



REPUBLIC OF KENYA



KENYA LAW
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**Anyenda v Simidi & 12 others (Environment and Land Appeal
1 of 2023) [2024] KEELC 4249 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4249 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND APPEAL 1 OF 2023**

FO NYAGAKA, J

MAY 15, 2024

BETWEEN

WILLIAM W ANYENDA APPELLANT

AND

ENOCK BULIMO SIMIDI & 12 OTHERS & 12 OTHERS RESPONDENT

*(Being an appeal from the Ruling of the Senior Principal Magistrate, Hon. S.
K. Mutai read on 3rd July, 2023 in Kitale CMC Land Case No. 50 of 2002)*

RULING

1. By a Notice of Motion dated 23/02/2023 the Appellant moved this Court under Order 42 Rule 6 of the Civil Procedure Rules. He prayed for the following orders:-
 1. ...spent.
 2. ...spent.
 3. That upon the inter partes hearing of the application, this honorable Court be pleased to confirm the stay order in Prayer 2, herein or grant a stay sought in prayer 2 while pending the hearing and determination of the pending appeal.
 4. That the costs of do abide in the appeal.
2. Prayer 2 of the Application was to the effect that this Honourable Court be pleased to stay the enforcement of the execution the orders made by the lower court on the 16/05/2022. The application was based on thirteen grounds. The first one was that the appellant was aggrieved by the ruling of 03/07/2023 delivered in Kitale CMCC Land Case No. 50 of 2002. The applicant in the application dated 11/05/2023 filed in the subordinate court sought to stay the enforcement of Ex Parte orders issued on 16/05/2022 and all consequential orders. He also sought a review and setting aside of the Ex Parte orders issued on 16/05/2022. The original decree in Land Case No. 50 of 2002 was perfected,



- and the Chief Land Registrar directed the County Land Registrar to issue individual titles to the respondents and other beneficiaries upon payment of the requisite fees.
3. The purported service of the application dated 03/08/2021, upon the applicant was flawed and the Affidavit of Service extremely suspect. If the stay orders sought herein were not issued the orders of 16/05/2022 would be enforced and that would render the appeal nugatory. Pursuant to orders this court made on 24/11/2023 the Applicant filed an application in the lower court in which he sought stay of execution and the enforcement of the orders of 16/05/2022. Vide a ruling delivered on 19/02/2024, the court dismissed the application.
 4. If the ex parte order of the trial Court is enforced the Applicant shall be arrested and committed to civil jail, which would subject to substantial loss and render the likely success of the appeal an academic exercise. The application was filed without undue delay and the appellant was ready to furnish such necessary security as the court would order.
 5. The application was supported by an affidavit sworn by the Plaintiff on 23/02/2023. Largely, the deposition repeated the contents of the grounds supporting the application. This Court does not need to repeat them but will take the contents thereof as replicated as the Applicant's factual depositions. He annexed and marked as WWA 1, 2, 3, 4 and 5 photocopies of the Memorandum of Appeal, the court Ruling of 03/07/2023, the application dated 03/08/2021, the Affidavit of Service and the ex parte orders issued on 16/05/2022. He also annexed WWA 6 and 7 the application dated 11/05/2023 and the Replying Affidavit.
 6. He deponed that he was never served with the Application dated 03/08/2021 and the hearing notice for 16/05/2022. Further, he learnt of the orders of 16/05/2022 when he was served with the application dated 27/04/2023 and the appealed from. He annexed as double WWA 8 a copy of the Application dated 27/04/2023. Further, the enforcement of the orders of 16/05/2022 would most likely cause him to be committed to civil jail without having been heard and another survey undertaken yet the Chief Land Registrar directed County Land Registrar Trans Nzoia had prepared land titles for the Respondents and that would serve to fully settle the dispute. He annexed as WWA9 communication from the Chief Land Registrar. He also annexed WWA 10 a copy of the lower court's ruling of 19/02/2024 on the application for stay of enforcement of the orders of 16/05/2022. His deposition was that the Application was made timeously and he was willing to furnish security as the Court would order.
 7. The 1st Respondent, one Enock Bulimo Simidi, opposed the Application. He swore a Replying Affidavit 01/03/2024. He deposed that the application did not satisfy the requirements for granting a stay of execution pending appeal since no security had been offered. Further, the Applicant had not demonstrated substantial loss as required. The Applicant intended to protract the matter unnecessarily by preventing the Respondents from recovering their property and thereby denying the successful parties from enjoying the fruits of the judgment or decree issued on 07/11/2002.
 8. He deponed further that the application was res judicata since the Applicant filed a similar application dated 07/07/2023 which was struck out with costs on 22/11/2023. He stated that he duly served the application dated 03/08/2021. Further, the Applicant did not seek to cross-examine the process server who effected service of the application hence the service was proper. The judgment of the Honorable Court delivered on 05/11/2002 and the decree issued on 07/11/2002, was to the effect that the Applicant was supposed to have a Government Surveyor to carry out the survey exercise and mark the boundaries of the purchasers' portions and take them to take them to the Land Control Board to enable them obtain land title deeds to their parcels. The Judgment of 07/11/2002 was not implemented. Instead, the Applicant looked for his friend, one Ben Wanyama Situma, a private



- surveyor who had no capacity to implement the decree. He annexed as EBS1 a copy of an Affidavit by the Surveyor. Further, that since the surveyor acted on the instructions of the Applicant, most of the Respondents ended up getting less than the acreage they had purchased from the Appellant.
9. The 1st Respondent complained to the Area Chief about the survey exercise. The Area Chief wrote to the County Surveyor about it. He annexed as EBS2 a copy of a letter by the Chief. It was over 20 years since the court pronounced itself, yet the Applicant was reluctant to implement the judgment. Orders of the court were not issued in the vain. They are to be obeyed unless vacated or varied. There was a valid judgement delivered on 07/11/2002. The Application did meet the threshold of a prima facie case. From the analysis of the law the reliefs sought by the Applicant could not be granted.
 10. He deponed that he was optimistic that at Common Law two wrongs could not make a right. Since the Applicant was not contesting the decree it could be implemented while awaiting the intended appeal. In the event the court was inclined to grant the stay of execution, it should do so on condition that the decree of 07/11/2002 be implemented, and the Record of Appeal be filed within a certain time frame. He prayed that the disallows the application.
 11. The applicant filed on 18/03/2024 a Further Supporting Affidavit sworn on 15/03/2014. He deposed that at all material times even before 15/11/2002 the 1st Respondent had been in occupation and possession of 3 acres the Applicant had sold to him. Vide a letter dated 10/01/2024, 65 titles subdivided from the Applicant's parcel of land LR. 7847/4 were forwarded by the Chief Land Registrar to the County Land Registrar for issuance to all 13 beneficiaries, including the Respondents' titles. The titles had been prepared pursuant to the work of the County Surveyor of Trans Nzoia who vide a letter dated 10/02/2020 forwarded his file for land parcel No. 7847/4 to the Director of Survey.
 12. The 1st Respondent had filed an application (in the lower Court) to restrain the Land Registrar from issuing the 65 titles forwarded to him by the Chief Land Registrar. He annexed and marked WWA 1 and 2 copies of the application and the replying affidavit. He also annexed WWA 3, a letter filed by eight (8) Plaintiffs in the lower court disassociating themselves with the 1st Plaintiff (herein 1st Respondent) and contending that he was not acting on their behalf, even on his act of filing the replying affidavit herein yet they had not authorized him. Four (4) respondents had since died and the other eight (8) had denounced what he was doing. Further, all the plaintiffs'/respondents' titles had the acreages awarded to them by the decree of the lower court. The applicant was apprehensive about being arrested and taken to prison and his movement limited, yet the titles had already been made ready for collection.
 13. The application was disposed of by way of written submissions. The applicant's submission was dated 15/03/2024 and filed on 18/03/2024. He summarized the prayers of the application and the grounds upon which it was predicated. He argued that the purpose of staying execution pending appeal was to preserve the substratum of the appeal so that it would not be rendered nugatory. He relied on the case of *RWW v EKW* [2019] eKLR. He cited Order 42 Rule 6 of the Civil Procedure Rules and summed that an applicant had to satisfy three (3) conditions for him succeed in an application of the nature. One, that he would suffer substantial loss, two, the application was filed without delay, and three, he was willing to furnish security.
 14. Further, he relied on the case of *James Wangalwa & others v Anges Naliaka Cheseto* (2012) eKLR which held on what constitutes substantial loss. He submitted that the application had been filed timeously and the requirement for performance of the decree had been satisfied since the applicant had demonstrated that the titles were ready for collection from the County Land Registrar.
 15. On his part the 1st Respondent argued the application through his written submissions dated 01/03/2024 and filed the same day. He summed the prayers in the application. He argued that Order 42 Rules 6 was self-explanatory regarding the conditions to be satisfied. Further, the instant application



was *res judicata*. That the applicant had not furnished security for costs and the application was designed to protract the matter further by denying the Respondents opportunity to recover their land. Following a decree issued on 07/11/2002, which is over 20 years, he urged the Respondents, he urged the court to hold the Respondents had a valid judgment, and that the application dated 03/08/2021 had been served. He submitted that the appellant could not diligently follow the judgment hence he should not have audience. Further, he who wants equity must do equity and he must come with clean hands therefore the Appellants did not deserve the orders sought. Regarding prejudice and irreparable loss if the orders were granted, he argued that it was the Respondents who would suffer it. Lastly, if the court were to exercise its discretion in favor of the Applicant, then it should impose conditions for stay of execution. He argued that the application should be dismissed.

Issue, Analysis And Determination

16. I have considered the application the law and the submissions by both the Applicant and the Respondents. Only two issues lie before me for determination. The first one is whether the application is merited. The second one is who to bear the costs of the application.
17. Regarding the merits of the application this court is alive to the fact the instant application is a second one in regard to seeking to stay the execution of the decree and the orders of the lower court. The first application having been dismissed on 19/02/2024.
18. In an application of this nature, the conditions to be met before granting it are basically three. They are provided for under Order Rule 6 (2) of the [Civil Procedure Rules](#) which stipulates as follows:
 - a. “No order of 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 applicant 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.”
19. Thus, when the sub-rule above is compared with Sub-rule 1 it is when it becomes clear that an appeal ought to have been preferred first to found the basis of the application. By Sub-rule 1, the party may move the court that issued the order or decree to stay execution thereof or, if the one that issued the order appealed from has refused the application or given conditions not agreeable to the appellant, he can move the court appealed to in order to consider a similar application. Then the Sub-rule gives conditions to be considered in such a case.
20. In the instant application, it has been deponed, and is not denied that the Applicant first moved the subordinate Court for a stay of enforcement of its order of 16/05/2023 and the Court refused the application on 19/02/2024 by holding that the same was *res judicata*. This the 1st Respondent swore to in his Replying Affidavit and submitted as much.
21. First, this Court needs to clarify that on 23/11/2023 it delivered a ruling in an application that the Applicant had made wherein he moved this Court for an order of stay of execution without first seeking the order in the court appealed from. In my Ruling, which is part of the record herein, I found, at paragraphs 23 and 24 that the Application was premature, incompetent and bad in law hence defective, and the Court could not consider its merits. I struck it out with costs. While doing so, this Court granted a conditional stay of execution of the orders appealed from, being that the appellant moves the subordinate Court for appropriate orders within 21 days of the order.



22. Whether the lower court was not notified of the order of this Court, or even perhaps a misapprehension of the law, the Applicant moved it for stay of execution. On 19/02/2024 it dismissed the Application for reason that it was res judicata. This was based on the finding of the Court that the application dated 14/07/2024 over which this Court delivered a ruling on 24/11/2023 was therefore considered. With due respect this was a misapprehension of the import of the decision of this Court. Even the clear wording therein was that the Appellant was required to move the ‘first court of call’ and have his application considered on merits.
23. The concept of res judicata, as provided for under Section 7 of the *Civil Procedure Act* is simple, the nerve centre of it is that the previous Court must have considered the merits of the issue sought to be brought before a subsequent court. Thus, Section 7 of the *Civil Procedure Act* provides that:
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
24. In the prior determination the Court ought to have allowed or dismissed the issue upon those merits, and not on technicalities. Therefore, in *Suleiman Said Shabbal v Independent Electoral & Boundaries Commission & 3 Others* [2014] eKLR the Court of Appeal stated as follows:
- “To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.”
25. Regarding the finding by subordinate Court that the Appellant had moved it on 11/05/2023 for similar orders, this Court is highly in doubt about it. The reason is that the Appellant filed the instant appeal on 11/07/2023 and then sought a stay of execution pending the appeal. It is not humanly possible that he could have sought to stay enforcement of the order of the Court pending the instant appeal two months before he filed it. Therefore, by this finding together with the short analysis above on what constitutes res judicata, this Court finds that the subordinate Court ought to have considered the application on merits.
26. That said, the discretion of the court to grant orders for stay of execution in such circumstances is not as wide as in other circumstances. It is fettered, as circumscribed in Order 42 Rule 6 (2). Under the provision, the court will have to consider four issues, namely:
- i. Establishment of sufficient cause;
 - ii. Demonstration of substantial loss;
 - iii. Furnishing of security;
 - iv. Making of Application without unreasonable delay.
27. As submitted by the Applicant, in *RWW v EKW* [2019] eKLR, the Court addressed its mind to the purpose of an order for stay of execution pending appeal. In so doing, it stated as follows:
- “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.”

9. 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.”

28. The starting point in determining whether or not this application succeeds is to consider whether it has been brought without undue delay. I find that from the 19/02/2024 when the trial Court dismissed the Application of stay of execution to 26/02/2024 when the instant application was filed was only seven (7) days. This period is not inordinate delay considering the fact that the Applicant had to instruct his learned counsel to prepare the application and learned counsel had to do so. Each case must be considered on its own merits.

29. The next issue the Court ought to determine is whether the Applicant has established that he will suffer substantial loss if stay of execution of its judgment is not granted. Substantial loss is a concept that many courts have voiced their meaning on. In the case of *Century Oil Trading Company Ltd v Kenya Shell Ltd Nairobi (Milimani)* HCMCA No. 156 of 2007, Kimaru J observed as follows: -

“The word “substantial” cannot mean the ordinary loss to which every Judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the code expressly prohibits stay of execution as an ordinary rule, it is clear the words “substantial loss” must mean something in addition to all and different from that which is ordinary. Where execution of a monetary decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The Court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The Court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his Judgment.”

30. In another decision, *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, substantial loss was described as follows: “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.”

31. Therefore, on substantial loss in this matter, the applicant is due for arrest and imprisonment for contempt of Court as a result of the orders issued on 16/05/2021. While execution of such an order is a lawful process unless it is stay, it is clear that if the appeal succeeds and yet the appellant shall have served the sentence, he may not be compensated by way of damages for loss of liberty: the 1st Respondent, although this should not be taken to be the case in all other matter, as not shown his intent to recompense that loss in case the appeal succeeds. I have considered that fact for the reason that the judgment sought to be enforced was delivered in 2002, and that seems to be an issue to be taken up on appeal. Further, the Appellant indicates, and it is not disputed, that titles have been prepared by the County Land Registrar and the Applicant argue he has done his bit but the 1st respondent disputes. Cancelling the title deeds already prepared may be costly both in finances, process and time. For these reasons, I find that the Applicant has established the likelihood of suffering substantial loss.



32. As a parting shot, one thing that I find intriguing is, whose brief other than pursuing his own interest the 1st Respondent is holding and whose instructions in this matter he is executing. It was sworn at paragraph 8 of the Further Supporting Affidavit of the Applicant filed on 18/03/2024 that of all the Respondents in this matter, the four (4) had since died, eight (8) had renounced his moves or disassociated with him. Indeed, to support the fact, the Applicant annexed as WWA3 a consent order dated 29/02/2024 filed in Kitale SPMC Land Case No. 50 of 2002. In it one Jane Osinde, Stephen Wanjala, Charles Wafula, Timothy Poula, Stephen Khayanga, Simon Nyasani and James Nyachieng'a have appended their signatures, which have not been disputed. Its content is that they are not parties to the Applications dated 14/02/2024 and 27/02/2024 which were filed by Enock Bulimo, the 1st Respondent herein. They also identified the Plaintiffs in that suit who had since died. These were Plaintiffs No. 4, 5, 10 and 12.
33. But in the Affidavit sworn by the 1st Respondent on 01/03/2024 at paragraph 3 he deposed that he was "seized of the facts of this matter and competent duly authorized to swear this Affidavit on my (his) own behalf and on behalf of the other Plaintiffs/Respondents." He has not annexed any signed authorization to show in this instance that the eight persons who disassociated with him gave him instructions to swear anything on their behalf after the consent referred to above. It was incumbent on him, the other parties having indicated that they did not instruct him, to avail evidence that he was duly authorized. From the foregoing facts summarized at paragraph 29 above, the 1st Respondent has not been authorized by the eight Respondents who are alive and the four who had since died. Therefore, he has falsely sworn to matters he knows to be untrue and is supposed to be punished for this offence. Offences of false swearing and perjury are rampant nowadays, being committed for purposes of litigants doing all in the book to obtain orders or steal matches against other innocent ones. This ought to be discouraged by all possible means and with heavy punishments meted against the perpetrators. The 1st Respondent should be an example of such suspects who ought to face the law. The Respondents who were dragged into this lie should report him, and avail a copy of this ruling, to the nearest Directorate of Criminal Investigation (DCIO) officers for investigation and possible prosecution.
34. In regard to the requirement of security of costs, the Applicant has stated that the titles are ready and it means he has made steps towards the due performance of the decree. The 1st Respondent does not dispute that. In fact, on 15/02/2024 he moved the subordinate Court vide an application dated 14/02/2024 for orders of restraining the County Land Registrar Trans Nzoia from issuing the titles. I agree with the Applicant that he has made efforts towards the due performance of the decree. As to whether it is being performed in accordance with the terms of the judgment or not, it is an issue to be taken on appeal. The Applicant has proposed to furnish security.
35. I have carefully considered the draft Memorandum of Appeal. The grounds, some of which, the issues of service of the Application impugned and the validity of the judgment sought to be enforced as demonstrated in ground 4 of the same especially as stated about overwhelming evidence in favour of the Appellant, are weighty matters which raise arguable points on appeal. Failing to grant the orders herein would render the appeal nugatory.
36. In *Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another* (2018) eKLR the court stated that:
- "Where the applicant proposes to provide security as the applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine



the security. The applicant has offered to provide security and has therefore satisfied this ground.”

37. Given the observations and the findings in paragraphs 29 and 30 above, I am not convinced that the 1st Respondent’s depositions in response should be trusted, and whether he is acting in good faith. The upshot is that the Applicant has shown that he has an arguable appeal, that he will suffer substantial loss in case the stay is not granted, the application was filed in good time, and that he is willing to perform the decree. Thus, the application dated 23/02/2024 is granted with costs to the Applicant.
38. The Appellant to file the record of Appeal and serve within 28 days. The Appeal is to be mentioned for directions and fixing a hearing date thereto on 13/06/2024.
39. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIA ELECTRONIC MAIL THIS 15TH DAY OF MAY, 2024.

**HON. DR. IUR FRED NYAGAKA
JUDGE, ELC KITALE.**

