



Kimerinyang v Chekes (Suing as the legal representative of the Estate of the Late Lomerikat Pkurket Lomer) (Environment and Land Appeal E007 of 2024) [2024] KEELC 5304 (KLR) (17 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5304 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND APPEAL E007 OF 2024
FO NYAGAKA, J
JULY 17, 2024**

BETWEEN

PIKAT KIMERINYANG APPELLANT

AND

CHEBET MARGARET CHEKES (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE LOMERIKAT PKURKET LOMER) RESPONDENT

(Being an appeal from the judgment of the Hon. Principal Magistrate S. N. Telewa delivered on 07/03/2024 in Kapenguria PM's Land Case No. E036 of 2023)

RULING

1. By a Notice of Motion dated 15/04/2024 the Appellant moved this Court under Order 42 Rule 6(1) (2) Rule 1, 2, 3 and 4 (sic) and Order 51 Rule 1 of the [Civil Procedure Rules](#), Section 3A of the [Civil Procedure Act](#), and what he termed as “all enabling provisions of the law.” He prayed for the following orders:-
 1. ...spent.
 2. That this honorable Court be pleased to stay the proceedings in Kapenguria SPM Land Case No. E036 of 2023 pending the hearing and determination of the appeal against the Ruling delivered on 07th March 2023. Order in Prayer 2, herein, or grant a stay sought in Prayer 2 while pending the hearing and determination of the pending appeal.
 3. That this honorable Court be pleased to set aside the proceedings of 07th March 2024 as the same are a nullity and violation of the Appellant’s right to fair hearing.
 4. That the costs of this application be provided for.



2. The Application was based on eleven grounds. The first one was that Appellant had moved the lower court through an application dated 27/11/2023 for an order of injunction over land parcel No. West Pokot/Kopro/Wakor/387. The court fixed the matter for 06/03/2024 to confirm the filing of a response to which the Appellant's advocate sought seven (7) days to do and was allowed. On the same date the Respondent sought leave to amend his application and the matter was fixed for mention on 07/03/2024 to confirm compliance. On 07/03/2024 the Respondent had amended his application and the trial court, issued ex parte orders without considering the oral submissions from the Applicant even without giving the Appellant a chance to respond to the amended application. The orders of 07/03/2024 were contrary to earlier directions hence making the Appellant to be condemned unheard.
3. The Appellant had been in peaceful, quiet and uninterrupted use and occupation of the suit land and was now locked out of it or from utilising the parcel of land which the Respondent had never occupied. The ex parte orders were detrimental to the Appellant who was not given an opportunity to be heard. The appellant was dissatisfied with the Ruling and had appealed therefrom and the appeal has high chances of success. The appeal if successful will not be rendered nugatory (sic) and substantial loss will not be suffered by the Respondent (sic) if the stay of the Ruling was granted. The Applicant stands to suffer irreparable loss if the stay order was not granted. It is in the interest of justice that the proceedings in the lower court matter be granted pending the hearing and determination of the appeal. The Application was made in good faith and without undue delay.
4. Largely, the Applicant's deposition repeated the contents of the grounds supporting the application hence this Court does not need to repeat them. Instead it will take their contents as the Applicant's factual depositions. But in addition to the depositions, the Applicant annexed and marked as PK-1 a copy of the application dated 27/11/2023, PK-2 a copy of the ruling of 07/03/2024 and PK-3 a copy of the memorandum of appeal.
5. It is worth noting that the instant application was filed on 16/04/2024, exactly a month and nine days after the delivery of the Ruling appealed against. The Application is filed in the Appeal itself and it appears the appeal was filed the same date as the application.
6. The Respondent opposed the Application through a Replying Affidavit sworn by her on 13/05/2024. She deposed that on 07/03/2024 the application was argued orally and on that basis the Court granted the orders impugned. The matter came up for mention on 17/04/2024 for compliance and the parties took another mention being the 29/05/2024 which implied that the Appellant was well aware of the orders of the Court. It was untrue that the Appellant was condemned unheard. The suit land was in the name of the deceased and the Appellant entered it and started mining gold without the Respondent's consent. The Appellant had never been in possession of the suit land. The deposition that the Appellant cannot suffer any loss was denied. Further, the appeal had no triable issues (sic). The Applicant was not truthful. In any event he was served with the order of 07/03/2024 and kept off the suit land.
7. The Application was disposed of by way of written submissions. The Appellant submitted vide theirs dated 22/05/2024 while the Respondent submitted through hers dated 24/05/2024. This Court has given due consideration of the rival submissions.

Issue, Analysis and Determination

8. Besides the submissions, the Court has considered the application and the law on the same. Only two issues lie before me for determination. One is whether the application is properly before this Court. Two is who to bear the costs of the application.



9. In an application of this nature, the Applicant has to satisfy the Court on three conditions before the orders sought are granted. These are provided for under Order Rule 6 (2) of the [Civil Procedure Rules](#). The provision is to the effect that:

“No order of 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 applicant the application has been made without unreasonable delay; and. 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.”

10. The preliminary question to be settled is whether the Applicant moved the Court in accordance with the law. If he did not, then the application would be incurably incompetent and not worth considering the merits thereof.
11. It is worth noting that on 07/03/2024 the subordinate court delivered a Ruling in an application by which the court issued an injunction against the Appellant. Then the Appellant appealed soon after and then moved this Court with the instant application.
12. Order 62 Rule 6(1) of the [Civil Procedure Rules, 2010](#) contemplates a situation where before a party moves this Court for stay of execution or proceedings of an order or decree made by the trial court, he or she has to first approach the trial Court for similar orders. When the court refuses the orders or grants it with conditions which are unfavourable then the aggrieved party may, if he so desires, move this court appropriately. The provision is to the effect that:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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” [emphasis mine].

13. In the case of [Anyenda v Simidi & 12 others \(Environment and Land Appeal 1 of 2023\)](#) [2023] KEELC 21845 (KLR) (24 November 2023) (Ruling) this Court had the following to say:

“The above Rule is to the effect that before an Appellant aggrieved by an order or decree of a subordinate Court moves the Appellate Court either on a first appeal (where the appeal is first) or on a second appeal (where the appeal is preferred as a second one in case there was an earlier one to a Court subordinate to the Superior Court) moves the Superior Court for stay of proceedings or execution he/she/it should have moved the court appealed from for similar orders. This is not optional but a compulsory step. Only upon fulfilment of that step shall the Superior Court be seized of jurisdiction to handle an application for stay of proceedings or execution. This is clearly provided for in the sub-Rule that “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.”

19. From the above provision, an Appellant can only apply to the Appellate Court to set aside the order (of stay of execution or proceedings) of the Court



appealed from if he/she/it is aggrieved by such an order. It means further that he/she/it or the adverse party must have moved the subordinate Court, the Court shall have rendered itself on the application, and the party is aggrieved by the decision of that Court and moves the Appellate Court. An appellant ought not and should never side-step the subordinate court and attempt successfully to move the appellant for orders he/she should have sought formally in that court. This is akin to forum shopping and a direct call for a breakdown of the rule of law.”

14. Thus, my humble view is, the Applicant jumped the gun. He moved this Court in contravention of the law and the instant application is incompetent before me. It may be said to be premature and this Court does not have jurisdiction to entertain it. The upshot is that the application is struck out with costs to the Respondent. Thus, the Court needs not consider the merits of the application as that will be a mere academic exercise.
15. The Applicant is directed to file the certified decree and record of appeal, together with the original receipt of the payment in respect of the appeal herein within the next seven (7) days, and serve the same on the Respondent within that time. Thereafter, the appeal shall be placed before me for mention for consideration under Section 79G of the *Civil Procedure Act* and further directions on admission or otherwise of the same, on 23/07/2024. Both parties shall attend the Court virtually for that purpose.
16. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 17TH DAY OF JULY, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

