



Mungai & another (Suing as the Trustees of Gatimu Dispensary Self – Help Group) v Registered Trustees of St Edward’s Catholic Church (Environment & Land Case 47 of 2014) [2024] KEELC 3937 (KLR) (20 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3937 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 47 OF 2014**

**MAO ODENY, J
MAY 20, 2024**

BETWEEN

JAMES MAINA MUNGAI 1ST PLAINTIFF

MBURU MUHUNYO 2ND PLAINTIFF

SUING AS THE TRUSTEES OF GATIMU DISPENSARY SELF – HELP GROUP

AND

**THE REGISTERED TRUSTEES OF ST EDWARD’S CATHOLIC
CHURCH DEFENDANT**

RULING

1. This ruling is in respect of a Notice of Motion dated 16th October 2023 by the defendant/Applicant seeking the following orders:
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of the Applicant’s intended appeal to the Court of Appeal, this honorable court be pleased to grant a stay of execution of the judgment issued on 22nd September 2023 together with all the consequential orders thereof.
 - d. That costs of this application be provided for.
2. The application was supported by the annexed affidavit of Fr. Denis Wanyonyi sworn on 16th October 2023 where he deponed that he is the parish priest in charge of the defendant. He stated that the defendant was the rightful owner of land parcel No. Mau Narok/Siapei Block 7/445.



3. He further deponed that the plaintiffs are likely to execute the said judgment upon expiry of the six-month period given in the judgment which will occasion the defendant substantial loss as church services will be disrupted with nowhere to worship. That this would render the intended appeal which has high chances of success nugatory.
4. The Plaintiff/Respondents filed a replying affidavit sworn on 31st October 2023 by the 1st plaintiff where he deponed that a party who has a decree or judgment in their favour is entitled to the fruits of their litigation unless circumstances exist which justify denying the immediate realization thereof.
5. It was the 1st plaintiff's case that where a successful litigant has a title deed in their name, there is no justification to grant stay of execution of the decree. Further that the defendant is mandated by law to demonstrate the substantial loss it is likely to suffer if the orders of stay of execution are not granted.
6. The 1st plaintiff deponed that the defendant had denied the plaintiffs the use of the suit property for a long time and it ought to vacate the property since it was illegally enjoying it.
7. The Respondent also stated that the court gave the defendant a period of six months to vacate the suit property and that in the event the court is inclined to grant stay of execution orders, the defendant can be ordered to deposit in court an amount equivalent to the current market value of the suit property or costs of the suit be deposited in a joint interest earning account of the advocates on record.

Defendant/applicants' Submissions

8. Counsel relied on order 42 Rule 6 of the *Civil Procedure Rules*, the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 and submitted that the defendant has to meet the threshold for grant of stay of execution, namely, that it will suffer substantial loss, that it was willing to offer security and that the application for stay was filed without unreasonable delay.
9. Counsel submitted that judgement in the matter was delivered on 22nd September 2023 while the defendant filed the application under consideration on 16th October 2023 hence it was filed within a reasonable time without delay.
10. On the issue of substantial loss, counsel submitted that the defendant was an entity running a church on the suit property for a period of twelve years and if it is evicted from the suit property, its appeal will be rendered nugatory. Counsel further submitted that if the eviction proceeds, the plaintiffs might dispose of the disputed portion to third parties without the knowledge of the defendant.
11. Counsel relied on the cases of *Consolidated Marine v Nampijja & another* Civil App. No. 93 of 1989 (Nairobi) and *Trustees Chrisco Church Nakuru vs Samuel Kibowen Towett & Others* [2017] eKLR and submitted that the defendant was willing to deposit any security as directed by the court.

Plaintiff's Submissions

12. Counsel relied on Order 42 Rule 6 of the *Civil Procedure Rules*, the case of *Samvir Trustee Limited vs Guardian Bank Limited* [2007] eKLR and submitted that for the court to grant stay of execution orders, the defendant has to prove that it will suffer substantial loss.
13. Counsel also relied on the cases of *J.P Machira T/A Machira & Co. Advocates vs East Africa Standard Limited* [2001] eKLR, *Everlyn Jebitok Keter v Henry Kiplagat Muge & 2 Others* [2011] eKLR and reiterated that the court should order the defendant to deposit security for costs which would either be the value of the suit property or the costs of the suit.



Analysis And Determination

14. The issue for determination is whether the defendant has met the threshold for grant of stay of execution as provided for under Order 42 Rule 6 of the *Civil Procedure Rules* which provides as follows:

- “(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.”

15. For the court to grant an order of stay of execution, the defendant must demonstrate that it filed the application under consideration without unreasonable delay, that it will suffer substantial loss if the orders sought are not granted and that it is willing to deposit security for the due performance of the decree.

16. On whether the application was filed without unreasonable delay, a perusal of the court record indicates that judgment was delivered on 22nd September 2023 while the current application was filed on 17th October 2023 and therefore it was filed timeously.

17. The defendant argued that it will suffer substantial loss if orders of stay of execution are not granted as it stands to be evicted from the suit property. In the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR the court held as follows:

“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.”

18. In the case of *Noor Said v Mary Mwawasi Manga* [2022] eKLR the court held as follows:

“16. The critical issues arising in this application are whether the applicant stands to suffer substantial loss if the order of stay is not granted and the question of security. The applicant has of course argued that if she is evicted and the respondent deals with the property, and she subsequently succeeds on appeal, she may find no house to return to. I am persuaded that if this happens then the applicant may suffer substantial loss. However, I think this is one case where the circumstances demand for security to be presented.”

19. The Applicant’s argument that it will suffer substantial loss if it is evicted is not tenable. The eviction is the outcome of the litigation, which is in execution of the orders of the court. The applicant should go a step further to explain how the eviction would result to substantial loss and not merely alleging so.



20. In the case of *Peter Rugu Gikanga & another v Weston Gitonga & 10 others* [2014] eKLR, the court held that:

“It is clear from the Replying Affidavit of the Peter Rugu Gikanga, that some of the Defendants/Applicants have moved out of the suit land in obedience to the order of court. The majority do not live on the land, but are said to have structures thereon. Only the 3rd and 10th Defendants/Applicants persist on living on the land, allegedly because they have no alternative land. This, with respect, is no ground for granting a stay of execution. In *Charles Wahome Geth/ v Angela Wa/R/Mu Geth/* (Court of Appeal Civil Application No. NAI 302 of 2007 UR 205/2007), the Court of Appeal held -

... it is not enough for the applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the applicants stand to suffer if the Respondent execute the decree in this suit against them. ”

21. On the issue of security for the due performance of the decree, In the case of *Kenya Commercial Bank Limited v Sun City Properties Limited & 5 others* [2012] eKLR held as follows:

“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.”

22. The Applicant indicated to the court they are willing to abide by the conditions set by the court on the issue of security for the due performance of the decree. The court is supposed to balance the interests of the successful litigant and party seeking to file an appeal.
23. I have considered the application, the submissions by counsel and find that in the interest of justice order that there be a conditional stay of execution of the judgment /decree of the court. That the Applicant deposits Kshs. 500,000/= in a joint interest earning account of the advocates on record within 30 days from the date of the ruling failure to which the stay lapses.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 20TH DAY OF MAY 2024.

M. A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure.

