



**Shariff v Kadenge & 10 others (Environment & Land Case
35 of 2019) [2024] KEELC 5578 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5578 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 35 OF 2019
FM NJOROGE, J
JULY 31, 2024**

BETWEEN

MWANAFELA ALI SHARIFF PLAINTIFF

AND

DICKSON KITSAO KADENGE 1ST DEFENDANT

SHIDA KAINGU 2ND DEFENDANT

HAMISI TUYE KAINGU 3RD DEFENDANT

CHENGO KADENGE KAINGU 4TH DEFENDANT

JOHNSON KAINGU CHARO 5TH DEFENDANT

RUEBEN KADHENGI KAINGU 6TH DEFENDANT

WILSON CHARO MTOI 7TH DEFENDANT

MOSES KAINGU CHEA 8TH DEFENDANT

RAJAB TUYE KAINGU 9TH DEFENDANT

SHIDA KAINGU CHEA 10TH DEFENDANT

JOSEPH TUYE KAINGU 11TH DEFENDANT

RULING

1. This Ruling is in respect of the Notice of Motion Application dated 21st March, 2024 filed by the defendants and is expressed to be brought under Section 1A, 3A, 63(e), of the *Civil Procedure Act*, Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*, Article 159(2)(d) of the *Constitution of Kenya* 2010 which sought the following orders:



1.Spent;
 2. Thatpending the hearing and determination of this application inter partes, the Honourable Court be pleased to order a temporary stay of execution of the judgment and decree herein delivered on 8th March 2024 and all consequential orders therefrom;
 3. Thatpending the hearing and determination of the intended appeal the Honourable Court be pleased to stay execution of the Judgment and decree delivered herein on 8th March, 2024 and all consequential therefrom;
 4. Thatcosts of this application be in the cause.
2. The application is premised on the following grounds: the defendants intend to file an appeal against the judgment of this court; that the proposed appeal is arguable and would be rendered nugatory unless the orders of stay of execution are issued; that no stay orders were granted to the defendants in the judgment and there is high likelihood of execution issuing against the defendants which may have the effect of leaving the defendants homeless and that the application has been made timeously. The application is supported by the sworn affidavit of Reuben Kadhenge Kaingu, the 6th defendant in which he annexes a notice of appeal, a draft memorandum of appeal and reiterates the grounds at the foot of the application.
 3. In response to the application, the plaintiff filed grounds of opposition dated 24/4/2024. The grounds he relies on are as follows:
 1. Thatstay of execution cannot issue with respect to a parcel of land that does not exist. Plot No. 1588 which the defendants are laying claim to no longer exists. The Plaintiff subdivided it in 2018 to yield nine (9) subdivisions with different titles;
 2. The defendants have no legitimate and/or legal claim to the plaintiffs' properties. Granting the orders sought in the application will be akin to upholding squatters' right over the plaintiff's right to property which is protected under article 40 of the constitution;
 3. Thatthe defendants have not met the condition for grant of stay of execution pending appeal as required under Order 42 rule 6 of the Civil Procedure Rules, 2010. In particular, the defendants have not demonstrated what loss, if any, they will suffer if the order of stay of execution is not made. The defendants have also not offered security for the due performance of such decree or order as may ultimately be binding on them;
 4. Thatthe Plaintiff is entitled to enjoy the fruits of his Judgment without undue delay.
 4. Both parties filed their submissions on the motion.

Determination.

5. I have considered the application the response and the submissions of the parties. The main issues arising from the application are whether a stay of execution pending appeal ought to issue in the present matter.
6. Stay of execution is governed by Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6 (1) of the Civil Procedure Rules as follows: -

“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.”

7. Rule 6 (2) further provides: -

“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. The principles governing an application for stay of execution are therefore as follows:

1. Whether there is an appeal in place;
2. Whether the applicant may sustain substantial loss if the orders of stay are not granted;
3. Whether the application has been brought without inordinate delay;
4. Whether security has been availed.

9. The above grounds are to be construed conjunctively and not disjunctively.

10. I have noted that a notice of appeal has been filed in the matter. Therefore, for the purposes of Order 42 Rule 6(1), there is an appeal in place.

11. The second issue to consider is if substantial loss would result unless the order sought is granted. The respondent has addressed this ground very specifically.

12. The applicants aver that the judgment may lead to execution against them. However, risk of execution per se is not evidence of risk of substantial loss. Evidence to support risk of substantial loss ought to be in the affidavit in support of the application. I have examined the affidavit in question and I have found it wanting. There is no such evidence. Other than state that the appeal may be rendered nugatory the affidavit is bare of any details as to the loss or damage that may occur if the order sought is not granted. Much as the applicants state that the court has unfettered powers that oblige it to balance between the rights of the decree holder and those of the applicants and which position is correct, evidence of substantial loss is the pivot upon which such exercise of the discretion of the court in that regard turns. As there is no evidence of possibility of any considerable loss or damage demonstrated, I find that the instant application is fatally flawed.

13. The next issue is whether the application was presented to this court timeously. In that regard the judgment was delivered on 8/3/2024 and the present application was filed on less than 3 weeks later. I find that there is no inordinate delay in the filing of the application. However, since the applicants have failed to establish that substantial loss may occur if the orders sought are not granted, the present application ought to fail and therefore this court needs not determine the issue of security.

14. The outcome of the foregoing analysis is that the application dated 21/3/2023 lacks merit and the same is hereby dismissed with costs to the respondent.



**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON
THIS 31ST DAY OF JULY, 2024.**

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

