



**Kontoma v Adan (Environment and Land Appeal 3 of 2023)
[2024] KEELC 4203 (KLR) (13 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4203 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT AND LAND APPEAL 3 OF 2023**

PM NJOROGE, J

MAY 13, 2024

BETWEEN

HALIMA KONTOMA APPELLANT

AND

ABDIRIZAK IBRAHIM ADAN RESPONDENT

RULING

1. This application is dated 31st July, 2023 and seeks orders:
 - a. That this application be certified as urgent and be heard *ex-parte* in the first instance.
 - b. That the Honourable Court be pleased to order the stay of execution including the declaration of ownership, eviction, demolition and injunction issued against the Appellant pending the hearing and determination of the Application and Appeal.
 - c. That the Honourable Court be pleased to order the lifting of the permanent injunction issued against the Appellant in regards to Plot No. Chechelesi C/756 pending the hearing and determination of this application and appeal.
 - d. That the costs incidental to this application be provided.
 - e. That the Honourable Court be pleased to issue such further orders it deems just and convenient in the circumstance of this case.
2. The application is buttressed by the affidavit of Halima Kontoma, the applicant, and has the following grounds;
 1. That the Applicant herein being dissatisfied with the said judgment in this appeal delivered on 25th July, 2023, which allowed the Respondent's case and claim, has filed an Appeal against said judgment.



2. That the Applicant herein has already filed its Memorandum of Appeal.
 3. That the Respondent had commenced execution against the Applicant and if the orders of the Magistrate court are not lifted and stayed pending hearing and determination of this Application and the Appeal, the stay and the Appeal shall be rendered nugatory.
 4. That the judgment was issued via email and the applicant and her counsel did not have the opportunity to seek for stay orders.
 5. That the Appellant resides on the parcel of land and she is on the verge of being rendered homeless and destitute.
 6. That the intended Appeal raises arguable issues with high chances of success.
 7. That the applicant will suffer greater harm and prejudice if the stay is not granted as the Respondent will proceed with the enforcement and eviction and destruction of the Appellant's property.
 8. That the activities of the Applicant and her livelihood will be greatly prejudiced and her life made a living hell if the said orders are not granted.
 9. That the Respondent will not suffer any prejudice if the orders sought herein are granted whereas the Applicant will stand to lose substantially since she lives on the parcel of land and has no alternative residence or source of income to procure a place to stay.
 10. That from the foregoing, the Applicant is reasonably apprehensive that unless the orders sought herein are granted, the Appeal shall be rendered nugatory.
 11. That it is in the best interest of justice and fairness that the orders (sic) herein are granted.
 12. That the application has been made without undue delay.
3. The application was canvassed by way of written submissions.
 4. A conspectus of the Applicant's case is that she owns the suit land and has been living on it and that she would suffer irreparable loss if the orders sought are not granted.
 5. A conspectus of the Respondent's case is that the applicant has not demonstrated that she would suffer any substantial loss should the orders she seeks be not granted. He further says that the applicant does not deserve the order she seeks as she failed to offer security for due performance of the apposite decree as ordered by the court on 17/8/2023.
 6. The applicant quotes the provisions of Order 42 Rule 6 of the Civil Procedure Rules and seems to agree that provision of security for the due performance of the decree is a legal requirement. However, the applicant cites the case of *Consolidated Marine v Nampijja & another*, Nairobi Civil Application No. 93 of 1989 as having stated that; -
 1. The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal is successful if not rendered nugatory.
 7. I agree that the right of appeal in proper cases should not be fettered unreasonably. I do find that the memorandum of Appeal in this matter raises arguable issues. But this court should be careful so that it does not delve into those issues which will be handled during the actual hearing of the appeal.



8. Having made my observation in the previous paragraph, I however opine that a court of law should not arrogate itself the role of the legislature. Order 42 Rule 6 is veritably pellucid that before a court can issue an order for stay of execution, the applicant shall provide security for due performance of the apposite decree.
9. I do note that on 16/8/2023, this court had ordered the applicant to deposit the sum of Kshs. 600,000/= as security for the due performance of the apposite decree. The applicant did not provide this security and argues that she was unable to meet the amount of money ordered by the court. Rather unorthodoxically, and to enhance the applicant's access to justice, I will reduce the sum of the security to be paid by the applicant to the sum of Kshs. 300,000/= instead of the Original Kshs. 600,000/=.
10. In the circumstances, I issue the following orders:
 - a. Prayers b and c in the application are hereby conditionally granted Provided that the applicant shall deposit with this court as security the sum of Kshs. 300,000/= within the next 21 days Failing which the conditional stay granted herein shall automatically lapse.
 - b. Costs shall be in the cause.

DELIVERED IN OPEN COURT AT ISIOLO THIS 13TH DAY OF MAY, 2024 IN THE PRESENCE OF:

Court assistant: Balozi/Rahma

Ouma present for the Respondent.

Miss Nyasani holding brief for Wario Minishi for the Appellant/Applicant.

HON. JUSTICE P.M NJOROGE

JUDGE

