



REPUBLIC OF KENYA



KENYA LAW
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**Karisa & Family & 6 others v Mwalimu & 2 others (Environment & Land
Case 183 of 2015) [2024] KEELC 4221 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4221 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 183 OF 2015**

FM NJOROGE, J

MAY 15, 2024

BETWEEN

KARISA KAHINDI KARISA & FAMILY & 6 OTHERS APPLICANT

AND

MWALIMU HAMISI MWALIMU & 2 OTHERS RESPONDENT

RULING

1. The notice of Motion dated 16th October 2023 seeks the following orders:
 1. Spent;
 2. Spent;
 3. Spent;
 4. That this honourable court be pleased to order a temporary stay of execution of the warrants of eviction issued on 6th April 2023 pending the hearing and determination of the Intended appeal;
 5. That costs of this application be provided for.
2. The application is premised on the grounds on its face and the sworn affidavit of Kahindi Karisa Kahindi, the 1st Plaintiff, who deponed that they instructed the firm of M/S Komora & Associates Advocates to represent them in this suit for recovery of their land which they had lawfully purchased from the respondents; that the firm, contrary to their instructions filed a suit claiming adverse possession. It was stated that when they appeared in court to testify they were not aware that the suit filed and presented before the court by their advocate was for adverse possession and they gave evidence in terms of their own understanding of the nature of the dispute between them and the respondents; upon questioning their advocate why he chose to file the suit against their instructions he promised



to correct the anomalies. Upon delivery of the judgment they were dissatisfied and preferred an appeal against the same hence the application for stay of execution.

3. The 1st respondent filed a replying affidavit stating that judgment was delivered on 1st November 2022 and the applicant is not being truthful as they filed the suit themselves and parties are bound by their pleadings. It was stated that the court is functus officio and a stay of execution and leave to appeal out of time should be sought at the court of appeal thus the application is an abuse of the court process.

Disposition

4. I have considered the rival affidavits, the submissions by the parties as well as the authorities relied on. The issue for determination is whether the order sought for stay of execution is merited.

The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides:

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.”
5. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. Further to the foregoing, stay be granted for sufficient cause; the Court the Court is no longer limited to the foregoing provisions in deciding whether or not to grant stay in light of the overriding objective stipulated in Sections 1A and 1B of the *Civil Procedure Act*. 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. Section 1A(2) of the *Civil Procedure Act* provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under Section 1B some of the aims of the said objectives are “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”

6. As to what substantial loss is, it was observed in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR that:

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.”

7. It has been stated in many a case before this that 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.



8. It has also been stated in other instances that in considering the appellant's right of appeal, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his judgment and that the court ought to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
9. In the instant application, the applicant filed the notice of motion for stay of execution approximately 11 months after judgment had been delivered. That delay is by any standards inordinate. The applicants aver that they were not aware of the judgment as their advocate had maintained that the matter was still pending judgment on notice. On 5/9/2023 the OCS Mtwapa informed the applicants that there was a judgment and eviction was imminent; that it was on that day that the applicants visited their advocate in his office who informed them that he was not aware of any judgment and was no longer interested in the matter; thereafter they visited the court registry and were informed of the existence of the judgment and warrants of eviction. They also aver that the advocate acted contrary to their instructions and filed a claim for adverse possession and not for recovery of land. This court being only interested in a adequate explanation for the delay, the conflict between advocate and client over the nature of instructions given and whether they were followed should be reserved for another forum and it is not for this court to wade into such in an application for stay. In any event this court fails to see from the affidavit evidence how such a conflict contributed to the inordinate delay.
10. Finally, regarding the inordinate delay, this court only has the applicant's word on what happened between them and their legal counsel. No affidavit of that counsel is attached to show that he had been seeking to find out about the judgment during the 11-month hiatus, or even before it was delivered. It is also not possible to believe the applicants' version in view of the fact that the judgment date was fixed in the presence of the plaintiffs' advocate on 15/6/22 and it was delivered on 1/11/22 as scheduled. Though inordinate delay may at times have extenuating circumstances, after perusal of the affidavit evidence provided and this court has found no sufficient reason advanced as to why the delay was occasioned.
11. In that case the delay in lodging the present application must be considered as unreasonable. One of this maxims of equity is that equity does not aid the indolent but the vigilant. It is on this account decline to grant orders for stay of execution. Consequently, the motion dated 16th October 2023 fails and the same is hereby dismissed with costs.

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

MWANGI NJOROGE

JUDGE, ELC, MALINDI

