



**Rorat v Kamoiro & another (Environment & Land Case  
E010 of 2021) [2024] KEELC 5522 (KLR) (23 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5522 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND CASE E010 OF 2021**

**CG MBOGO, J  
JULY 23, 2024**

**BETWEEN**

**DANIEL KASATUA RORAT ..... PLAINTIFF**

**AND**

**KOIKAI OLE KAMOIRO ..... 1<sup>ST</sup> DEFENDANT**

**TOTO ENE KAMOIRO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before this court for determination is the Notice of Motion dated 15<sup>th</sup> May, 2024 filed by the defendants/ applicants and it is expressed to be brought under Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 3, & 3A of the Civil Procedure Act seeking the following orders: -
  1. Spent.
  2. Spent.
  3. That this honourable court be pleased to stay execution of the decree and judgment of this honourable court delivered on 24<sup>th</sup> April, 2024 together with all other consequential orders pending the hearing and determination of the appellant's intended appeal against the judgment of this honourable court delivered on 24<sup>th</sup> April, 2024.
  4. That costs of this application be in the cause.
2. The application is premised on the grounds inter alia that the appellant being aggrieved with the judgment of this court delivered on 24<sup>th</sup> April, 2024, the defendants/applicants have lodged a notice of appeal and applied for certified typed proceedings.
3. The application is supported by the affidavit of the 1<sup>st</sup> defendant/ applicant sworn on even date. The 1<sup>st</sup> defendant/ applicant deposed that they intend to appeal against the judgment of this court, and that



- they have lodged the notice of appeal, and served the same upon the plaintiff/ respondent. Further, he deposed that there is real apprehension if the court does not grant stay, the appeal will be rendered nugatory if the plaintiff/respondent executes the decree.
4. The 1<sup>st</sup> defendant/applicant deposed that the plaintiff/respondent has threatened to enter into the suit property and on 12<sup>th</sup> May, 20124, he caused a herbicide to be sprayed on the land in purporting to carry out cultivation thereon. He went on to depose that they are willing and ready to abide by any conditions this court may find fit to impose. He also deposed that the appeal has high chances of success, and it is in the interest of justice that the application be allowed.
  5. The application was opposed by the replying affidavit of the plaintiff/respondent sworn on 31<sup>st</sup> May, 2024. The plaintiff/ respondent deposed that this court is functus officio, and lacks jurisdiction to entertain a matter that the applicant has already escalated to a superior court, and that the remedy for the applicants is now in the Court of Appeal. He deposed that a notice of appeal has already been filed, and the court is stripped of jurisdiction and that it cannot ascertain whether the appeal is arguable or not. Further, the plaintiff/respondent deposed that the decree having been effected there is nothing to be stayed by this court.
  6. The plaintiff/respondent deposed that the right of appeal must be balanced against an equally weighty right of a successful party to enjoy the fruits of judgment delivered in his favour, and there must be a just cause for depriving him of that right. He deposed that the judgment has already been executed and perfected, and there is nothing to stay save for costs. He further deposed that the application is an afterthought and an abuse of the judicial process.
  7. The application was canvassed by way of written submissions. The defendants/ applicants filed their written submissions dated 12<sup>th</sup> June, 2024 where it raised two issues for determination as listed below: -
    1. Whether stay of execution of the decree and judgment delivered on 24<sup>th</sup> April, 2024 should be granted pending the appeal.
    2. Who bears the costs of this suit (sic).
  8. On the first issue, the defendants/ applicants submitted that they will suffer substantial loss if the orders sought are not granted. Further, they submitted that they have no alternative land and are apprehensive that unless the judgment and decree of this court are stayed, the intended appeal shall be rendered nugatory. Further, it was submitted that the plaintiff/ respondent may deal with the suit property in a manner that is prejudicial to them with a likelihood of disposing it off to a third party and they might not be able to recover the same if the appeal succeeds. They relied on the case of Republic v Retirement Benefits Appeals Tribunal Ex-Parte Heritage A.I.I Insurance Company Limited Retirement Benefits Scheme [2017] eKLR.
  9. The defendants/ applicants further submitted that they are willing and ready to furnish reasonable security within the law and they are willing to abide by any conditions set by this court. However, this requirement would be unnecessary since the plaintiff/ respondent has processed a title deed over the suit property in his name.
  10. They further submitted that the notice of appeal was filed on 6<sup>th</sup> May, 2024 and the application was brought without any unreasonable delay.
  11. I have considered the application, the replying affidavit, and the written submissions filed by the defendants/ applicants. As at the time of writing this ruling, the plaintiff/ respondent had not filed his written submissions. Be that as it may, having analysed the application, I am of the views that the issue for determination is whether this court ought to grant stay of execution in the matter.



12. This court delivered judgment on 24<sup>th</sup> April, 2024, in favour of the plaintiff/ respondent in the following terms: -

1. A declaration that the defendants' right to recover a portion measuring 16 acres of Cis-Mara/Olorropil/234 is barred under Limitation of Actions Act Cap. 22 of the Laws of Kenya, and their title over the suit property in occupation/use of the plaintiff thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously been in occupation/use and possession of the aforesaid parcel for uninterrupted period exceeding 12 years.
2. That there be an order that the plaintiff be registered as the proprietor of the portion measuring 16 acres of the parcel no. Cis-Mara/Olorropil/234 in place of the defendants and or the Narok Land Registrar be directed to rectify the register thereof to reflect the plaintiff's ownership of the aforesaid parcel.
3. That the defendants herein be ordered to execute all the papers necessary to have the plaintiff be registered as the proprietor of the portion of parcel number Cis-Mara Olorropil/234 measuring 16 acres, decreed by the court, in default the Deputy Registrar be at liberty to execute all such necessary documents to give effect to the effect to the judgment and or decree of this honourable court.
4. The cost of this originating summons be borne by the defendants.

13. The defendants/ applicants being aggrieved by the judgment delivered by this court, filed the instant application. The principles guiding the grant of stay of execution pending appeal are well settled. Order 42 Rule 6(2) of the Civil Procedure Rules provides:

“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.”

14. From the above, it is clear that an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the following conditions;

- (a) that substantial loss may result to the applicant unless the order is made,
- (b) that the application has been made without unreasonable delay, and
- (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

15. It is not in doubt that the application has been brought without unreasonable delay. As to what amounts to a substantial loss, in James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, it was held that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors



which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

16. Also, in *RWW v EKW* [2019] eKLR, the court considered the purpose of a stay of execution order pending appeal, as follows:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

17. In this case, the defendant/ applicants contended that the plaintiff/ respondent has threatened to enter into the suit property and has gone ahead and sprayed herbicide purporting to carry out cultivation. The defendant/ applicants further contended that unless the judgment and decree are stayed, the appeal will be rendered nugatory.

18. On the other hand, the plaintiff/ respondent argued that this court is functus officio since the defendant/ applicants have escalated the matter to the Court of Appeal. Further, he argued that the judgment has already been executed and perfected. In support of his claim, the plaintiff/ respondent annexed a copy of a title deed which shows that it was issued to him on 23<sup>rd</sup> May, 2024.

19. Bearing in mind that this court cannot issue orders in vain, and in line with the orders granted pursuant to the judgment delivered on 24<sup>th</sup> April, 2024, it appears that the plaintiff/ respondent executed the judgment by having the suit property known as Cis-Mara/Olorropil/ 234 registered in his name.

20. That being the case, there is nothing capable of being stayed by this court at this stage. The notice of motion dated 15<sup>th</sup> May, 2024 is thus dismissed. Each party to bear its own costs. It is so ordered.

**DATED, SIGNED & DELIVERED VIA EMAIL THIS 23RD DAY OF JULY, 2024.**

**HON. MBOGO C.G.**

**JUDGE**

**23/07/2024.**

**In the presence of: -**

**Mr. Meyoki Pere – C.A**

