Sinei & another v Sigilai (Environment and Land Appeal 3 of 2023) [2024] KEELC 6968 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6968 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND APPEAL 3 OF 2023

MAO ODENY, J

OCTOBER 24, 2024

BETWEEN

RICHARD KIPKEMOI SINEI ..... 1ST APPELLANT

THOMAS LANGAT ..... 2ND APPELLANT

AND

RICHARD KIPKOSKEI SIGILAI ..... RESPONDENT

RULING

1. This ruling is in respect of a Notice of Motion dated 24th January, 2024 by the Appellants/Applicants seeking the following orders:

    a. Spent

    b. Spent

    c. That Pending hearing and determination of the instant Appeal, there be stay of execution of the *ex parte* judgment in Molo CM ELC No 6 of 2022 Richard Kipkoskei Sigilai v Richard Kipkemoi Sinei & Thomas Langat delivered on 7.07.22.

    d. That costs of this application be granted.

2. The application was supported by the affidavit of Thomas Langat sworn on 24th January, 2024 where he deponed that *ex parte* Judgment was delivered on 7th July 2022 in Molo CM ELC No 6 of 2022 Richard Kipkoskei Sigilai v Richard Kipkemoi Sinei & Thomas Langat, in which he is a party, and there are No stay of execution orders.

3. He further deponed that on 15th July, 2022, they made an application to the trial court seeking to set aside judgment and stay of execution but the said application was dismissed vide a ruling dated 15th

June, 2023 of which he has filed an appeal. Further they made another application dated 18th July 2023 but the same was dismissed on for non-attendance on 3rd August 2023.

4. It was the Applicant's testimony that on 15th of August, 2023 they applied for the reinstatement of the application for stay of execution that had been dismissed for non-attendance, to be heard on merit, but the same was again dismissed without justifiable reason. He urged the court to allow the application as he will suffer irreparable damage and that the instant appeal will be rendered nugatory.

5. The Respondent filed a Replying Affidavit sworn on 12th February, 2024 and deponed that the Appellants in CM ELC E006 of 2022 were duly served with the application dated 20th January 2022, the Plaint and the Hearing Notice of 3rd February 2022 together with the summons and were fully aware that the matter was in court but were relying on their acquaintance with the District Commissioner to adjudicate the matter on their favour.

6. He further deponed that the Appellants approached the Court in Molo through an application dated 15th July 2022 and in the affidavit of Thomas Langat and Richard Kipkemoi Sinei, the Appellants clearly admit in paragraph five that the 1st Defendant having called the 2nd Defendant informing him that the matter was in court is admission that both Appellants were aware of the matter in CM ELC E006 of 2022 but declined/neglected to respond.

7. The Respondent further deponed that the Appellants' application dated 15th July 2022 for stay of execution and setting aside judgment was heard and determined by the trial court and dismissed via ruling dated 15th June, 2023. He deponed that the application dated 15th August, 2023 was heard on merit and the court directed that the parties file responses and submissions and the same was dismissed with costs.

Appellant/applicants' Submissions

8. Counsel for the Appellant/Applicant filed submissions dated 24th April, 2024 and identified the following issues for determination:

    a. Which Court should be moved for orders of stay?

    b. Whether the Applicants have satisfied the conditions for grant of the orders sought?

9. On the first issue, counsel submitted that the applicants have properly moved this court for orders of stay, being the court to which an Appeal has been preferred and having already applied to the trial court for such orders and denied. The Applicants relied on the provisions of Order 42 Rule 6 (1) of the *Civil Procedure Rules*.

10. On the second issue, counsel relied on Order 42 rule 6 (2) of the *Civil Procedure Rules* and submitted that the instant application for stay has been brought without unreasonable delay as it was brought less than 30 days from when the application for reinstatement of their initial application for stay in the trial court was declined which was on 30th November, 2023.

11. It was counsel's submission that from the said period to 15th December only 15 days had lapsed which was then followed by a period where time does not run as per the provisions of order 50 Rule 4 of the *Civil Procedure Rules* which deals with computation of time and that time started running again on 16th January, 2024 and the application herein was brought promptly eight days later. Counsel submitted that a total of twenty-three days in their view should not be deemed unreasonable and relied on the case of *Mukuma v Abuoga* (1988) KLR 645 on the issue of substantial loss.

12. According to counsel, it is the Applicants who are in occupation of the suit land and they are seeking to preserve status quo pending the hearing and determination of the appeal herein which would otherwise be rendered nugatory should the orders of stay not be allowed. Further that the Applicants are willing to offer security for costs on just and reasonable terms as may be set by this Honourable court.

Respondent's Submissions

13. Counsel for the Respondent filed submissions dated 10th September, 2024 and identified the following issues for determination:

    a. Whether this Honourable court should grant stay of execution of the *ex parte* judgment in Molo ELEC No 6 of 2022 of Richard Kipkoskei Sigilai v Richard Kipkemoi Sinei & Thomas Langat?

    b. Costs of this application

14. On the first issue, counsel relied on Order 42 Rule 6 (2) of the *Civil Procedure Rules* and submitted that a successful litigant should not be deprived as he is the registered owner of Nakuru/SaiNo Settlement Scheme. Counsel further cited the case of RWW v EKW [2019] eKLR and submitted that this Honourable Court has discretionary powers to grant or refuse an application for stay of execution pending appeal and the court must balance the interests of both parties.

15. It was counsel's submission that Appellant delayed in filing this application as it was filed more than five months after the dismissal. On whether the Applicant has established that he will suffer substantial loss, counsel submitted that it is the respondent who will suffer substantial loss if dispossessed of his parcel of land being Nakuru/SaiNo Settlement Scheme/1535. Counsel submitted that the Appellants have not demonstrated to this Honourable Court the substantial loss they are likely to suffer and cited Sections 24 (a) and 26 of the *Land Registration Act* and the cases of *Republic v Director Land Administration Ministry of Lands and Physical Planning & 2 others ex parte Roysa Community Development Society Ltd* [2022] eKLR and *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR.

16. According to counsel, the Appellant has not furnished any security to the court, and/or proposed any amount for security of costs which is a mandatory legal requirement pursuant to the provisions of Order 42 Rule 6 (2) (b) of the *Civil Procedure Rules* and relied on the case of *Stephen Kihara Githinji v Jackson Muiruri Nduati* [2019] eKLR.

Analysis And Determination

17. The issue for determination is whether this court should grant an order of stay of execution of the *ex parte* judgment in Molo CM ELC No 6 of 2022 pending the hearing and determination of this Appeal.

18. The principles that guide the court in an application for stay of execution pending appeal are provided for under Order 42 Rule 6 of the *Civil Procedure Rules*. In order for the court to grant an order of stay of execution, the applicants/appellants must demonstrate that they filed the application under consideration without unreasonable delay, that they will suffer substantial loss if the orders sought are not granted and that they are willing to offer security for the due performance of the decree.

19. On whether the application was filed without unreasonable delay, a perusal of the court record shows that judgment in the matter was delivered on 7th July, 2022 while the application under consideration is dated 24th January, 2024.

20. In the case of *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] the court held as follows:

> " The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter."

21. The computation of time to establish whether there was delay in filing this application is when the applicant finished with the process at the lower court in trying to set aside the judgment dated 7th July 2022. It is on record that the Applicant filed an application of 15th July 2022 to the trial court seeking to set aside judgment and to stay execution but the said application was dismissed vide a ruling dated 15th June, 2023 and for which this Appeal has been preferred.

22. It should also be noted that the Applicant filed an application dated 18th July 2023, but the same was dismissed for non- attendance on 3rd August 2023 and that on 15th August, 2023 they applied for the reinstatement of the application for stay of execution that had been dismissed for non-attendance, to be heard on merit, but the same was again dismissed without justifiable reason. From the chronology of the events that took place in the quest by the Applicant to have his matter heard, I find that the application was filed timeously.

23. The second limb of the prerequisites for granting an order of stay of execution is that the Applicants/ Appellants must demonstrate that unless the court grants stay of execution pending appeal, they stand to suffer substantial loss. It is the Applicant's case that unless the order is granted they will be evicted from the suit land and shall suffer irreparable damage hence that the instant appeal will be rendered nugatory.

24. In the case of *Tropical Commodities Suppliers Limited 7 others v International Credit Bank Ltd (in liquidation)* (2004) 2 EA 331 the Court persuasively defined the aspect of substantial loss thus:

> " Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value is a loss that is merely nominal."

25. At this stage, the court is not asked to determine the dispute between the parties but to stay the execution of the *ex parte* judgment delivered at the lower court. The applicant has gone to great lengths to try to set aside the judgment and stay the execution of the said judgment in order to be given an opportunity to be heard on merit.

26. An argument that there is eminent eviction of the Applicant should not be automatically treated as proof of substantial loss as was held in the case of *Karungu v Masira & another* (Environment & Land Case 540 of 2016) [2024] KEELC 5683 (KLR) (25 July 2024) (Ruling) where this court held that:

> " It should also be noted that where there is an order of eviction, it is not enough to say that a party shall be evicted, as that is a decree that was issued after the parties have been heard and a case is determined. A mere mention of imminent eviction is not proof of substantial loss.

27. In this case the Applicant was not heard on merit hence it suffices to state that there is eminent eviction.

28. On the issue of security for the due performance of the decree, the Applicant stated that he is ready and willing to abide by the conditions set by the court.In the case of *Exclusive Mines Limited & another v Ministry of Mining & 2 others* [2015] eKLR, the court stated as follows:

> "...On the issue of furnishing security, my understanding is that an applicant seeking an order of stay pending appeal should, as a sign of good faith, offer or propose any such security for the performance of the decree which the appeal has been preferred. I have looked at the Interested party's affidavit in support of his Notice of Motion and nowhere in his seventeen (17) paragraph affidavit does he make any offer of any security nor bind himself to meet any such orders that the Court may impose. While the law leaves it to the Court's discretion to make such orders as to security as it may deem fit, it is a good practice for an applicant seeking such an order to intimate to the Court his preparation to meet such orders as the Court may impose as this assists the Court while exercising its discretion in that respect."

29. In the Court of Appeal case of *RWW v EKW* (2019) eKLR the court held 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.
>
> 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."

30. The purpose of security is to guarantee the due performance of the decree and not to punish the judgment debtor as was held in the case of *Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others* [2014] eKLR as follows:

> "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 1st applicant 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 1st applicant. I presume the security must be one which can serve that purpose."

31. In the interest of justice, I find that the application has merit and is therefore allowed as prayed on condition that the Applicant deposits Kshs 200,000/ in a joint interest earning account of the Advocates on record for the parties within 30 days failure to which the order lapses. Costs of the application to abide by the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 24TH DAY of OCTOBER 2024.

M. A. ODENY

JUDGE