



REPUBLIC OF KENYA



Muhia & another v Dellian Langata Limited & another (Environment & Land Case 30 of 2016) [2024] KEELC 4759 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4759 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 30 OF 2016**

**AA OMOLLO, J
JUNE 13, 2024**

BETWEEN

MARY NJOKI MUHIA 1ST PLAINTIFF

SIMON THUO MUHIA 2ND PLAINTIFF

AND

DELLIAN LANGATA LIMITED 1ST DEFENDANT

AGRICULTURAL FINANCE CORP LTD 2ND DEFENDANT

RULING

1. The Applicants filed a notice of motion dated 19th December 2023 seeking for the following orders;
 1. Spent.
 2. Spent
 3. That there be a stay of execution of the judgment and decree of 14th December 2023 pending the hearing and determination of the 1st Defendant/Applicant's appeal filed at the Court of Appeal.
 4. That costs of this Application be in the cause
2. The motion was supported by the grounds outlined on the motion and supporting affidavit sworn on 19th December 2023 by Phyliss Christable Wambura Maranga, 1st Defendant/Applicant's Director. The Applicant stated that it is aggrieved by this court's judgment of 14th December 2023 and has filed an Appeal against the same at the Court of Appeal in Nairobi.
3. That the impugned judgment has granted the Plaintiffs orders of specific performance of an agreement of over 30 years and the appeal of the same has high chances of success which will be rendered



nugatory unless the orders sought are granted. The 1st Defendant/Applicant filed the application being apprehensive that unless orders of stay of execution pending appeal are granted the Plaintiff will proceed with execution after the expiry of the 30 days stay of execution orders thereby rendering their appeal useless.

4. The deponent stated that they had applied for copies certified proceedings, judgment and decree from the Deputy Registrar of the Environment and Land Court and served the same documents upon the Plaintiffs Advocates. Thus, all steps of instituting an appeal to the Court of Appeal have been complied with and it is only fair and just that this application is allowed to enable the 1st Defendant pursue its appeal.
5. In opposition, the Plaintiffs filed a replying affidavit sworn on 24th January 2024 by Symon Thuo Muhia stating that this suit has been lagging in the courts for over 33 years before it was finalized. That the instant application has not met the threshold for granting of the stay order as required under order 42 rule 6 of the *Civil Procedure rules*. Mr Thuo stated that the Applicant has not demonstrated to the satisfaction of this court that it may suffer any substantial loss unless the order is made. The 1st Respondent further stated that they have suffered substantial loss since 1991 to date and the same cannot be equated to any loss that may occur to the Applicant during the time that is likely to be taken to hear and determine the Appeal.
6. The Plaintiffs/Respondents posited that the power to grant or deny the application for stay is purely discretionary and should be applied in a way that is fair even to the Judgement creditor who has suffered under the hands of the judgement debtor who illegally refused to transfer the subject land to him since 1991 to date. They contend that the Applicant has not demonstrated how the appeal will be rendered nugatory if the stay is not granted and has not shown any grave errors in the judgement that would make the appeal a success.
7. The Respondent stated that he saved the entire 100 acres from being auctioned by the 2nd Defendant following his professional undertaking and that he is willing to give a professional undertaking that the subject land shall not be sold or leased or in any way adversely utilized pending the hearing of the Appeal. He added that he will undertake to diligently preserve and protect the subject parcel upon taking possession of the same and shall remain in the same state it is since at the moment it is idle land that has not been utilized and no activities have been going on there.
8. In response, the Applicant filed a supplementary affidavit and stated that the L.R 3591/23 is 7.5 acres has a current market price ranging between sixty Million (Kshs.60,000,000) and a hundred million (100,000,000) per acre thereby making the total market price to range from Kshs.450,000,000 to Kshs.750,000,000. They have been paying the Land Rent and Land Rates throughout as the owners in order to secure the said property. That the loss to be suffered by the Applicant includes the effort incurred in securing the property from encroachers while the Respondents have not suffered any loss.
9. The Applicant stated that there is no need for a professional undertaking as the court has enough mechanism of preserving the land pending the determination of the Appeal and there is no need to transfer the suit property to the Respondent only for the same to be transferred back to them if the Court of Appeal reverses the court's decision.
10. The Applicant also stated that the suit land is developed and has remained secured by erecting the Northern and Western permanent perimeter wall, installing 3-phase power and developed the public road serving it. Further, that their animals graze on this land and their workers also reside on the land, thus will be affected by the threatened eviction.



Submissions.

11. The Applicant submitted that the filing of the appeal and the application of stay pending Appeal have been made within good and reasonable time and all the steps required for filing a record of Appeal have been undertaken with diligence. They stated that they had demonstrated loss and suffering that it may suffer if stay is not granted to a colossal sum that ranges from the current market price of Ksh. 450,000,000/- to 750,000,000/-, payment of Land Rent and Rates for the past thirty three (33) years and also the efforts to keep the suit land from grabbers.
12. They urged the court to preserve the suit property in the very state it is now, to allow them prosecute its Appeal which is a constitutional right. In support of its submissions, the Applicant cited the Court of Appeal in *Butt vs Rent Restriction Tribunal* (1982) KLR 417 which is quoted with authority in Nyahururu ELCA no. 5 of 2020 and which case set standards on how discretion should be exercised.
13. The Respondent submitted that the application has not met the threshold for granting of the stay order as required under Order 42 rule 6 because the Applicant has not demonstrated that it may suffer any substantial loss unless the order is made. The Respondent submitted that they are ready to give a professional undertaking that the subject land will be preserved until the appeal is concluded therefore no substantial loss will be suffered by the Applicants.
14. The Respondent added that the Applicant has not even attempted to demonstrate to this court how the Appeal would be rendered nugatory if the stay is not granted noting that the Plaintiff/Respondent is willing to abide by the directions of this court in ensuring that no action that may jeopardize the interests of either party is undertaken while the appeal is pending before court. That the applicant has previously disobeyed court orders and continued construction on the subject land, despite there being court orders to maintain status quo.
15. He also submitted that this court should consider and take notice of the long time that the judgement creditor has suffered under the hands of the Judgement debtor who illegally and unlawfully refused to transfer the subject land LR 3591/23 to him since 1991 to date and the fact that the respondent paid the purchase price long time ago on or before 1990 save for a small balance which he is willing to pay immediately upon being supplied with the Applicant's bank account or deposit the same in court. He avers that the Applicant/defendant is likely to sell the land to evade justice since the same was already fenced off, subdivided into small plots and they have been awaiting to sell, considering that the title is still in the defendant's name and now know the outcome of the judgement.
16. He stated that the Applicant herein does not reside on the subject parcel of land LR 3591/23 and therefore her residence is not threatened in any way, no other persons are residents on the subject land and therefore no one will suffer any hardships upon execution of the judgement.

Analysis and determination:

17. The principles guiding the grant of a stay of execution pending appeal are well settled and 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.

18. An interpretation of this provision gives the conditions which must be proved by an applicant to merit the order of stay of execution of a decree or order pending appeal. The conditions are (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.
19. The Applicant stated that they would suffer substantial loss if the order of stay is not granted and calculated the loss in terms of the current value market of the suit land, the land rates and rents paid overtime and also the effort used in preservation of the same including building a wall around it during the pendency of the suit. On the other hand, the respondent opposed granting of the stay order argues on account that the applicant does not reside on the suit land. They also stated that they have suffered under the hands of the Judgement debtor/Applicant who illegally refused to transfer the subject land to him since 1991.
20. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, Justice F. Gikonyo held that;

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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.”

21. Upon considering the facts put forward by both parties, It is not in dispute that the Judgement creditor has been denied possession for the duration longer than when this case was filed and determined. The application was brought without undue delay as it was filed within one week of the delivery of the judgement. The Applicant stated that they have been paying land rates and rents on the suit property over the years and that they built a wall around it to secure it from encroachment. They also brought in the cost of re-transferring the suit property in the event its appeal is successful which process will have incidental costs. In addition, the Applicant submitted on the opportunity to exercise its right to appeal. Do these reasons given amount to proof of substantial loss?
22. The answer to the above question is found in the cases of *James Wangalwa supra* that, “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.” Further the Court of Appeal in *Absalom Dova vs. Tarbo Transporters* [2013] eKLR, stated thus: -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes



full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

23. In the circumstances of this case, it is my considered view and I so hold that granting the order of stay sought will not change the nature of the land. I am alive to the fact that the Applicant has been enjoying possession to the detriment of the Plaintiffs but the justice of this case requires retaining that status awaiting the determination of the appeal. I am therefore satisfied that there is basis to grant the order sought. The order for security made is that the Applicant shall not dispose, transfer or part with possession of the suit property pending hearing and determination of its appeal
24. Since the Plaintiffs were the successful party before me, I award them costs of this application. Consequently, the motion dated 19th December, 2023 is allowed as follows:
 - a. That there be and is hereby issued an order of stay of execution of the judgment and decree of 14th December 2023 pending the hearing and determination of the 1st Defendant/Applicant's appeal filed at the Court of Appeal.
 - b. That costs of this application to the Plaintiffs/Respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE, 2024

A. OMOLLO

JUDGE

