



Kamwara & 5 others v Mwenda (Environment and Land Appeal E007 of 2023) [2024] KEELC 5497 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5497 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND APPEAL E007 OF 2023**

CK YANO, J

JULY 25, 2024

BETWEEN

JOSPHAT MWINJI KAMWARA 1ST APPELLANT
MUTWIRI MWINJI KAMWARA 2ND APPELLANT
NYAGA NJERU KAMWARA 3RD APPELLANT
MUGENDI MWINJI KAMWARA 4TH APPELLANT
VILIVINA NCONDI MWINJI 5TH APPELLANT
NIPHA MWINJI KAMWARA 6TH APPELLANT

AND

ANDREW GITONGA MWENDA RESPONDENT

RULING

1. Before this court for determination is the appellants'/applicants' application by way of Notice of Motion dated 17th October, 2023 brought under the provisions of Sections 1A and 1B of the [Civil Procedure Act](#) and Order 42 Rule 6 of the Civil Procedure Rules and the inherent power of the court.
2. The application mainly seeks an order of stay of execution of the judgment delivered in this matter on 25th October, 2023 pending the hearing and determination of an intended appeal in the court of appeal.
3. The grounds upon which the application is predicated are that on 25th October, 2023, the court delivered judgment dismissing the appellant's appeal with costs; that the appellants are aggrieved by the said judgment and have filed a notice of appeal and have also requested for proceedings for purposes of the appeal; that following the delivery of judgment, the respondent is likely to move in any time to execute the judgment and evict the appellants from the suit properties; that the appellants will suffer



irreparable loss and damage if stay of execution is not granted; that the appellants have an arguable appeal and unless the stay of execution is granted, the appeal will be rendered nugatory in the event it is successful; that the subject matter of the intended appeal is land which needs to be preserved pending appeal; that the appellants have a right of appeal and it is therefore just and fair that the stay of execution be granted to enable the appellants to pursue their right of appeal; and that the appellants undertake to maintain the status quo of the suit property as it were before the judgment so as to preserve it pending the hearing and determination of the intended appeal.

4. The application is further supported by the affidavit sworn by Josphat Mwinji Kamwara, the 1st appellant, on 17th October, 2023 who reiterates the aforesaid grounds and annexed copies of an authority, judgment, photographs showing their homestead, crops and trees planted in the suit properties, notice of appeal and a draft memorandum of appeal.
5. The application is opposed by the respondent who filed grounds of opposition dated 5th February, 2024 on the grounds that this court having determined the appeal by dismissing it has become functus officio and therefore cannot entertain this application; that the appeal is yet to be filed and as such it is hard to say whether it has chance of success, and that the application as filed is an abuse of the due process of the court.
6. The court directed and the parties agreed that the Application be canvassed by way of written submissions which were duly filed. The Appellants filed their submissions dated 14th February, 2024 through the firm of Jesse Mwiti Advocates while the respondent filed his dated 6th March, 2024 through the firm of L. Kimathi Kiara & Co. Advocates.
7. The Appellants submitted that the factors that the court will consider in determining whether or not to grant an application for stay of execution were set out by the court of appeal in the case of Halai & Another Vs. Thornton & Turpin (1963) Ltd (1990) KLR 365.
8. The Appellants submitted on the first limb of substantial loss that they stand to suffer substantial loss if the order of stay of execution is not granted. That the subject matter of the appeal is land and they are the ones in occupation and have been in such occupation for long. That they have exhibited photographs taken from the suit property which shows the homestead and the crops they have grown in the suit property.
9. The Appellants submitted that they are apprehensive therefore that if the decree is executed, they will be evicted from the suit property and would be put out in cold together with their families with nowhere to move to. That should that be so, the appellants will suffer substantial loss if the execution was not stayed. The Appellants relied on the case of Peter Nkupang Lowar Vs. Nautu Lowar [2022] eKLR and urged the court to find that the appellants will suffer substantial loss if stay of execution is not granted.
10. The Appellants submitted on the second limb that the application has been made without unreasonable delay. The appellants pointed out that the judgment in the matter was delivered on 25th October, 2023 and they filed the instant application on 22nd November, 2023 which is just about 28 days from the delivery of the judgment. The Appellants relied on the case of Kariuki Njuri Vs. Francis Kimaru Rwaru (2020) eKLR, and submitted that the delay, if any, in making the application is not unreasonable and that no prejudice has been occasioned to the respondent.
11. On the third limb, which is security, it was submitted on behalf of the appellants that the first Appellant is the patriarch of the family and is an old man of about 70 years. That he is a man of no means and is in occupation of the suit property and relies on it for upkeep and to feed his family.



12. The Appellants submitted that the subject matter of the judgment in the matter is land and the appellants do not have the title to the land which is with the respondent. That since they do not have the title, the appellants cannot transfer or deal with the land in any manner prejudicial to the respondent. The Appellants relied on the case of Kariuki Njeri Vs. Francis Kimaru Rwara (Supra) and submitted that it is clear from the finding of that court that security for costs is to ensure that the decree holder has something to enforce the decree should the appeal not succeed. That giving security should not in any way be a punishment to the judgment debtor. That the decree in this matter is therefore not one for money where a security for such money can be given by the appellants. That the decree issued is one to evict the appellants from the suit property and secondly, the appellants do not have the title to the suit property which is with the respondent. It is therefore the appellants' submission that this is not a proper case to order for security in the circumstances of the matter.
13. The appellants submitted that they have established sufficient cause for the grant of the order of stay of execution. That it will be in the interest of justice to allow the appellants to pursue their rights of appeal in the court of Appeal. The Appellants relied on the case of Edward Kamau & Another Vs. Hannah Mukui Gichuki & Another (2015) eKLR.
14. The appellants submitted that the memorandum of appeal to the court of appeal which is annexed to the supporting affidavit is not frivolous or a sham. That whereas the respondent has a right to enjoy the fruits of his judgment, it is only fair and just that the appellants are accorded an opportunity to pursue their right of appeal which is guaranteed under *the constitution*. The Appellants urged the court to allow the application as prayed.
15. It is the respondent's submission that the application lacks merit and ought to be dismissed forthwith. The court was urged to peruse the grounds of opposition and find that the application is an abuse of the due process of the law.
16. It is the respondent's submission that the applicants have not yet filed an appeal and have only issued a notice of appeal and that the time for filing the appeal expired way back in December. That there being no appeal to which the application is pegged on, then the said application as filed is an abuse of the due process of the law.
17. The respondent further submitted that the issues in the appeal have been determined and the appeal has been dismissed and therefore this court has become functus officio and cannot entertain any other issue arising from the appeal. That the only option the applicants may have is in the court of appeal. That unfortunately, even in the court of appeal the applicants' goose is cooked as no appeal has been filed yet and the time for filing has lapsed.
18. It is the respondent's submission that even if the application was to be allowed, the applicants have not offered any security for costs as per Order 42 of the Civil Procedure Rules. The respondent prayed for the application to be dismissed.
19. This court has considered the application filed herein, the affidavit in support thereof, the grounds of opposition and the written submissions by counsel for both parties. The issues that arise for determination are: -
 - i. Whether this court is functus officio.
 - ii. Whether the order for stay of execution pending appeal to the court of appeal should issue.
20. In the affidavit in support of the application herein, it is deposed that this court delivered judgment on 25th October, 2023 dismissing the applicants' appeal and thereby allowing the respondent's suit in the



lower court which sought for the eviction of the applicants from the suit property. That following the delivery of the judgment herein, the respondent is likely to move in any time to execute the judgment in the lower court and evict the applicants from the suit property.

21. The applicants averred that they were aggrieved by the judgment of this court delivered on 25th October, 2023 dismissing the appeal and have filed a notice of appeal to the Court of Appeal. It is the applicants' contention that they have an arguable appeal and unless stay of execution is granted, the appeal will be rendered nugatory in the event it is successful since the respondent may execute the decree of the lower court and have the applicants evicted from the suit property.
22. On the other hand, it is the respondent's contention that this court having determined the appeal by dismissing it, has become functus officio and therefore cannot entertain this application.
23. In Election Petition Nos. 3, 4 & 5 Raila Odinga & Others Vs Independent Electoral and Boundaries Commission & Others (2013) eKLR, the Supreme Court of Kenya cited with approval an excerpt from an article by Daniel Malan Pretorius, in "The origin of the functus officio Doctrine, with specific Reference to its Application in Administrative Law" (2005) 122 SALJ 832 in the following words:

"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The (principle) is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive such a decision cannot be revoked or varied by the decision-maker."

24. It is trite law that the principles guiding the grant of stay of execution pending appeal are well settled. They are provided under order 42 Rule 6 (2) of the Civil Procedure Rules as follows:

"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."

25. In addition to the provisions set out hereinabove, the court in exercising its discretion on whether or not to grant an order for stay of execution pending appeal, the Court of Appeal in Kenya Tea Growers Association & Another Vs. Kenya Plantation and Agricultural Workers Union [2012] eKLR addressed what is considered to be an arguable appeal as hereunder: -

"The power of the court under rule 5(2) (b) of the Court of Appeal Rules is discretionary. Two principles guide the court in exercising that discretion. First, for an applicant to succeed in such application he must show that his appeal or intended appeal is arguable, or put another way that it is not a frivolous one. He need not show that such appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the court should pronounce its decision. It is also trite that the applicant need not show several issues. As stated earlier, at least one issue suffices for purposes of an application under rule 5(2)



(b). Second, the applicant must in addition, show that unless he is granted either a stay or injunction as the case may be, the success of his appeal or intended appeal will be rendered nugatory.”

26. It is this court’s finding that having heard and determined the appeal before the court on its merits and rendered a judgment dismissing the said appeal, all pertinent issues of fact and points by law have been fully canvassed and considered. As such, this court conclusively dealt with the issue of whether the applicants’ appeal is an arguable one and concluded that it has no merit. Having discharged its duty on the appeal which was before it, this court is functus officio. Moreover, there were no positive orders granted by the court as the court simply dismissed the appeal. Therefore, there are no orders that were issued by this court capable of being executed, save for costs.
27. In view of the above findings, this court has no jurisdiction to delve into the issue whether the applicants have satisfied the conditions for grant of an order of stay of execution pending appeal or intended appeal since court orders are not given in vain.
28. The upshot is that the application dated 17th October, 2023 is devoid of merit and the same is dismissed with costs to the respondent.
29. It is so ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH JULY, 2024

In the presence of:

Court Assistant – Kiruja

No appearance for Appellants.

No appearance for Respondent

C.K YANO,

JUDGE

