



Sunshine Villas Limited v County Government of Kisumu & another; Ethics and Anti Corruption Commission (Interested Party) (Environment and Land Case Civil Suit 23 of 2018) [2024] KEELC 5400 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5400 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 23 OF 2018
SO OKONG'O, J
JULY 18, 2024**

BETWEEN

SUNSHINE VILLAS LIMITED PLAINTIFF

AND

**COUNTY GOVERNMENT OF KISUMU 1ST DEFENDANT
CITY MANAGER, COUNTY GOVERNMENT OF KISUMU ... 2ND DEFENDANT**

AND

ETHICS AND ANTI CORRUPTION COMMISSION INTERESTED PARTY

RULING

1. The facts giving rise to this suit are set out in detail in the judgment of this court delivered on 16th November 2023. In its plaint dated 30th April 2018 that was amended on 2nd September 2020, the Plaintiff averred that at all material times, it was the registered owner of all that parcel of land known as Kisumu/Municipality/ Block 13/302 (hereinafter referred to as the “suit property”). The Plaintiff averred that on or about February 2017, the Plaintiff commenced the construction of an up-market residential apartments on the suit property after obtaining all requisite approvals.
2. The Plaintiff averred that on or about the 4th April 2018 the Defendants caused to be marked in red paint on the walls of the suit property the words, “X Demolish” indicating that the Defendants intended to move and demolish the structures on the suit property at any time notwithstanding that the Plaintiff had obtained all approvals and complied with all statutory and legal requirements concerning the project it was undertaking on the suit property.
3. The Plaintiff averred further that on Sunday 29th April 2018 at 10 p.m., the Defendants’ agents, servants and/ or employees commenced demolition exercise on the suit property and demolished



- the boundary wall, balconies, canopies, internal walls, and in the process stole the Plaintiff's tools and equipment including a vibrator, poker, water pumps, electrical and plumbing equipment, site documents among others.
4. The Plaintiff averred that no written notice was issued to it by the Defendants and no hearing was accorded to it before the Defendants placed markings on the walls of the suit property and proceeded to undertake demolition of the structures thereon. The Plaintiff averred further that it was also not given a notice or a hearing before the revocation of the approvals it had obtained from the Defendants. The Plaintiff averred that the said actions by the Defendants were undertaken against the rules of natural justice and in violation of the Plaintiff's fundamental rights as enshrined in the *Constitution* of Kenya.
 5. The Plaintiff averred that it obtained finance from Bank of Baroda Kenya Ltd. for the construction of the apartments on the suit property and would be unable to service the loan if the Defendants continued further with demolition of the developments on the suit property. The Plaintiff averred that the Defendants intended action of further demolishing its structures on the suit property was contrary to the law, oppressive and capricious.
 6. The Plaintiff averred that the Defendants' unlawful and wrongful actions and intended demolition of the structures on the suit property would result in the Plaintiff being deprived of its property and the collapse of its business. The Plaintiff averred that the said actions had caused and would further cause the Plaintiff extreme loss, damage, and embarrassment.
 7. The Plaintiff prayed for judgment against the Defendants for:
 - a. A permanent injunctive order restraining the Defendants, their officers, servants, agents or any other person or entity affiliated or associated with them or acting through or under their instructions from demolishing, alienating or in any other way interfering with or dealing with the Plaintiff's property, development and construction on all that parcel of land known as Kisumu/Municipality/ Block 13/302(the suit property).
 - b. A declaration that its property, development and construction on the suit property did not encroach on the road reserve or interfere in any way with the proposed upgrading of the Impala Park -Dunga Road to bitumen standards.
 - c. Special Damages of Kshs 142,055,447/- arising from and as a consequence of unlawful demolition of its property as set out in Paragraph 17 (B) (a-c) of the plaint.
 - d. Costs of the suit and interest on (c) above from the date of filing the amended plaint.
 - e. Any other relief that the court deemed fit and just to grant.
 10. The Defendants filed a joint amended statement of defence on 8th September 2020. The Defendants averred that the approvals that they granted to the Plaintiff for the development it intended to put up on the suit property were conditional. The Defendants averred that the Plaintiff had admitted that the water pipes belonging to Kisumu Water and Sanitation Company Limited(KIWASCO) were within the suit property. The Defendants averred that the Plaintiff ignored the way leave while planning for the project on the suit property. The Defendants admitted that they served the Plaintiff with a letter on 27th April 2018 revoking all the approvals they had granted to the Plaintiff regarding the project that the Plaintiff was to undertake on the suit property. The Defendants averred that the Plaintiff had not complied with some of the conditions in the approval letter.
 11. The Defendants denied further that they entered the suit property on 29th April 2018 and commenced demolition of the Plaintiff's perimeter fence, balconies, internal walls and canopies and in the process



stole the Plaintiff's tools and equipment. The Defendants averred that although they did not carry out any demolition on the suit property as claimed by the Plaintiff, they did issue the Plaintiff with notices revoking the approvals they had granted to the Plaintiff and also stopping the construction on the suit property.

12. The Interested Party filed a defence and a counter-claim on 29th August 2022. The Interested Party averred that the suit property was set aside as an open space for public use through Part Development Plan Reference No. N9/87/27 and Approved Development Plan number 741 of 11th August 1987. The Interested Party averred that under the Part Development Plan(PDP) the suit property bore an inscription 34 which number on the grid indicated that the subject land parcel was earmarked as an open space.
13. The Interested Party averred that the said Open Space was a public utility plot and was not available for alienation. The Interested Party averred that the Plaintiff while developing the suit property had severally destroyed the wayleave for KIWASCO.
14. The Interested Party averred that the Plaintiff ought to have known that the suit property was public land by virtue of the wayleave that was evident when it was carrying out construction on the property. The Interested Party averred that the Plaintiff had on several occasions during the construction works destroyed KIWASCO's water pipes. The Interested Party averred that the PDP at the Ministry of Lands clearly indicated that the land was an open space for public use only and that the Plaintiff acquired the suit property without undertaking due diligence.
15. The Interested Party prayed for judgment against the Plaintiff for;
 - a. A declaration that the issuance of a lease by the Land Registrar to the first owner of the suit property Jayantilal Pragji Sedani was null and void ab initio and ineffectual to confer any right, interest or title upon him.
 - b. A declaration that the registration of the lease and issuance of a Certificate of Lease over the suit property to the Plaintiff was null and void and ineffectual to confer a good title upon the Plaintiff.
 - c. A declaration that the suit property was set aside as open space and hence should be under the custody of the County Government of Kisumu, the 1st Defendant herein.
 - d. An order for rectification of the land register by the cancellation of the lease over the suit property and Certificate of Lease issued to the Plaintiff so as to restore the suit property back to the Government.
 - e. A declaration that the charge created and registered in favour of Bank of Baroda over the suit property on 9th March 2017 was null and void and ineffectual to confer any valid interest upon the said bank and an order of a permanent injunction restraining the said bank from selling, transferring, advertising for sale or from howsoever dealing with the suit property in the exercise of any statutory power by virtue of the charge.
 - f. An order for a permanent injunction against the Plaintiff by itself, its agents, servants or assigns restraining it from leasing, transferring, charging, further charging, entering upon, developing, or in any other manner howsoever from dealing with the suit property.
 - g. General damages for fraud.
 - h. Costs of and incidental to the suit.



- i. Any other or further relief that the Court may deem fit and just to grant.
20. The court heard the Plaintiff's claim and the Interested Party's claim against the Plaintiff and rendered a judgment on 16th November 2023 in which it dismissed the Plaintiff's suit and entered judgment for the Interested Party in its cross-claim against the Plaintiff. In the judgment, the court stated as follows in part concerning the suit property:

“The property was reserved for use by the public as an open space. The apartments that the Plaintiff was constructing on the suit property were illegal structures as the same were not in furtherance of the public purposes for which the land was reserved. The developments that the Plaintiff was undertaking on the suit property were illegal despite the approvals that the Plaintiff obtained from the 1st Defendant and other regulatory bodies. The 1st Defendant and the said regulatory bodies had no power to approve private development on illegally acquired public land. The purported approvals were equally null and void and could not give the Plaintiff's development any validity. The 1st Defendant's attempts to revoke the purported approvals were superfluous as there was in law nothing to revoke.”

20. In conclusion the court made the following orders in the matter;
- a. “The Plaintiff's suit is dismissed.
 - b. A declaration is issued that the issuance of a lease over Title No. Kisumu Municipality/Block 13/302, the registration of the said lease and the issuance of a certificate of lease in respect thereof by the Registrar in favour of the first owner of the property, Jayantilal Pragji Sedani was null and *void ab initio* and ineffectual to confer any right, interest or title upon the said Jayantilal Pragji Sedani.
 - c. A declaration is issued that the transfer of lease over Title No. Kisumu Municipality/Block 13/302 by the said Jayantilal Pragji Sedani to the Plaintiff, the registration of the said transfer of lease and the issuance of a certificate of lease to the Plaintiff was null and void and ineffectual to confer a good title upon the Plaintiff.
 - d. A declaration is issued that Title No. Kisumu Municipality/Block 13/302 is land set aside as an open space and should be under the custody of the 1st Defendant, County Government of Kisumu.
 - e. The register of Title No. Kisumu Municipality/Block 13/302 is hereby rectified by the cancellation of the registration of the property in the names of Jayantilal Pragji Sedani and the Plaintiff and the certificates of leases that were issued to them.
 - f. The ownership of Title Kisumu Municipality/Block 13/302 is restored to the Government of Kenya who shall hold the same in trust for the residents of Kisumu for the public purpose for which the land was reserved.
 - g. A declaration is issued that since the Plaintiff had no valid proprietary interest in Title No. Kisumu Municipality/Block 13/302, the Plaintiff could not create any lawful charge over the same to secure a debt.
 - h. An order of a permanent injunction is issued restraining the Plaintiff by itself, its agents, servants or assigns from leasing, transferring, charging, further charging, entering upon, developing, or in any other manner howsoever dealing with Title No. Kisumu Municipality/Block 13/302.



- i. The Interested Party shall have the costs of the suit and the counter-claim to be paid by the Plaintiff.
 - j. The Defendants shall bear their own costs of the suit.”
20. The Plaintiff was dissatisfied with the judgment of the court and filed a Notice of Appeal against the same to the Court of Appeal on 21st November 2023. What is now before the court is the Plaintiff’s application brought by way of Notice of Motion dated 30th November 2023 seeking a stay of execution of the said judgment pending the hearing and determination of the intended appeal against the same to the Court of Appeal. The application was brought on the grounds that the Plaintiff had filed a Notice of Appeal against the judgment of the court delivered on 16th November 2023 and that the 2nd and 3rd Defendants had expressed an intention of demolishing the structures on the suit property and would do so at any time unless the stay sought was granted. The Plaintiff averred that the execution of the court’s said judgment by the Defendants would not only subject the Plaintiff to irreparable loss and damage but would also render the Plaintiff’s intended appeal nugatory. The Plaintiff averred that it was willing to furnish such security as the court may order as a condition for granting the stay. The Plaintiff averred further that the intended appeal had good chances of success.
21. The application was opposed by the Defendants and the Interested Party. The Defendants filed Grounds of Opposition dated 10th January 2024 in opposition to the application. The Defendants averred that the application did not meet the conditions for granting a stay of execution and that there was no proper appeal filed by the Plaintiff.
22. The Interested Party opposed the application through Grounds of Opposition dated 18th January 2024. The Interested Party averred that the building on the suit property which the Plaintiff had come to court to protect from demolition was standing on KIWASCO’s huge water pipes and in case there was damage to the said pipes which are under high pressure, the building could collapse leading to loss of life and property. The Interested Party averred that despite the danger posed to the said building by the said water pipes, the Plaintiff had rented out the apartments in the building thereby endangering the lives of the occupants. The Interested Party averred that life must be protected more than the Plaintiff’s economic pursuits. The Interested Party averred that there was no compelling reason put forward to warrant the stay order sought and that to the contrary, there was a threat to human life that deserved protection.
23. The Plaintiff filed a further affidavit also sworn by its director, Suresh Patel on 19th February 2024. The Plaintiff averred that contrary to the averments in the Grounds of Opposition by the Defendants and the Interested Party, the Plaintiff’s application had merit. The Plaintiff reiterated that it had an arguable appeal with good chances of success. The Plaintiff submitted that the Defendants and the Interested Party had not demonstrated that the application had not met the threshold for granting a stay order.
24. The Plaintiffs’ application was argued by way of written submissions. The Plaintiff filed submissions dated 17th February 2024 while the Defendants filed submissions dated 20th February 2024. I have considered the Plaintiff’s application together with the affidavits filed in support thereof. I have also considered the grounds of opposition filed by the Defendants and the Interested Party in opposition to the application. The Plaintiff’s application was brought under Order 42 Rule 6 of the [Civil Procedure Rules](#). Order 42 Rule 6(2) of the [Civil Procedure Rules](#) provides that:

“(2) 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 ultimately be binding on him has been given by the applicant.”

20. In *Kenya Shell Limited v. Karuga* (1982 – 1988) I KAR 1018 the court stated that:

“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 cornerstone 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.”

20. I am persuaded that the Plaintiff’s application has met the threshold for granting an order for a stay of execution. The Plaintiff is the registered proprietor of the suit property. The Plaintiff has developed the suit property by putting up thereon several apartments. In the judgment the subject of the intended appeal, the court found the title held by the Plaintiff in respect of the suit property null and void and ordered the cancellation of the same and the restoration of the property to the Government of Kenya to hold in trust for the residents of Kisumu. Although the court found the title held by the Plaintiff a nullity and declared that the Plaintiff had no proprietary interest in the suit property, this court does not have the last word on the issue. The Plaintiff has a right of appeal to the Court of Appeal and the decision of this court may be overturned. I am not competent to consider whether the Plaintiff’s intended appeal has a good chance of success. My duty is to prevent substantial loss if any to the Plaintiff while it is pursuing its right of appeal.
21. I am persuaded that the Plaintiff is likely to suffer substantial loss if the stay sought is not granted. Once the Plaintiff’s title is cancelled and the ownership of the suit property reverted to the Government of Kenya, the Government of Kenya would be at liberty to deal with the property as it wished in the interest of the residents of Kisumu. It will be at liberty to pull down the building that the Plaintiff has on the property and convert the land into a park for public recreation or something similar to that.
22. If the Plaintiff’s title is cancelled and its building on the suit property is brought down, there is a possibility that the suit property would be put beyond the reach of the Plaintiff. The Plaintiff is therefore likely to suffer substantial loss in case the stay sought is not granted and it succeeds in the intended appeal. I agree with the Interested Party and the Defendants that the Plaintiff’s possible loss must be weighed against a potential threat to public safety and convenience posed by the Plaintiff’s building on the suit property. The court has power to impose conditions while granting a stay. The threat posed by the said building can be addressed by the court while considering whether to impose any condition to the stay if granted and should not fetter the discretion of the court to grant the stay sought.
23. It is not disputed that the application for stay was brought without unreasonable delay. The Plaintiff has also offered to furnish any security that the court may impose as a condition for granting a stay.
24. Due to the foregoing, I find merit in the Plaintiff’s application dated 30th November 2023. The application is allowed on the following terms;



- a. The execution of the judgment delivered by this court on 16th November 2023 is stayed pending the hearing and determination of the intended appeal by the Plaintiff against the same to the Court of Appeal.
- b. Pending the hearing and determination of the said appeal by the Plaintiff to the Court of Appeal, the Plaintiff is restrained from selling, transferring or charging all that property known as Title No. Kisumu Municipality/Block 13/302 together with the developments and improvements thereon.
- c. Pending the hearing and determination of the said appeal by the Plaintiff to the Court of Appeal, there shall be an inhibition inhibiting the registration of any other or further dealings with all that property known as Title No. Kisumu Municipality/Block 13/302 together with all the developments and improvements thereon.
- d. Pending the hearing and determination of the said appeal by the Plaintiff to the Court of Appeal, in the event that there is a damage to the KIWASCO's water infrastructure or pipes passing through all that property known as Title No. Kisumu Municipality/Block 13/302, the Plaintiff shall grant to KIWASCO unrestricted access to the premises for the purposes of carrying out the repairs or remedial works.
- e. The Plaintiff shall deposit in an interest earning bank account in the joint names of the advocates for the Plaintiff and the advocates for the Interested Party a sum of Kshs. 500,000/- as security within 30 days from the date hereof in default of which the stay shall lapse automatically without any further reference to the court.
- f. Each party shall bear its costs of the application.

DELIVERED AND DATED AT KISUMU ON THIS 18TH DAY OF JULY 2024

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Maganga for the Plaintiff

Ms. Okaka h/b for Mr. Yogo the Defendants

Ms Kakuvi for the Interested Party

Ms. J. Omondi - Court Assistant

