



Nabule & another v Tamu & another (Environment and Land Appeal 3 of 2024) [2024] KEELC 6171 (KLR) (19 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6171 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL 3 OF 2024**

**E ASATI, J
SEPTEMBER 19, 2024**

BETWEEN

SIMEON NDAKALU NABULE 1ST APPLICANT

RHODA ANDEYO SIMEON 2ND APPLICANT

AND

LUKE AMUKHALE TAMU 1ST RESPONDENT

IBRAHIM KUNDUT TAMU 2ND RESPONDENT

(Being an Appeal from the judgement and decree of honourable Rose Ndombi (Principal Magistrate) delivered on the 18th day of January 2024)

RULING

1. This Ruling is in respect of the Notice of Motion application dated 2nd April, 2024 brought by the Appellants pursuant to the provisions of sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Order 40 Rule (1), Order 42 Rule 6(1) and (6) and Order 51 Rule 1 of the Civil Procedure Rules and Article 159(2), (b) and (d) of the Constitution of Kenya 2010. The application seeks for orders that:
 - a. There be stay of execution of the judgment and decree delivered on the 18th day of January 2024, pending the hearing and determination of the Appellants/Applicants' intended appeal.
 - b. The Honourable court be pleased to grant a temporary injunction or conservatory order stopping and or restraining the Respondents and or their agents, employees and/or servants from interfering the occupation of the subject property, trespassing, proceeding to evict, remove the appellants from the suit property and/or destroy the property situate on the suit property being land parcel No. West Bunyore/Embali/2264.
 - c. The court be pleased to grant any orders that would uphold justice in the circumstances.



- d. That the costs of this application be provided for.
2. The application was based on the grounds stated in the Notice of Motion and the Supporting Affidavit sworn by Rhoda Andeyo Semeon, the 2nd Appellant, on 2nd April, 2024 and the annexures thereto.
 3. The Application was not opposed. Affidavit of Service sworn by Joseph M. Akuno a Court Process server indicates that the 2nd Respondent was served with the Notice of Motion and Order on 12th April 2024, and that on the same day, the 2nd Respondent received a copy of the Notice of Motion on behalf of the 1st Respondent. Another Affidavit of service by the same process server shows that the Respondents were served with Mention Notice dated 30/4/2024 for the mention of the application on 9th May 2024. Further, there is an Affidavit of Service by the same process server sworn on 7th June, 2024 showing that the Respondents and their Advocates were served with an extract of the directions given by the court on 9th May 2024. The Respondents filed no response to the application, did not attend court and did not file submissions as directed by the court.
 4. The Application seeks firstly for an order of stay of execution of the judgment appealed against. The grounds for grant an order of stay of execution of judgment, decree or order pending appeal as provided for under Order 42 Rule (6) are well settled. Order 42 Rule 6(2) of the *Civil Procedure Rules* 2010 provides as follows:

“No order for stay of execution may 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 may ultimately be binding on him has been given by the Applicant.”
5. Firstly, the court must be satisfied that the Applicant will suffer substantial loss if the order of stay of execution is not granted.
 6. The burden of proof lies with the Applicant to prove that substantial loss will result to him if the order sought is not granted. In the case of *Charles Wabome Gethi vs Angela Wairimu Gethi* [2008]eKLR the Court of Appeal held-

“...it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the applicants stand to suffer if the Respondent execute the decree in this suit against them”

7. In the case of *Shell Kenya Ltd v Benjamin Karuga Kibiru & Another* [1986] eKLR 410 the court stated that

“if it is shown that execution would render a proposed appeal nugatory then a stay can properly be granted.”

8. The applicants' case herein is that vide the Judgment delivered on 18th January 2024, the trial court dismissed the appellant's case that was undefended. That the appellants being dissatisfied with the judgment have filed the present appeal, that the appellants stand to suffer substantial loss if the judgment is enforced as they will be evicted from the suit property where they have lived and known as their home from the year 1965. That the appellants are senior citizens aged 90 years old. That



the appellants have beneficial and/or proprietary interest in the suit property the same having been purchased by the 1st appellant herein (deceased) on the 10th day of January 1965. That the application has been brought without unreasonable delay. That the Respondents have extracted the decree and threatened the appellant with eviction. That the appellants are ready and willing to abide by any orders and conditions that may be set by the court for the orders sought.

9. It is the appellants case as stated in the application and in paragraph 3 of the Supporting Affidavit that the orders made in the judgment whose execution is sought to be stayed were for dismissal of the sit with costs to the Respondents. There is no evidence that costs have been assessed. No eviction order was granted in the judgment.
10. The judgement was essentially a negative order and the Court of Appeal has held that to such, an order of stay of execution is not available. See case of *Western College of Arts And Applied Sciences v Oranga & Others* [1976] KLR 63 the Court of Appeal whilst considering whether an order of stay can be granted in respect of a negative order stated:-

“ But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....”
11. The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.”
12. And in *David Kipruto Chingi & Another v Director of Public Prosecutions & 2 Others* [2016] eKLR where the Court observed that an application seeking stay of execution of a negative order was bound to fail and proceeded to dismiss the application before it.
13. I find that the grounds for grant of an order of stay of execution have not been proved.
14. The second order sought is for temporary injunction. The appellants’ case is that they have been in occupation of the suit land since the year 1965 and that they have known the suit land as their home. The 2nd appellant deposed in paragraph 9 of the Supporting Affidavit that she has a beneficial and/or proprietary interest in the suit property. That the suit property was bought in 1965 by her husband, the first appellant, who is now deceased. That she is aged above 80 years and will suffer if she is evicted and her home demolished from the suit land.
15. There was no response filed by the Respondents to contest the appellant’s claim that she resides and has occupation of the suit land. I find it to be in the interest of justice to preserve the status quo as stated by the applicants pending hearing and determination of the appeal. The power of the court to grant temporary injunction pending hearing and determination of appeal is provided for under. O. 42 Rule 6 (6) *Civil Procedure Rules* 2010. The grounds for grant of the orders of injunction are as set out in order 40 Rule 1 and in the case of *Giella v Cassman Brown Co. Ltd* [1973] 358 namely; that the Applicant must establish a prima facie case with a probability of success, an interlocutory injunction will not normally be granted unless the Applicant would suffer irreparable injury which would not adequately be compensated in damages and that when the court is in doubt, it will decide the application on a balance of convenience.
16. The applicant has, prima facie, demonstrated these grounds and is entitled to an order of injunction. In conclusion, I find that the application has merit and allow it as follows; -



- i. An order of temporary injunction is hereby issued restraining the Respondents and their agents, employees and/or servants from interfering with the applicant's occupation of the suit land parcel No. West Bunyore/Emballi/2264 pending hearing and determination of the appeal herein.
- ii. Costs of the application be in the appeal.
Orders accordingly.

RULING, DATED AND SIGNED AT VIHIGA AND READ VIRTUALLY THIS 19TH DAY OF SEPTEMBER 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

**E. ASATI,
JUDGE.**

In the presence of:

Ajevi Court Assistant.

Mare h/b for Wekesa for the Appellants/Applicants.

No appearance for the Respondents.

