



Kimani & 2 others v Akuisi Farmers Company Limited & another (Environment and Land Appeal E046 of 2023) [2024] KEELC 5474 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5474 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E046 OF 2023**

MAO ODENY, J

JULY 25, 2024

BETWEEN

SIMON KIMANI 1ST APPLICANT

DAVID MWANGI NJAMA 2ND APPLICANT

KIREMBA FRMERS CO-OPERATIVE SOCIETY LTD 3RD APPLICANT

AND

AKUISI FARMERS COMPANY LIMITED 1ST RESPONDENT

KIFCO FARMERS COOPERATIVE SOCIETY LIMITED 2ND RESPONDENT

RULING

1. This ruling is in respect of a Notice of Motion dated 24th January, 2024 by the applicants seeking the following orders:
 - a. Spent.
 - b. Spent.
 - c. That there be stay of execution of the judgment /decree issued herein on the 13th December, 2023 and any other consequential orders therein pending the hearing and determination of the appeal herein lodged.
 - d. That the costs of this Application be costs in the appeal.
2. The application is grounded on the supporting affidavit of Simon Kimani the 1st applicant who deponed that judgment was delivered on the 13th December, 2023 in favour of the respondent and that he has filed an appeal.



3. He further deponed that the respondents have since made threats of executing the decree by virtue of the several meetings to discuss how they will storm the factory and evict the officials of the 3rd Respondent.
4. It was the applicant's case that if the instant application is not allowed, the farmers who are members of the 3rd applicant will suffer loss as there is coffee worth 60 million which the 1st and 2nd respondent cannot sell or market as they lack the necessary government licenses.
5. The Applicant stated that the appeal will be rendered nugatory if the application is not allowed and that the same has high chances of success. Further that the respondents will not be prejudiced if the orders of stay are granted.

1st Respondent's Case

6. The 1st Respondent filed its replying affidavit sworn on 1st May, 2024 by one Stanley Mburu Njoroge the secretary of the 1st respondent where he averred that the application was incompetent meant to deny them their rights to enjoy the fruits of their judgment.
7. The respondent denied that they have threatened to execute the judgment as alleged by the applicants and that the notice attached and marked as SK4 informed the members of a meeting which they were allowed to hold being a private company.
8. It was the respondents' case that matters of coffee pulping license were not the subject of litigation before the trial court as it only dealt with ownership of the suit land, further that the said farmers were not parties to the suit hence they cannot be allowed to deny the respondents use of their land.
9. He averred that the 1st respondent's members will suffer loss having been denied rightful use of their land including the coffee pulping machine and further that there was no material evidence to demonstrate that the applicants had coffee worth 60 million. The respondent stated that the court had already granted the Applicants a 90 days stay of execution.
10. The Respondent further deponed that there was no danger of the subject matter being wasted or changing hands before the outcome of the appeal and urged the court to allow the respondents and their members to remain in possession pending the determination of the appeal. Further that the respondents have committed not to transfer or charge the suit property pending determination of the appeal.

Applicant's Submissions

11. Counsel for the applicants identified four issues for determination, namely; whether there exists an arguable appeal, whether the application was filed timeously, whether the applicant will suffer substantial loss, security of costs for the due performance of the decree.
12. On the first issue whether there is an arguable appeal, counsel relied on the Court of Appeal case of *Josephine Koki Raymond V Philomena Kanini Maingi* (Suing as the Personal Representative of Maingi Musila Mutava (deceased) & Another [2018] eKLR and submitted that the grounds of appeal are arguable.
13. On the second issue of whether the court has been approached without unreasonable delay, counsel submitted that judgment was delivered on 13th December, 2023 while the instant application was filed on 24th January, 2024 barely a month after delivery of judgment. Counsel submitted that the



application was filed timeously and relied on the case of *Kiptui & Another V Mburu & 3 Others* [2024] KEELC 289 (KLR)

14. On the third issue whether the Applicant will suffer substantial loss if an order for stay of execution is not granted, counsel relied on the case of *Mukuma V Abuoga* (1988) KLR 645 and submitted that the applicants shall not only be evicted from a factory they operate but that they shall be permanently restricted from accessing it.
15. Counsel further submitted that it would be in the interest of justice that the substratum of the suit be preserved and the status quo of the suit land ought to be maintained pending the determination of the appeal.
16. On the final issue of security, counsel submitted that the applicants are willing to submit to the terms set by this court and that the Applicant has met the threshold for grant of stay of execution.
17. Counsel filed supplementary submissions and relied on Section 4 (1) of the *Oaths and Statutory Declarations Act* and submitted that the replying affidavit was sworn before Muthoni P. Njuguna a commissioner who is advocate practicing in the firm of Ashitiva Advocates on record for the Respondents.
18. Counsel cited the cases in Kenya Federation of Labour & Another V Attorney General & 2 Others Industrial Court of Kenya 735 of 2012 and *Stephen M' Mogaka V Independent Electoral & Boundaries Commission (IEBC) & 2 Others* [2017] eKLR and urged the court to strike out the affidavit as it is defective

Analysis And Determination

19. The main issue for determination is whether the applicants have met the threshold for grant of stay of execution as provided for under Order 42 Rule 6 of the *Civil Procedure Rules*.
20. Order 42 Rule 6 (2) provides as follows:
 - “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.”
21. The applicants filed this application on 24th January, 2024, the Memorandum of Appeal on 29th December, 2023 and judgment was delivered on 13th December, 2023, it follows that the application was filed timeously without undue delay.
22. On the issue as to whether the applicants will suffer substantial loss, the trial court in its judgment issued an eviction order against the applicants to vacate the suit land and use of the pulping machine therein. It also issued a permanent injunction restraining the applicants' use and occupation of the suit land. The Applicants were also granted a 90 days stay of execution from the date of the judgment which has now lapsed.



23. In the case of *Siegfried Busch v MCSK* [2013] eKLR, the court held as follows:
- “A superior court to which an application has been made must recognize and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment...”
24. The fact that there is imminent eviction is not proof of substantial loss as the parties were heard and an order for eviction ordered by the court. In granting stay of execution, the court must balance the rights of both the successful litigant and the aggrieved party who would wish to file an appeal. That is why there are hierarchy of courts and rights of appeal.
25. In the case of *Kenya Shell Limited v. Kibiru* [1986] KLR 410, it was held as follows:
- “It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.
26. It should be noted that the Applicants are ready and willing to abide by any orders or directions of the court on security for the due performance of the decree. The Applicants were also granted a 90 days stay of execution by the court upon pronouncement of the judgment.
27. Grant of refusal of orders of stay of execution are discretionary but the same must be exercised judiciously as was held in the case of *Butt -v- Rent Restriction Tribunal* [1979] eKLR, where the Court of Appeal stated what ought to be considered in determining whether or not to grant stay of execution pending appeal. The court explained that the power of a court to grant or refuse an application for stay of execution is discretionary, and the discretion should be exercised in such a way so as not to prevent an appeal.
28. The applicants’ counsel also submitted that the 1st respondent’s replying affidavit dated 1st May, 2024 was defective as the advocate who commissioned the same represented the respondents and thus had an interest in the matter violating Section 4(1) of the *Oaths and Statutory Declarations Act*. The court has perused the applicant’s supplementary affidavit sworn on 10th July, 2024 and there is no evidence that the said Advocate acted for the respondents.
29. I have considered the application, the submissions by counsel and order that the Applicants do deposit Kshs. 300,000/ in a joint interest earning account for the Advocates for the Applicants and the Respondents within 30 days, failure to which the order lapses.
30. The costs of the application shall abide by the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 25TH DAY OF JULY 2024.

M. A. ODENY

JUDGE

