



REPUBLIC OF KENYA



KENYA LAW
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**Owuor v Adar (Environment and Land Appeal E045 of 2022)
[2024] KEELC 4895 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4895 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E045 OF 2022**

E ASATI, J

JUNE 20, 2024

BETWEEN

JOANES DINGA OWUOR APPELLANT

AND

JOHN MAX ADAR RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion application dated 6th March, 2024 brought pursuant to the provisions of Order 42 Rule 6 [Civil Procedure Rules](#) and sections 1A, 1B and 3A of the [Civil Procedure Act](#). The application seeks for an order of stay of execution of the judgement delivered herein on 22nd February, 2024 pending the hearing and determination of an appeal to the Court of Appeal.
2. The grounds upon which the application was brought as shown in the Notice of Motion and the Supporting Affidavit are that the applicant was aggrieved by the judgement of this court dated 22nd February, 2024 and has since lodged an appeal at the Court Appeal. That the application meets the criteria for a stay of execution pending appeal as set forth under Order 42 Rule 6 of the [Civil Procedure Rules](#). That unless the order sought is granted, the Applicant stands to suffer irreparable loss and prejudice as the Appellant is at liberty to dispose off the suit land. That the appeal to the Court of Appeal has high chances of success.
3. The application was opposed vide the contents of the Appellant's Replying Affidavit sworn by the Appellant on 16th March, 2024. It was the Appellant's case that he had lived on the suit parcel since the year 2000 when he established his home in the traditional manner, having moved out of his parent's home which is on the adjoining parcel. That before putting up his home on the land, he had used it together with his parents since his birth, cultivating and rearing animals. That he lives on the suit land together with his wife and 3 sons all of whom have their houses also on the parcel of land within his homestead.



That he has no intention of disposing of the suit land. That the suit land is in the name of his deceased father, hence to dispose of it, it would require the taking out of a grant, a process which he had not commenced. That the application he not attained the required standard for the granting of an order of stay under Order 42 Rule 6 *Civil Procedure Rules*. That the Applicant has not demonstrated the loss that is likely to be incurred and has not given any offer/undertaking on security.

4. The application was argued by way of written submissions. It was submitted on behalf of the applicant that unless the orders sought are granted pending the appeal to the Court of Appeal the Appellant herein may proceed to enforce the judgement dated 22nd February, 2024 by executing the party and party Bill of Costs awarded and thereby potential disposal of the disputed land namely; South West Nyakach/Kadianga West/782 significantly prejudicing the Respondent's claim to the suit land. Counsel relied on the case of *James Wangalwa v Agnes Nalika Cheseto* [2012]eKLR on what amounts to substantial loss. That the application was filed without unreasonable delay.
5. On behalf of the Appellant, it was submitted that the Appellant has not demonstrated the cardinal principle of the substantial loss he stands to suffer and that court ought not exercise discretionary powers without just cause. That the Applicant has never occupied the suit parcel and therefore will not suffer by the Appellant's continued occupation of the suit land during the appeal. That the suit land is the Appellant's home and there is no indication that the Appellant is likely to dispose of the parcel. That the suit land is in the name of a deceased person. That should the court find that the Applicant has met the grounds in order 42 Rule 6, the court should order adequate security being Kshs 300,000/-.
6. I have considered the application. The judgement whose stay is sought to be stayed allowed the appeal, dismissed the lower court case with costs to the Appellant and awarded the Appellant costs of the appeal.

The only order in the judgement that is capable of execution against the Applicant is the order for recovery of costs. This is what the Applicant seeks to have stayed.

7. To the Replying Affidavit, the Applicant attached a Notice of Appeal to the court of Appeal. Perusal of the court file reveals that there is a Notice of Appeal lodged on 5th March, 2024, notifying of the Applicant's intention to appeal to the Court of Appeal. Under Order 42 Rule 6(4), an appeal to the Court of Appeal for purposes of Rule 6 of Order 42 shall be deemed to have been filed when under the Rules of that court, Notice of Appeal has been given.
8. Taking into account the grounds of the application and the submissions made, I find that the application is merited. The court allows the application as follows: -
 - a. There be stay of execution for recovery of the costs awarded in the judgement dated 22nd February 2024 pending hearing and determination of the appeal to the Court of Appeal.
 - b. The Applicant to deposit the sum of Kshs 200,000/= as security for due performance of such order as may ultimately be binding on him, in an interest earning account in the joint names of Counsel for the Applicant and Counsel for the Respondent within 45 days hereof, failing which the stay of execution order hereby granted shall lapse.
 - c. Each party to bear own costs of the application.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 20TH DAY OF JUNE, 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,



JUDGE.

In the presence of:

Maureen: Court Assistant.

for the Appellant/Applicants

No appearance for the Defendants/Respondents.

