



Oluoch v St Joseph Mission of Messiah (Environment and Land Appeal E088 of 2024) [2024] KEELC 13481 (KLR) (28 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13481 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E088 OF 2024**

E ASATI, J

NOVEMBER 28, 2024

BETWEEN

DAVID OMBOGO OLUOCH APPELLANT

AND

ST JOSEPH MISSION OF MESSIAH RESPONDENT

*(Being an appeal against the decision and judgement of Hon. Douglas Ogoti –
Cm in Kisumu Mcelc No.124 Of 2018 Registered Trustees Of St. Joseph Mission
Of Messiah In Africa Vs David Ombogo Oluoch dated 30th September, 2024)*

RULING

1. This ruling is in respect of the Notice of Motion application brought by the Applicant pursuant to the provisions of section 3A of the [Civil Procedure Act](#) and Order 42 Rule 6(1), (2) & (6) of the [Civil Procedure Rules](#).
2. The application seeks for an order that pending the hearing and determination of the appeal herein, an order of injunction do issue restraining the Respondent, its agents, servants, employees or any other person acting on their behalf from interfering with the Appellant's occupation of the disputed portion of land between land parcel No.kisumu Kanyadwera/2004 and Kisumu/kanyadwera/2008 whereon his home is situated and or stay of execution of the decree in Kisumu Cmc Elc No.melc No.124 Of 2018 do issue. The application also seeks that costs of the application be provided for.
3. The grounds upon which the application was brought as shown on the face of the Notice of Motion are that the Appellant's home is on the disputed portion of land which was the subject of the suit in the trial court. That judgement was delivered n the suit against the Appellant who subsequently filed the present appeal. That the appeal raises several weighty issues and is arguable with high chances of success. That the impugned judgement has directed eviction of the Appellant from the disputed



portion of land and an injunction barring the Appellant and his agents and family members from entering or interfering with the suit parcel of land.

4. That the Appellant stands to lose half of his homestead, including his access thereto which if not restrained will render the Appellant homeless and expose him as well as his family to extreme suffering and substantial and irreparable loss and render the appeal nugatory. That the application has been brought expeditiously and without undue delay.
5. The application was supported by the averments in the Supporting Affidavit sworn by the Appellant/Applicant on 5th November, 2024.
6. The application was opposed vide the grounds raised in the Replying Affidavit sworn by Michael Kus Onyango on behalf of the Respondent on 15th November, 2023. It was the case of the Respondent that the Appellant has been unlawfully occupying the suit parcel of land despite judgement in Kisumu CMC ELC No.124 Of 2018 in which the suit land parcel No. Kisumu/kanyadwera/2008 was properly adjudicated upon and found in favour of the Respondent. That the Appellant has not demonstrated any legal or equitable basis to justify his continued occupation.
7. That the Appellant will not suffer substantial loss as he has encroached onto land belonging to the Respondent.
8. That granting a stay would amount to condoning the Appellant's unlawful occupation and continued interference with the Respondent's right as the registered proprietor of the suit parcel of land. That such interference has caused substantial prejudice and loss to the Respondent. That the application intended to frustrate the outcome of the lawful judgement.

The application was argued orally on 21st November, 2024.

9. It was submitted on behalf of the Applicant that the appeal raises serious matters of law and if the orders sought are not granted, the applicant will suffer substantial loss including demolition of his house. That the Applicant is ready and willing to provide security as the court will order.
10. The Applicant relied on the case of *Michael Ntouthi Mithen -vs- Abraham Kivondo Musau* (E052 of 2021) 201 I KCHC4530 (KLR) and urged the court to allow the application.
11. On behalf of the Respondent, it was submitted that as required under Order 42 Rule 6(2) the Applicant must demonstrate that there is actual loss to be suffered. That it has not been shown that there will be substantial loss. That the activities complained of by the Applicant do not amount to substantial loss.

Determination

12. I have considered the application, the contents of the Supporting Affidavit and the annexures thereto, the Replying Affidavit, the submissions made and the authority cited.
13. The application seeks for an order of temporary injunction or stay of execution of the judgement appealed against pending hearing and determination of the appeal herein.
14. Both temporary injunction and stay of execution as interim relief pending appeal are provided for in order 42 Rule 6 of the *Civil Procedure Rules*, 2010. Regarding temporary injunction pending appeal, Order 42 Rule 6(6) provides that;

“Notwithstanding anything contained in the sub rule (1) of this rule, the High Court shall have power in exercise of its appellate jurisdiction to grant a temporary injunction on such



terms as it thinks just provided the procedure for institution an appeal from a subordinate court has been complied with”

15. An order of temporary execution as provided in order 40 Rule 1 is intended to restrain unlawful wastage, damage, alienation or wrongful sale or disposal of the property in dispute pending determination of the suit or further orders of the court.
16. In the present case, the Respondent is armed with a judgement and decree from the trial court that directs the eviction of the Applicant from the suit land. The judgement and decree also contain an order of injunction barring the Applicant, his agents and family members from entry onto or interference with the suit land. The actions of the Respondent of entry onto and/or their activities on the suit portion of property cannot be said to be unlawful and capable of being stopped by an order of injunction. They are action in execution of the judgement and decree which the Respondent holds.
17. In my view, the applicable relief in the circumstances is an order of stay of execution of the decree and judgement.
18. Order 42 Rule 6(2) provided for the conditions for grant of an order of stay of execution pending appeal as follows;
 2. 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 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.”
19. From the above quoted provision of law, the Applicant must demonstrate to the satisfaction of the court that he will suffer substantial loss if the order sought is not granted, the application must be made without unreasonable delay and the Applicant must give such security as the court orders.
20. In the present case, the Applicant avers that his home is on the suit land and that the judgement appealed against ordered for eviction and injunction which orders whose execution will result in demolition of his home and him and his family being rendered homeless before the appeal is heard and disposed of.
21. That if this happens, he will suffer substantial loss and the appeal will be rendered nugatory. He demonstrated that he has filed the appeal by annexing a copy of the Memorandum of Appeal to the Supporting Affidavit.
22. The Applicant also undertook to provide security as shall be ordered by the court. The judgement appealed against was delivered on 30th September 2024 and the application filed on 6th November, 2024 as the Memorandum of Appeal had been filed on 28th October, 2024. There was no unreasonable delay in bringing the application.
23. The Respondent’s contention is that the suit land has been adjudicated in favour of the Respondent and that the application is only meant to frustrate execution of the judgement.
24. The Respondent does not deny the acts complained of by the Applicant namely; entry onto the land, cutting down trees and intention to evict the Applicant in execution of the judgement.
25. I find that the Applicant has demonstrated the requisite conditions for grant of an order of stay of execution of the judgement pending appeal.



26. I find that the application has merit and hereby allow it as follows:-

- a. an order of stay of execution of the judgement in Kisumu Cmc Melc No.124 Of 2018 dated 30th September, 2024 is hereby granted pending hearing and determination of the appeal herein on condition that the Applicant deposits the sum of Kshs.150,000/- in a joint interest earning account in the name of Counsel for the Applicant and Counsel for the Respondent within 45 days hereof, failing which the stay of execution order granted herein shall lapse.
- b. Costs of the application to the Respondent.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 28TH DAY OF NOVEMBER, 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

Ouma Njoga for the Appellant/Applicant

No appearance for the Respondent.

