



Otim & another v Elsek and Elsek Company Limited & 2 others (Environment & Land Case 833 of 2017) [2024] KEELC 4315 (KLR) (28 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4315 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 833 OF 2017
MN GICHERU, J
MAY 28, 2024**

BETWEEN

DR BENNY BEN OTIM 1ST PLAINTIFF

KENYA RANCHING COMPANY LIMITED 2ND PLAINTIFF

AND

ELSEK AND ELSEK COMPANY LIMITED 1ST DEFENDANT

KENYA COMMERCIAL BANK LIMITED 2ND DEFENDANT

LAND REGISTRAR, KAJIADO 3RD DEFENDANT

RULING

1. This ruling is on the notice of motion dated 7/8/2023. The motion which is brought under Sections 1A, 1B, 3A of the *Civil Procedure Act*, Orders 41 rule 4, 42 Rule 6, 51 Rule 1 of the Civil Procedure Rules as well as Article 159 of *the Constitution* of Kenya 2010 and all enabling provisions of the law seeks the following residual orders.
4. Stay of execution of the judgment of the High Court delivered on 16/5/2023 and any other consequential orders pending the hearing and determination of an appeal to the Court of Appeal.
5. That the costs of this application be in the cause.
2. The motion is based on thirteen grounds and is supported by an affidavit sworn by the 1st plaintiff. The gist of the above material is as follows.

Firstly, the applicant is aggrieved by the judgment of this court dated 16/5/2023 which dismissed his suit.

Secondly, he lodged an appeal which has high chances of success.



Thirdly, the 1st defendant has started to alienate the suit property in execution of the decree herein and also taxed the bill of costs.

Fourthly, the appeal will be rendered nugatory as the plaintiff will suffer irreparable loss in excess of Kshs. 150 million which will not be recoverable.

Finally, the applicant is willing to prosecute the appeal without delay.

3. The motion is opposed by the second defendant and its group general counsel Bonnie Okumu, has sworn a replying affidavit dated 24/8/2023 in which he states as follows.

Firstly, the judgment dated 16/5/2023 is sound and just.

Secondly, the 2nd defendant was awarded costs and no law stops it from taxing such costs.

Thirdly, the 1st defendant which is the bonafide registered owner and chargor of the suit land is still heavily indebted to the Bank and any further delay in this matter will heavily prejudice it since it cannot move to exercise its statutory rights over the suit property to recover the outstanding loan amount which is due and owing.

Fourthly, the applicant has not satisfied the principles for stay of execution pending appeal especially the one requiring security for the due performance of the decree.

Finally, this litigation should come to an end since it has been more than seven (7) years since the dispute started.

4. The 2nd plaintiff through its director Joseph Bradley Gitari has also filed a replying affidavit dated 14/9/2023 in which the motion is said to be incompetent and fatally defective for referring to an undisclosed judgment of the High Court.

5. Counsel for the parties were to file written submissions by 31/3/2024 but by the time that I am writing this ruling on 23/5/2024, no such submissions have been filed. I have written this ruling without the benefit of the written submissions.

6. I have carefully considered the motion in its entirety including the grounds, the affidavits, the annexures and the entire record. I find the following issues arise in this application.

- i. Whether the applicant has proved that he stands to suffer substantial loss if the application is not allowed.
- ii. Whether the application has been made without unreasonable delay.
- iii. Whether the applicant has provided security for the due performance of the decree in the event that his appeal is dismissed.

These issues are lifted from Order 42 rule (2) (1) (a) and (b) which provides as follows.

“No order for stay of execution shall be made under sub rule (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 orders as may ultimately be binding on his has been given by the applicant”.



7. Regarding the first issue, I find that the applicant has not proved that he stands to suffer substantial loss. He is not saying that he lives on the suit land and that if the application is not allowed, he will be evicted and rendered destitute. I find that the substantial loss is only alleged but not proved.
8. On the second issue, I find in favour of the applicant. The application was made without unreasonable delay. This alone is however not sufficient because the three conditions for the grant of an order of stay are conjunctive and not disjunctive. In other words all the three prerequisites must exist together for the application to be successful. The absence of one of the prerequisites defeats the whole application. The use of the word “and” in subsection 2(a) after the word “made” and at the end of the subsection after the word “delay” means that all the three conditions must all exist together for an application such as this to succeed.
9. Looking at the final condition, I find that the applicant has not satisfied it because he has not offered anything as security for the due performance of the decree. He is only talking about succeeding in the appeal. He is not saying that he will pay the loan due to the second defendant. He is not saying that he paid the loan yet he is accused of squandering it. Since success and failure are two sides of the same coin, he should also be telling us how he will repay the hefty loan in the event that he loses the appeal. He should also demonstrate that he has assets whose value is equal to or higher than the value of the loan due and owing to the second defendant. He has failed to do all this.

For the above stated reasons, I find no merit in the motion dated 7/8/2023 and I dismiss it with costs.

Dated Signed and Delivered at Kajiado Virtually this 28th Day of May 2024.

M.N. GICHERU

JUDGE

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