



**Limangura v Palit & another (Environment & Land Case 28 of 2023)
[2024] KEELC 7508 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7508 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 28 OF 2023
FO NYAGAKA, J
NOVEMBER 14, 2024**

BETWEEN

ELIZABETH LIMANGURA PLAINTIFF

AND

JAMES PALIT 1ST DEFENDANT

JOHN MWOK KOMOLKAT 2ND DEFENDANT

RULING

1. This is a Notice of Motion dated 24/01/2024. It is brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya and Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules. It seeks the following orders:-
 1. That pending the lodging, hearing and determination of the Applicant's intended Appeal there be a stay of all further proceedings in Kitale Environment and Land Case No. 28 of 2023.
 2. That an order of injunction be issued restraining the respondent from leasing, selling, transferring or disposing of the proportions in any manner pending the hearing and determination of the appeal.
 3. That the costs of this application be provided for.
2. The application was based on four (4) grounds, namely, that a Notice of Appeal had been filed; the applicant's intended appeal raised substantial issues of law and unless the Application was heard and allowed as prayed the Applicant is likely to be condemned unheard before the substantive appeal is heard and thereby rendering the appeal nugatory and occasioning loss and prejudice to the applicant; and the Respondents had the intention of selling part or whole of the suit land.
3. The Application was supported by the Affidavit of Elizabeth Limangura, sworn on 24/01/2024. She deposed that she had been informed by her advocates that the Court had dismissed her case and allowed



the Respondents' Preliminary Objection. She resolved to instruct the advocate to appeal their ruling. She annexed as ESL-1 and 2 the Notice of Appeal and a draft memorandum of appeal. She stated that she had applied for proceedings which were yet to be supplied to her. She annexed a copy of the letter marked EL3 requesting for the proceedings. She was apprehensive that the proceedings herein were likely to proceed unless the orders of stay were granted. She believed that she had an arguable appeal with prospects of success. After the ruling sought to be stayed the Respondents had started looking for prospective buyers with an intention of setting the whole or part of the suit property. Unless an injunction had been issued the respondents would proceed to sell their land and render the appeal in nugatory if it succeeded. It was in the interest of justice that the application be granted.

4. The application was opposed through an Affidavit sworn by John Mwok Komolkat on 05/03/2024. He deposed that he had been authorized to sign the documents on behalf of the 1st defendant. The application lacked merit and was brought in bad faith with the intention of frustrating the judgment and embarrass the process of the court. The first defendant had enjoyed quiet possession of the suit land, being West Pokot/Kanyarkwat "B"/130 since the year 1965 to date while the deponent had enjoyed quiet possession of his suit land, West Pokot/Kanyarkwat "B"/96 since the year 1984 and none of them had the intention of selling, leasing, transferring or disposing of the respective parcels. The applicant would still not suffer any prejudice if the order of injunction was not granted since she had never been in occupation of the parcels at any one given time whatsoever. The application was only calculated and deliberate to attempt to delay the course of justice and the enjoyment of the fruits of judgment. The Applicant had not demonstrated the merits of the Intended Appeal and there was no possibility or any chance of the success of the Intended Appeal. The order sought was discretionary, as provided for under Order 42 Rule 6 of the Civil Procedure Rules. The Applicant had not demonstrated how the intended appeal would be rendered nugatory if the orders were not granted.
5. After that, the Applicant filed a Supplementary Affidavit sworn on 22/04/2024 in which she deposed that she was asking for a stay of proceedings and orders to restrain their Respondents from disposing of the suit land, following the ruling of the court dismissing her suit on a preliminary objection. If the proceedings were not stayed the matter would proceed and the counterclaim be heard, thereby rendering the Appeal nugatory. It was in the interest of justice that she be given a chance to be heard on the appeal. The court could not determine the merits of their appeal since she was appealing against it.
6. The Appeal was arguable and if it succeeded, the court would hear and determine her claim on a full trial and the start of the matter de novo would be a waste of judicial time if the counterclaim would have proceeded only to start afresh. The Respondents would not suffer any prejudice if the suit land was preserved pending the hearing and determination of the appeal. The Respondents had intimated that they were not intending to dispose of the land and therefore it would be proper to maintain the status quo.
7. I have considered the application, the Responses to the Application, the law and the submissions of the rival parties. Only two issues lie before me for determination. These are whether the Application is merited, and who bear the costs of thereof.
8. The law in regard to stay of proceedings following the filing of an appeal against an order or judgment of the Court is now settled. The relevant law governing applications of the nature is Order 42 Rule 6 1(2) of the Civil Procedure Rules. It provides that:-

“(2) No order for stay of execution shall be made under subrule (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.”

9. It is not lost to anyone that courts have many times without number discussed substantially such an issue and pronounced themselves thereon. As such there is a plethora of decisions on the same to guide this Court. Thus, in *Halal & Another -vs- Thornton & Turpin* [1963] Ltd [1990] eKLR the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag. JA) the Court of Appeal held that:

“...thus the superior court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must of course, be made without unreasonable delay.”

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in the case of *Hassan Guyo Wakalo -vs- Straman EA Ltd* (2013) as follows:

“In addition the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory.”

These two principles go hand in hand and failure to prove one dislodges the other.”

10. Even then, the grant of an order of stay of execution is a discretionary one. When the court is exercising the discretion it must act judiciously, within the confines of the law and not capriciously. This court bases its reasoning on that on the Court of Appeal decision in *COI & another v Chief Magistrate Ukunda Law Courts & 4 others* [2018] eKLR. To act judiciously means the Court must consider all facts and the law and then makes a reasoned judgment. In Brian A. Garner (2019). *Black’s Law Dictionary*, 11th Edition, Thompson Reuters, MN, the term “judiciously” is defined to mean “to use sound judgment.”

11. That said, the purpose of an order for stay of execution pending appeal is to preserve the subject matter of the appeal. It means that if the subject is not maintained before the determination of the appeal it would render the appeal an academic exercise. For this I am persuaded by the decision in *RWW vs EKW* (2019) eKLR where the Court was held:

“.....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.”

12. Thus, what are the interests of the parties herein, to be balanced on the scales of justice? One, a successful party should not be unnecessarily barred or excluded from enjoying the fruits of his



judgment merely because of an appeal against the judgment. The other party's interest is that he has an appeal which may succeed and be rendered nugatory if stay of execution is not granted.

13. I bear in mind that Order 42 Rule 6 of the Civil Procedure Rules provides that a Court can order a stay of execution or proceedings in such circumstances for a sufficient reason. Further, under Order 42 Rule 6(4) provides that the lodging of a Notice of Appeal is, for the purposes of the Rule, means that an appeal has been filed. But the Rule also provides that "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except... sufficient reason..."
14. What that means is that the Court must look at the circumstances of the case and reasons given to find if the same amount to being sufficient as to cause the order to be granted.
15. I have carefully analysed the application and response. Indeed, there is an appeal preferred from the decision of this Court. It was done by filing a Notice of Appeal on 17/01/2024. The Plaintiff also filed a letter requesting for proceedings. It was dated 20/12/2023. As to whether the Notice of Appeal is competent or valid or not it is a matter to be taken up in the Court of Appeal because this court delivered the impugned Ruling on 19/12/2023 and the Notice is filed almost a month later.
16. What is important to note is that the suit herein was dismissed on account of a Preliminary Objection raised by the Defendant. As it stands, there is no suit pending in regard to the Plaintiff. The order made by the Court is a negative one. It cannot be stayed. The Court is functus officio. What remains are only post-judgment applications. These do not form the ground or staying proceedings pending appeal.
17. I am aware that the Applicant argued that if stay of proceedings is not granted the Defendant's Counterclaim will proceed hence render the Appeal nugatory. I beg to differ. A Counterclaim is an independent suit which can proceed non-existence of a suit notwithstanding. No orders were granted in respect of the Counterclaim. To stay proceedings in regard to it merely because the suit was dismissed would be an injustice to the Defendant, who allege that they have been on the land for more than 12 years continuously. They have a right to be heard expeditiously on whether the person they counterclaimed against can legally lay claim onto the land they have occupied all those years.
18. In regard to the prayer for injunction on appeal. As I have stated above, there is no suit pending before this court on the part of the Plaintiff. Thus, to grant an order of injunction on a non-existent suit would be tantamount to introducing a suit where there is none. In any event, there is no material placed before me to show that indeed the Defendants are intent on selling the parcels of land in issue. It is a mere allegation which cannot support the basis of an order such as the one sought. Therefore, the prayer itself is also not merited.
19. The upshot is that the application is not merited and it is dismissed with costs to the respondent. The Counterclaim shall be mentioned on 04/12/2024 for directions under Order 11 of the Civil Procedure Rules.
20. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA THE TEAMS PLATFORM THIS 14TH DAY OF NOVEMBER, 2024.

HON. DR. IUR F.NYAGAKA

JUDGE, ELC KITALE

In the presence of:

Kaosa Advocate for Barongo Advocate for the Plaintiff/Applicant

Ms Mwemeke Advocate for the Defendant/Respondent

