



REPUBLIC OF KENYA



Lukwa (Suing as the legal representative of the Estate of the Late Julius Muhambi Amayi (Dcd) v Imbuusi (Environment & Land Case 10 of 2020) [2024] KEELC 4810 (KLR) (20 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4810 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 10 OF 2020
DO OHUNGO, J
JUNE 20, 2024**

BETWEEN

AGNES NYALOYA LUKWA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE JULIUS MUHAMBI AMAYI (DCD) APPLICANT

AND

ANTONY PANGA IMBUUSI RESPONDENT

RULING

1. Judgment was delivered in this matter on 15th November 2023. The Court held that the Applicant had failed to establish adverse possession and was therefore not entitled to the reliefs she sought. On the other hand, the Respondent established his counterclaim. The court therefore made the following orders:
 - a. The applicant's claim is dismissed.
 - b. The applicant to vacate the parcel of land known as Idakho/Shikulu/2339 within ninety (90) days of delivery of this judgment. In default, an eviction order shall issue.
 - c. The respondent shall have costs of the suit.
2. Subsequently, the Applicant filed Notice of Motion dated 29th November 2023, which is the subject of this ruling. The applicant is seeking stay of execution of the judgment and decree and maintenance of status quo prevailing on the aforesaid suit property pending hearing and determination of her appeal to the Court of Appeal.
3. The application is based on the grounds listed on its face and is supported by an affidavit sworn by the Applicant. She deposed that she filed Notice of Appeal against the judgment and that she should be allowed to use the suit property pending determination of the appeal.



4. The Respondent opposed the application through grounds of opposition wherein he contended that the Court having granted the Applicant stay of 90 days is now functus officio regarding the grant of stay of execution in the matter, that the application is legally incompetent and the orders sought cannot issue as the Applicant is seeking Orders that have already been granted, that there is no appeal filed by the Applicant that would guide the Court on the aspect of the appeal being arguable and that a notice of appeal is not an appeal.
5. The application was canvassed through written submissions. The Applicant relied inter alia on cases of *Butt v Rent Restriction Tribunal* [1982] KLR 417 and *RWW v EKW* [2019] eKLR and argued that the court should exercise discretion and grant stay so as to preserve the subject matter of the dispute.
6. The Respondent relied on the cases of *Moyale Liner Bus Services v Gachui Ibrahim* [2021] eKLR and argued that the court is functus officio. He urged the court to dismiss the application with costs.
7. I have considered the application, the affidavits and submissions. The court's power to grant stay pending appeal is guided by Order 42 rule 6 (1) and (2) of the *Civil Procedure Rules*, 2010 which provide as follows:
 6.
 - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) 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 order as may ultimately be binding on him has been given by the applicant.
8. Consequently, an applicant seeking stay pending appeal must demonstrate that substantial loss will result to her if stay is not granted, and that the application has been made without unreasonable delay. Such an applicant is further required to give such security as the court may order for the due performance of the decree. See *Kenya Power & Lighting Co. Ltd v Kigaita Ngare Unduthu & 36 others* [2020] eKLR and *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR. As Platt Ag JA (as he then was) stated in *Kenya Shell Limited v Benjamin Karuga Kibiru & another* (supra), substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. It is virtually impossible for such an application to succeed if an applicant fails to demonstrate that he will suffer substantial loss if stay is not granted.
9. The Respondent has argued that the court is functus officio since in the judgment, it granted the Applicant 90 days to vacate. The doctrine of functus officio was discussed by the Supreme Court in *Raila Odinga & Others vs. IEBC & Others* [2013] eKLR, where the Court cited, with approval, a paper by Daniel Malan Pretorius, titled *The Origins of the functus officio Doctrine, with Specific Reference to*



its Application in Administrative Law,” (2005) 122 SALJ 832. The author discussed the concept as follows:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

10. The 90 days given in the judgment was not stay of execution pending appeal but was a requirement of justice and in realisation of the need for an orderly process of enforcing the order for vacant possession. The Court is not functus officio, as regards the issue of stay of execution pending appeal.
11. I have perused the record and I have confirmed that the Applicant filed Notice of Appeal against the judgment on 22nd November 2023, which is within the Fourteen days specified under Rule 77 (2) of the Court of Appeal Rules, 2022. Pursuant to Order 42 rule 6 (4) of the *Civil Procedure Rules*, 2010, an appeal to the Court of Appeal is deemed to have been filed when under the Rules of the Court of Appeal, Notice of Appeal has been given. There is therefore a valid appeal.
12. I also note that in the judgment, the court ordered the Applicant to vacate the suit property within ninety (90) days of delivery of the judgment and in default, an eviction order to issue. Eviction from the suit property prior to determination of the appeal will no doubt constitute substantial loss the Applicant.
13. On the question of whether the application has been made without unreasonable delay, I note that the judgment was delivered on 15th November 2023 while the application was filed on 5th December 2023. There was no unreasonable delay.
14. Lastly, I turn to the issue of security for the due performance of the decree. The Respondent was awarded costs of the suit. In those circumstances, I deem that the appropriate security to impose is that the Applicant deposits taxed Party and Party costs.
15. In view of the foregoing discourse, I find merit in Notice of Motion dated 29th November 2023. I will limit the life of the stay orders, to encourage the Applicant to proactively prosecute the appeal.
16. I therefore make the following order:
 - a. I grant stay of execution of the judgment and decree herein pending hearing and determination of the Applicant’s appeal to the Court of Appeal.
 - b. I make no order as to costs of the application.
 - c. The stay is conditional on the Applicant depositing in court such sum as will be determined to be the party and party costs of this suit.
 - d. The deposit to be made within 21 (twenty-one) days of the costs being taxed or agreed. In default, the stay orders shall automatically lapse, and Notice of Motion dated 29th November 2023 shall stand dismissed.
 - e. The stay orders shall, if the Applicant complies with the conditions in (c) and (d) above, remain in force for a period of only 2 (two) years from the date of delivery of this ruling, unless otherwise extended in the Appellate Court.



DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 20TH DAY OF JUNE 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

The Applicant present in person

Ms Kadenyi for the Respondent

Court Assistant: M Nguyayi

