Kipseret v Yator & another (Civil Appeal E022 of 2024)
[2024] KEELC 6252 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6252 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

CIVIL APPEAL E022 OF 2024

EO OBAGA, J

SEPTEMBER 26, 2024

BETWEEN

RICHARD KAINO KIPSERET ..... APPELLANT

AND

JOHN LUKE AMEMO OSIEMO ..... 1ST RESPONDENT

MAJOR JOHN KIPCHUMBA YATOR ..... 2ND RESPONDENT

RULING

1. The Appellant/Applicant herein filed the a Notice of Motion dated 28th May, 2024 seeking the following orders:-

    i. Spent

    ii. Spent

    iii. That his Honourable Court be pleased to order a stay of execution of the Decree, Certificate of Costs and all consequential orders arising from the Judgment delivered against the Appellants in Eldoret CMC E&L No. 64 of 2018, John Luke Amemo Osiemo v Richard Kaino Kipseret & Another pending the hearing and final determination of this appeal.

    iv. That the costs of this Application be provided for.

2. The Application is premised on the grounds set out on the Motion and is supported by the Appellant's Supporting Affidavit of the same date. The Appellant's case is that in the judgment delivered on 7th May, 2024 in Eld CMC E&L No. 64 of 2018, the trial court declared him a trespasser on the suit property and ordered his eviction within 90 days. Being aggrieved by the judgment, he has filed and served a Memorandum of Appeal. The Appellant deponed that the judgment was delivered despite orders by this Court staying the proceedings in Eldoret CMC E&L 64 of 2018.

3. The Appellant deponed that there is sufficient cause to warrant issuance of the order of stay of execution as prayed since the appeal raises fundamental and arguable legal issues. He added that there is no amount of damages capable of compensating him if the Respondent is allowed to proceed with execution. He deponed that the application is brought in good faith and without undue delay and it is in the interest of justice that it is allowed. Further, that he is willing to abide by any reasonable terms and conditions that the court may issue on security.

4. The 1st Respondent swore a very lengthy Replying Affidavit opposing the Application. He deponed that he is the legal and registered owner of the suit property, which he purchased in 2002. The 1st Respondent then rehashed the facts of his case up to delivery of judgment in his favour on 7th May, 2024. He termed the application bad in law, fatally and incurably defective and an abuse of the court process. He deponed that the Appellant had not met the threshold for grant of the orders sought. He averred that the trial magistrate had every right to deliver judgment on the set date, and asserted that the Appellant was afforded an opportunity to be heard severally, hence that cannot be a sufficient ground for appeal.

5. The Respondent added that he stands to suffer extreme prejudice as the Appellant is in possession of the suit property, depriving him of it since 2017. He added execution of a valid judgment is not considered a substantial loss. That on the contrary, the Appellant is not prejudiced at all since he has his own land that he purchased being Kiplombe/Kiplombe Block 13(Greenfield)/443. That the application is for selfish interests; that it is meant to frustrate him from utilizing his land; and that it premised on a false affidavit, and he prayed that it be dismissed with costs.

6. In response thereto, the Appellant swore and filed a Further Affidavit dated 22nd July, 2024 insisting that his application is merited and properly before court. He deponed that the Respondent obtained title and registration to the land in violation of orders of the court issued in Eldoret Petition No. 20 of 2022. He stated that he has been in occupation of the suit property since he was resettled thereon by the Marakwet Development Association to date, and the trial court would have reached a different decision had he been allowed to avail his witnesses and adduce evidence.

7. The Appellant reiterated that the judgment had been delivered contrary to an order of this court issued on 29th February, 2024 staying further proceedings therein pending hearing of his application in Eldoret ELCA No. E008 of 2024. He deponed that the court's refusal to issue summons for his witnesses and involuntarily closing his case prematurely paralysed his case and infringed on his right to a fair trial. The Appellant deponed that he stood to suffer irreparably as he has settled his family on the suit land and the extensive developments thereon will be lost if a stay is not granted. He insisted that he has an arguable and meritorious Appeal, and that the Respondent will suffer no prejudice because the Appellant has been occupying the suit land since 2014.

Submissions

Appellant's Submissions

8. The application was canvassed by way of written submissions. In the Appellant's Submissions dated 22nd July, 2024 Counsel submitted that judgment was delivered on 7th May, 2024 and the instant application was filed on 28th May, 2024. Relying on *Cynthia Achieng Marere v Athanas Shibwon Asiavugwa* [2015] eKLR and *Utalii Transport Co. Ltd & 3 Others v NIC Bank Ltd & Ano.* [2014] eKLR, he submitted that there was therefore no delay in bringing the application. It was submitted that if the 1st Respondent is allowed to evict the Appellant and his family, he stands to suffer substantial loss which cannot be compensated by way of damages.

9. In addition, that the Appellant risks losing his family home and extensive developments on the land, yet he has no other place to call home. He relied on *Kitamaiyu Limited v County Government - Kiambu & Another* [2018] eKLR and *Niaz Mohammed Janmohammed v Commissioner for Lands & 4 Others* [1996] eKLR. Counsel submitted that as a sign of good faith, the Appellant is willing to furnish such security as this court directs. Counsel further submitted that the 1st Respondent has filed his bill of costs and is likely to obtain a Certificate of Costs before this Appeal is heard. He asserted that he was deserving of the order sought and asked that the Application be allowed as prayed or on favourable conditions as set by the court.

1st Respondent's Submissions

10. The 1st Respondent's submissions in response are dated 1st August, 2024. Counsel submitted that the Appellant had failed to demonstrate that he would suffer loss if the orders are not granted, neither had he stated what loss he would suffer. He relied on *James Wangalwa & Anor v Agnes Naliaka Cheseto* [2012] eKLR. Counsel also submitted that the Application was filed on 12th June, 2024 over a month after the judgment, thus there was inordinate delay. Further, that the Appellant had not offered any security as required under Order 42 Rule 6. He cited *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR and *Equity Bank Ltd v Taiga Adams Company Ltd* [2012] eKLR. Counsel argued that the Appellant had not demonstrated that his Appeal was arguable (*Hassan Guyo Wakalo v Straman EA Ltd* [2013] eKLR).

11. Counsel argued that there is no proof the order staying proceedings in the trial court was placed before the trial magistrate. In addition, that the execution of a judgment does render an appeal nugatory. Counsel pointed out that the Appellant had not sworn an affidavit on the substantial loss he would suffer, but instead raised it in the submissions. He bolstered his argument by relying on the case of *Chege v Gachora (Civil Appeal 265 of 2023*) (2024) KEHC 1994 (KLR). Also, that nothing had been attached to show the alleged developments on the land including the family home. Counsel argued that the Appellant had thus not met the threshold for grant of the orders sought and urged the court to dismiss the application with costs.

Analysis and Determination:

12. I have considered the Appellant's application herein alongside the affidavits filed in support thereof, the replying affidavit and rival submissions. The main prayer for determination in this application is that of stay of execution. The primary issue for determination in this application therefore, is whether the appellant has satisfied the conditions set out in Order 42 Rule 6 for grant of stay of execution pending appeal. The said provision of the law provides that:

> "(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 and to make such order thereon as it may 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.
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> (2) No order for stay of execution shall be made under sub-rule 1 unless:-

a. 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."

13. As correctly submitted by the 1st Respondent, under Order 42 Rule 6 above, a party seeking stay of execution must satisfy the court that;

a. Substantial loss may result to the applicant unless the order is made;

b. The application has been made without unreasonable delay; and

c. They shall provide such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant.

14. Under the head of substantial loss, a Party must clearly state what loss, if any, they stand to suffer if the order of stay is not granted. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the court held as follows:-

> " 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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma v Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the *CPR* and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:
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> " ...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."

15. The Appellant has indicated at paragraph 16 of his Further Affidavit that he settled his family on the suit property and it is now his family's home, and he alleges that they have no other place to call home. From the judgment of the trial court, it appears that both the Appellant and Respondent purchased their land from the Marakwet Development Association (MDA), which then settled them on their respective plots. It is the Appellant's case that he has, since settling on the suit land, undertaken extensive developments, which he stands to lose if execution is allowed.

16. The requirement is that a party needs to state the substantial loss he will suffer if the order of stay of execution is not granted. The 1st Respondent submitted that nothing had been attached as to the developments on the suit property. That may be so, however, if indeed the Appellant did not occupy the suit property, the 1st Respondent would have no need for an order of eviction, neither indeed would

the suit in the trial court have been necessary. The Appellant complied with this requirement, and demonstrated that he stands to suffer the loss of his family home if the 1st Respondent is allowed to proceed with execution and evict them from the suit property. I therefore find that the Appellant has succeeded on this particular limb.

17. The requirement of substantial loss is tied to the question of whether the pending appeal raises arguable issues. The justification for this requirement is based on principle that if an appeal raises arguable points, the court should grant stay of execution so that it is not rendered nugatory. The instant application questions validity and legality of the Judgment and resultant Decree on the basis that it was issued at a time where there was an order from the Environment and Land Court staying the proceedings in the lower court. Indeed, the Appellant attached an order made on 26th February, 2024 and issued on 29th February, 2024 staying the proceedings in Eldoret CMC ELC No. 64 of 2018, which order directed as follows:

> " Stay of proceedings and/or further proceedings and/or hearing or mentioning of Eldoret CMC ELC No. 64 of 2018 and or any action and/or activity be and is hereby issued pending the hearing and determination of this application inter-partes and or pending further orders of the court."

18. The 1st Respondent did not in any way counter the allegation that the order was still in existence at the time that the judgment was delivered, only submitting that there is no proof the order was placed before the trial magistrate. Since the issue was only raised in the 1st Respondent's submissions, the Appellant was unable to respond to it. Be that as it may, it appears from paragraph 21 of the 1st Respondent's Replying Affidavit, the trial magistrate completely ignored the order issued by this court and mentioned the case on 29th February, 2024. He then set it down for judgement on 2nd May, 2024 and come that date, went ahead to deliver the said judgment.

19. From the above, it is clear that there is a question as to whether the Trial court contravened the order of stay of proceedings issued from this superior court, baring it from mentioning, hearing or otherwise taking any action in the suit. This is in my opinion a valid ground of Appeal, since if the court does find that the judgment was issued in contravention of the said order, the said decision and the proceedings leading up to it that were conducted during the pendency of the said order would automatically be impeached. However, that is a matter to be determined in the Appeal and not at this stage.

20. I note also the allegation by the Appellant that the 1st Respondent's title over the suit property was obtained during the pendency of the suit, and contrary to orders issued in Eldoret Petition No. 20 of 2022 which the Respondent did not controvert. The Appellant also deponed that the Trial Magistrate cancelled his Witness Summons save one which was not of much importance to his case without informing him, raising the issue of infringement of his right to a fair trial. All these are arguable and meritorious grounds which raise serious issues to be determined in the Appeal. The Appellant has thus also fulfilled this limb.

21. The second requirement is that the application for stay must be made without unreasonable delay. Indeed, the time stamp on this application indicates that it was filed on 12th June, 2024. This was just a month after the impugned judgment was delivered. The 1st Respondent has not indicated any special circumstance demonstrating how the delay of one month was prejudicial to him. In the circumstances, I find that the delay is not inordinate.

22. The last requirement is that the Appellant must furnish such security as the court orders for the due performance of the decree. In *Arun C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates* [2014] eKLR, the Court held that:

> " The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose."

23. The Appellant has indicated on the face of the Motion and at Paragraph 11 of his Supporting Affidavit that he is willing to abide by all reasonable conditions that this court may deem fit, including the provision for security. This counters the 1st Respondent's submission that the said willingness was not expressed by the Appellant and was instead made from the bar. The issue of security for costs was explained in the *James Wangalwa Case (Supra*), where the Court held that:-

> " 18. I agree with the Respondent that the Applicants have not offered or proposed any security for the due performance of the decree of the lower court. This should be done as a sign of good faith that the Applicant is ready and willing to commit to giving security. But my reading of order 42 rule 6(2) (b) of the *CPR* reveals that, it is the court that orders the kind of security the applicant should give as may ultimately be binding on the applicant. This modelling of the law is to ensure the discretion of the court is not fettered."

24. As explained in the above authority, indeed, it is the court that determines if a party should furnish security, and if so, the nature of the said security or any other condition attached to the stay. The willingness to abide by any conditions on security that the court may issue has been held to be enough to demonstrate good faith on the part of an Applicant, that it is sufficient to satisfy the condition for security under Order 42 Rule 6. I am persuasively guided by the decision of the High Court in *Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another* [2018] eKLR, where it was held that:-

> " Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay."

25. Therefore, Appellant's willingness to abide by any conditions and terms as to security as the court may deem fit to impose, sufficiently meets the condition of security that is necessary for grant of an order of stay of execution.

26. In conclusion, it is trite that to succeed, a party seeking stay of execution must satisfy all the three conditions for an order of stay of execution to be granted. The court in *Trust Bank Limited v Ajay Shah & 3 Others*, [2012] eKLR stated that:-

> " The conditions set out in Order 42 Rule 6(2) (a) and (b) are cumulative. All the three must be satisfied before a stay can be granted. The Applicant only satisfied one condition and failed to satisfy the others. For the foregoing reasons, I find that the Plaintiff's Notice of Motion dated 24th April, 2012 it without merit."

27. The Appellant herein has clearly met all the conditions for grant an order of stay of execution. It is therefore in the interests of justice that the suit property, which is the subject of the Appeal herein, is secured/preserved in its current condition pending hearing and determination thereof. Consequently, the Application dated 28th May, 2024 is therefore allowed in the following terms:

a. An order is hereby issued staying the execution of the Decree, Certificate of Costs and all consequential orders arising from the Judgment delivered against the Appellants in Eldoret CMC E&L No. 64 Of 2018, John Luke Amemo Osiemo v Richard Kaino Kipseret & Another pending the hearing and final determination of this appeal. The Appellant shall deposit in court a sum of Kshs 50,000/= as security for costs within 14 days failing which the stay orders will lapse.

b. The costs of this Application shall be in the cause.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 26TH DAY OF SEPTEMBER, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

M/s Chesoo 1st Respondent.

M/s Kogo for Applicant.

Court Assistant -Laban

E. O. OBAGA

JUDGE

26TH SEPTEMBER, 2024