



REPUBLIC OF KENYA



KENYA LAW
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**Wamore v Omar (Environmental and Land Originating Summons
44 of 2019) [2024] KEELC 4648 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4648 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 44 OF 2019**

DO OHUNGO, J

JUNE 13, 2024

BETWEEN

PASILIANO MUKOYA WAMORE PLAINTIFF

AND

BENVILLY SHIACHI OMAR DEFENDANT

RULING

1. Judgment was delivered in this matter on 28th March 2023. The plaintiff's case was dismissed with costs to the defendant. Subsequently on 30th May 2023, the plaintiff was granted extension of time to file and serve a Notice of Appeal against the judgment.
2. The plaintiff then filed Notice of Appeal on 30th May 2023. Shortly thereafter, the plaintiff filed Notice of Motion dated 12th June 2023, which is the subject of this ruling. The plaintiff is seeking an injunction to restrain the defendant from evicting him from the suit property pending determination of the appeal. In the alternative, the plaintiff is seeking maintenance of the status that existed prior to delivery of the judgment.
3. The application is supported by an affidavit sworn by the plaintiff. He deposed that he has been farming on the suit property through an agent known as Ernest Wamore and that he has sugar cane crop, maize and vegetables on the suit property. That following delivery of the judgment, the defendant wrote to Ernest Wamore on 15th May 2023 through which he misinterpreted the judgment. He added that he had filed Notice of Appeal and that unless status quo is maintained, he would suffer substantial loss.
4. The defendant opposed the application through a replying affidavit in which he confirmed that he wrote the letter referred to by the plaintiff and added that he had been kept from his land for 23 years. He urged the court to dismiss the application to enable him to enjoy the fruits of justice.
5. The application was canvassed through written submissions. The applicant argued that he is in possession and that the application should be allowed to preserve the status that existed at delivery of



- the judgment. He added that since the defendant never sought an eviction order, it is plainly wrong for the defendant now to seek to evict him in the manner notified through the letter dated 15th May 2023. He therefore urged the court to allow the application.
6. On his part, the defendant relied on the case of Charles Kariuki Njuri v Francis Kimaru Rwara (suing as Administrator of Estate of Rwara Kimaru alias Benson Rwara Kimaru (Deceased) [2020] eKLR and argued that the applicant had not demonstrated substantial loss. He further argued that the application was brought after unreasonable delay and urged the court to dismiss it with costs.
 7. I have considered the application, the affidavits and the submissions. The issues that arise for determination are whether an injunction pending appeal should be granted and who bears the costs of the application.
 8. The application is stated to be brought under Order 42 rule 6 (2) of the Civil Procedure Rules, 2010. The applicant is seeking an injunction pending appeal, a jurisdiction which is akin to stay of execution pending hearing and determination of an appeal.
 9. Order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010 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.
 10. Thus, an applicant seeking stay pending appeal or an injunction pending appeal must demonstrate that substantial loss will result to him 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.
 11. The plaintiff is appealing against the judgment of this court. The said judgment was simply a dismissal of the plaintiff's suit. A dismissal is a negative order which is incapable of execution. Consequently, there is nothing to stay in the judgment. See *Western College of Arts and Applied Sciences v EP Oranga*



& 3 others [1976] eKLR and Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others [2021] eKLR.

12. I find no merit in Notice of Motion dated 12th June 2023. I therefore dismiss the application with costs to the defendant.

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

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the plaintiff

Mr Owuor holding brief for Mr Namatsi for the defendant

Court Assistant: M Nguyayi

