



REPUBLIC OF KENYA



**Ogembo v Nzinga & another (Environment and Land Appeal
36 of 2023) [2024] KEELC 4788 (KLR) (12 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4788 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 36 OF 2023**

**CK NZILI, J
JUNE 12, 2024**

BETWEEN

JAMES ONYONA OGEMBO APPLICANT

AND

CHRISTINE TAABU NZINGA 1ST RESPONDENT

JOHN MBIJIWE T/A BEALINE KENYA AUCTIONEERS 2ND RESPONDENT

RULING

1. What is before the court is the application dated 30.4.2024, seeking a temporary injunction barring and restraining the respondents' agents or employers from execution, seizing, or repossessing and putting on sale the applicant's movable properties pending hearing and determination of this appeal. The reasons are contained on the face of the application and in a supporting affidavit of James Onyona Ogembo sworn on 30.4.2024.
2. The applicant avers that the judgment was delivered by the lower court on 11.10.2023, and an appeal was preferred against it, now slated for a hearing on 1.7.2024.
3. The applicant avers that while aware of the pending appeal, the 1st respondent rushed and instructed auctioneers to proclaim his movable properties without following the proper legal procedures as per a copy of the proclamation attached as annexures marked JOO "1".
4. Again, the applicant avers that John M. T/a Bealine (K) Auctioneers seized his motor vehicle registration number KCU 815 Y and a notification made for sale as per annexure marked JOO "2".
5. The applicant avers that he stands to suffer irreparable loss and damage if the impending auction is carried out without following due process.
6. The appeal before this court was filed on 17.10.2023. The same was admitted for hearing on 6.3.2024 and the appellant directed to file the record of appeal within 60 days. The 60 days expired on 6.5.2024



without compliance on the part of the appellant. The subject matter at the lower court was breach by the appellant of a sale agreement dated 21.7.2020, where the respondent paid Kshs.440,000/=, to purchase the appellants 1 ¼ acre of L.R. Abothuguchi/lower Kaongo/1133, but refused to transfer the land.

7. The respondent had averred that the appellant had already sold the land to a third party. He, however, declined to refund the sum paid. The trial court, by a judgment dated 25.8.2022, ordered the appellant to refund Kshs.440,000/=, plus interest at commercial rates, Kshs.880,000/= liquidated damages, and Kshs.53,800/= for crop damages plus cost.
8. From the lower court record, it appears that the applicant had filed an application dated 1.3.2023 for a stay of execution after his motor vehicle registration number KDD 127Q was proclaimed. At the time, there was no pending appeal an application for leave to file the appeal out of time. The warrants of attachment then dated 16.2.2023 was for a total decretal sum of Kshs.2,251,270/=.
9. By a notice dated 7.3.2023, the appellant withdrew the said application. After the appellant was granted leave to file an appeal out of time, he waited till 30.4.2024 to apply for a stay of execution.
10. For a party to be entitled to a stay of execution, he has to apply for a stay without unreasonable delay. Even though the law has not set the minimum and maximum delay, each case is to be decided on its circumstances for even a delay of one day could be inordinate.
11. As indicated above, the decree sought to be stayed is dated 7.2.2023. The applicant was aware of it the moment the judgment was delivered. A delay of over a year and two months after the decree was issued has not been explained at all. Similarly, a delay of over six months since the appeal was filed to apply for a stay of execution has not been sufficiently explained. The appellant avers that unless the orders sought were granted, he stands to suffer irreparable loss and damage.
12. In *James Wangalwa vs Agnes Naliaka Cheseto* (2012) eKLR, the court observed that execution per se does not amount to substantial loss since it is a legal process consequent upon the issuance of a decree and that the party must show through tangible evidence how the substratum of the appeal is likely to be altered if no stay was granted.
13. In *Samvir Trustee Ltd vs Guardian Bank Ltd* (2001) eKLR, the court said that the discretion on whether to stay execution or not was a balancing act between two competing constitutional rights of a successful party who should not be denied the enjoyment of the fruits of his judgment, against the right of appeal of the unsuccessful party wishing to appeal.
14. What is sought to be stayed before the court is a money decree arising out of a breach of a sale agreement where the appellant was paid Kshs.440,000/= but failed to deliver the land, the subject matter of the sale agreement. The applicant avers that the execution process is flawed. He has, however, not demonstrated how irregular it is. The applicant has not averred that the respondent would be unable to refund the decretal amount should his appeal be successful.
15. In *Kenya Shell Ltd vs Karuga Kibiru & another* (1986) eKLR, the court observed that it was not enough to say that the decretal amount was colossal without demonstrating how the appeal is likely to be rendered nugatory, if execution commenced before the appeal is heard and determined.
16. The next issue to consider is whether the appellant has offered security for the due realization of the decree should the appeal not succeed. In *Mwaura Karuga t/a Limit Enterprises vs Kenya Bus Service Ltd & others* (2015) eKLR the court said security offered should be binding security beneficial to both parties.



17. In *Visram Ravji Halai & another vs Thortorn & Turpin* (1963) Ltd NRB Civil Application No.1 5 of 1990, the court said it should not place the plaintiff in a place of disadvantage should the appeal fail so that he would not be able to realize the fruits of his litigation, due to the inadequacy of the security offered.
18. Applying the preceding binding case law, the applicant has come to court late and without any explanation. There is no evidence of substantial loss. The applicant has offered no security for the due realization of the decree should the appeal fail. It is also not in the interest of justice to grant the orders sought. The application is, as a result of this, dismissed with costs.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 12TH DAY OF JUNE, 2024

In presence of

C.A Kananu

Mugamuto for applicant

Mugo for respondents

HON. C K NZILI

JUDGE

