order 42 Rule 6 of the [Civil Procedure Rules](#). That the substantial loss alluded to by the Applicant has not been demonstrated as there has not been occupation of the suit property. The court is urged to disallow the application.
- 6 The application was canvassed by way of written submissions which parties filed and exchanged. The court has considered the same.

### Determination

- 7 The court is guided by the provisions of Order 42 Rule 6(1) of the [Civil Procedure Rules](#) which donate the jurisdiction for grant of stay of execution pending appeal. The same states that: -
- 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 order set aside.
- 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.”
- 8 Arising from the above provisions of the law, it is clear that 3 conditions have been set out before grant of orders of stay of execution pending appeal, the same are establishment of a sufficient cause,



satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. See [Antoine Ndiaye v African Virtual University](#) [2015] eKLR.

- 9 The 2<sup>nd</sup> Defendant raised the issue of a decree not having been filed as an annexure to the application and the Notice of Appeal. I am in agreement with this position as indeed I have not had the chance to peruse the same from the record, though it is not mandatory for a decree to be filed as a pre-requisite for grant of stay of execution pending appeal. I further note that in his submissions before court, the Applicant at paragraph 6 of the same stated that a Notice of Appeal was filed on 12/10/2023 and served upon the Respondents. I will treat the failure to file the same before this court as an oversight and an issue of procedural technicality which does not interfere with the substance of the application.
- 10 As to whether the Applicant has given sufficient cause to warrant grant of the orders sought, a perusal of the judgement shows that the Applicant has lost ownership and use of the suit property, even though the aspect of its use was never proved. The final orders as issued in the judgement are to the effect that the Land Registrar Kwale to cancel the registration of the Plaintiff as the absolute proprietor of the suit property and the 1<sup>st</sup> Defendant be registered as the proprietor. It is clear that in the event that the decree is executed the same will result in cancellation of the titles from the Plaintiff's name. This in my view demonstrates sufficient cause as well as substantial loss of property. See the case of [James Wangalwa & another v Agnes Naliaka Cheseto](#) [2012] eKLR, where the court underscored the need to show "....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 I find that the Applicant has proved the limb of substantial loss being imminently suffered in the event that the orders sought are not granted.
- 12 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.
- 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."
- 13 Further, stay may only be granted for sufficient cause and which in my view entails amplifying the purpose of the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#). The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions in ensuring delivery of substantive justice. It is further my view that as a court, it is necessary to take all the available steps necessary to allow a litigant pursue justice to the furthest end. I also see no prejudice to be occasioned to the decree holder.
- 14 The court notes that the application has been filed within reasonable time, judgement was rendered on 2/10/2023 and the instant application filed 22 days later on 24/10/2023. I wish to caution myself against having to look at the merits of the appeal and rather focus on the intention of having stay of execution pending appeal.



15 The issue of security for costs is in my view discretionary depending on the circumstances of every case, given that the decree herein is not a money decree, the Respondent can always recover any costs from litigation as had been granted by the court in its judgement. I am persuaded with the dictum in Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others [2015] eKLR, it was said:

... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

16 From the foregoing I find and hold that the Applicant has fulfilled the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules.

17 In the upshot, I find that the application dated 24/10/2023, is meritorious, and the same is hereby allowed as prayed, with no orders as to costs.

It is so ordered.

**RULING SIGNED DATED AND DELIVERED THIS 22<sup>ND</sup> DAY OF APRIL 2024.**

.....

**A.E DENA**

**JUDGE**

Mr. Khamisi holding brief for Mr. Abubakar for the Plaintiff/Applicant

No appearance for the 1<sup>st</sup> Defendant/Respondent

Ms. Kabole for the 2<sup>nd</sup> Defendant/Respondent

Mr. Daniel Disii – Court Assistant

