Korir v Koimet (Environment and Land Appeal E029 of 2024)
[2024] KEELC 13982 (KLR) (20 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13982 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT AND LAND APPEAL E029 OF 2024

EO OBAGA, J

DECEMBER 20, 2024

BETWEEN

JOHN KIMITEI A KORIR ..... APPELLANT

AND

HASSAN KIPCHUMBA KOIMET ..... RESPONDENT

RULING

1. This ruling determines the Appellant's Notice of Motion dated 21st June, 2024 which seeks the following orders:-

    a. Spent

    b. Spent

    c. That there be a stay of proceedings Eldoret MCELC No E151 Of 2022; Hassan Kipchumba Koimet -versus- John Kimitei Arap Kipkorir pending the hearing and determination of this Appeal.

    d. That there be a stay of execution of the decree issued on 16/1/2024 pending hearing and determination of this appeal.

    e. That costs of this application be awarded to the Applicants.

2. The Application is premised on the grounds on the face of it and on the Appellant's Supporting Affidavit of even date. The Appellant's case is that he was served with Summons to Enter Appearance and instructed the firm of Mose, Mose & Mose Advocates to enter Appearance on his behalf, which they did. His Defence was filed on 30th November, 2022 and served on the same date. His Advocate was served with a Mention Notice that the matter was scheduled for mention on 2nd February, 2023 on which day his Advocates attended but the court was not sitting. The Appellant has however been informed by his Advocate that they recently realised the matter has been proceeding without service

of any notices from the Respondent's advocate. The Appellant has since learnt that judgment was entered against him on 14th December, 2023 and a decree issued on 16th January, 2024 directing that he be forcefully removed from the suit property, yet he was not given notice of entry of judgment. The Respondent has filed an Application seeking security during the eviction exercise.

3. It is also the Appellant's case that he applied to have the exparte proceedings set aside to no avail, hence the instant appeal. According to the Appellant, the Respondent is at liberty to execute the judgment and he will irreparably suffer since he will be unjustifiably be removed from his late father's land, on which he lives and for which he possesses the title deed. He thus seeks a stay of execution of the orders in the decree pending the determination of the appeal. He deponed that succession proceedings for his father's estate are still ongoing and the Respondent obtained his title fraudulently. He also deponed that he has a right under Article 50 of the *Constitution* of Kenya to be accorded a fair hearing. He averred that no prejudice shall be suffered by the Respondent if the prayers are granted, and that it is only fair, just and in the interest of justice that the application be allowed.

4. The Respondent opposed the Application vide a Replying Affidavit sworn on 23rd July, 2024. He explained that after the failed mention of 2nd February, 2023 the matter was fixed for mention on 29th June, 2023 and Notice was served on the Appellant's Advocate. Thereafter, the matter was fixed for hearing on 17th October, 2023 and a hearing Notice was served to that effect. On the said date, the matter was heard in the Appellant's absence. That the Respondent's Advocate then filed Submissions and served them on the Appellant's Advocate on 27th October, 2023. He deponed that the Appellant refused to defend the suit and failed to seek for re-opening of the case and setting aside the proceedings before delivery of judgment. That the Application to set aside was filed way after filing of submissions and on receipt of the decree and was thus was dismissed for indolence or refusal to defend.

5. According to the Respondent, the Appeal has no chances of success and is only meant to delay justice. Therefore, any stay of execution would be unjust and prejudicial since he is currently in occupation of and cultivating the land, and the Appellants claim that he is in possession is false. He added that there are no ongoing proceedings and the prayer for stay of proceedings has been overtaken by events. Further, that Appellant is aware that the suit land being Parcel No. Uasin Gishu/Ilula/275 has since been subdivided from the original and a new title being Uasin Gishu/Ilula Scheme 2497 issued. The Respondent deponed that no reason has been given for the grant of the orders sought thus the application should be dismissed.

6. On 25th July, 2024 the court directed that the Application be canvassed by way of written submissions. The Parties complied, with the Appellant filing his submissions dated 31st July, 2024 and the Respondent filing his dated 10th September, 2024.

Submissions:

Appellant's Submissions;

7. Counsel for the Appellant submitted that he was challenging the title that the Respondent has, thus if the order of stay is not granted, the appeal will be rendered nugatory. Counsel submitted that if the Appellant is evicted, he will lose his home and his beneficial interest in the land for which he is the rightful heir. That these losses amount to substantial and irreparable damage. Further, that he had demonstrated a prima facie claim over the suit property. Counsel argued that the Appellant moved the court timeously and without delay from the date of discovery of the judgment and decree of the trial court. He submitted that the Appellant is willing to abide by any conditions the court may order/ direct with regards to security. Counsel opined that the Appellant has demonstrated that he deserves

the order of stay of execution. He relied on *Butt vs Rent Restriction Tribunal* (1982) KLR 417 and *RWW vs EKW* (2019) eKLR.

Respondent's Submissions;

8. In the Respondent's submissions, it was submitted that the eviction orders/decree issued by this court on 16th January, 2024 have been executed and there is nothing to stay. Counsel further explained that the Application for security that the Appellant had deponed was still pending, was determined on 30th July, 2024. That this marked the end of proceedings and the trial court's file has been closed, therefore there are no ongoing proceedings to be stayed. Counsel contended that the decree has already been executed, hence if this court were to issue the order of stay, it would be in a vacuum as there is nothing to stay. He relied on *Kenya Wildlife Service vs James Mutembei* (2019) eKLR, Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000, *Irshad Abdalla Azam vs Mazar Abdalla Khan & Another* (2017) eKLR and *Peter Nakupang Lowar vs Nautu Lowar* (2022) eKLR. He urged that the Appellant's Motion has been overtaken by events and should be dismissed with costs.

Analysis and Determination:

9. I have considered the application and grounds adduced thereon, the supporting affidavit and annexures. I have also considered the Replying affidavit and submissions together with case law cited by both counsel for their respective clients. I am of the opinion that the following issues lend themselves for determination:-

    a. Whether the Defendant has met the conditions necessary for grant of an order of stay of execution pending Appeal

    b. Whether the proceedings in the trial court should be stayed;

a. Whether the Defendant has met the conditions necessary for grant of an order of stay of execution pending Appeal

10. The principles upon which the court may stay the execution of orders appealed from are stipulated at Order 42 Rule 6 of the *Civil Procedure Rules*, which provides that:-

> " 6. Stay in case of appeal [Order 42, rule 6]
>
> (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 application and to make such order thereon as may to it 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 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."

11. From the above, the Appellant must approach the court timeously and demonstrate the likelihood that he will suffer substantial loss if the order is denied. He must also furnish security for the performance of the decree in the event the appeal does not succeed.

12. On whether the Application has been brought without undue delay, the orders sought to be stayed were made on 14th December, 2023 and the decree issued on 16th January, 2024. The Appellant then lodged his Application to set aside on 26th April, 2024. It is not clear when the Appellant became aware of the judgement made against him, but it is worth noting that I have seen no proof that the Appellant was served with any Notice of entry of judgement, as required under Order 22 Rule 6. It is possible he was indeed unaware of the judgement made against him. Thus even though there is a period of about 4 months between the judgment and the first application to set aside in the trial court, without formal notice of entry of judgement, the Appellant cannot be said to have been indolent yet he was unaware of the proceedings in the trial court. In any event, per the Memorandum of Appeal, the decision appealed from herein was rendered on 6th June, 2024. The Appellant filed this Application on the 21st June, 2024 just 15 days later. I find that the period is reasonable.

13. On whether substantial loss would result to the applicant if the stay orders are denied, I am guided by the decision of the Court of Appeal in *Shell Ltd vs Kibiru and Another* (1986) KLR 410, where Platt JA had this to say:-

> "It is usually a good rule to see if Order XLI Rule 4 of the civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented.

14. The Appellant has argued that if execution is allowed to continue, he will be removed from his late father's land. He deponed that he is in possession of the title to the said land, and that there are succession proceedings ongoing over his father's Estate. The Appellant not only stands to lose his interest in the suit property, but the same is apparently subject of succession proceedings in which he is an heir. According to the Respondent, granting the prayer of stay will be prejudicial to him since he is currently in occupation and use of the suit land. To be clear, there would be no need for eviction orders if indeed the Appellant was not residing on or in occupation of the suit land. There is no evidence produced that the Respondent indeed managed to execute the decree and gain entry into the suit land. I am convinced that the Appellant herein indeed stands to suffer from the loss of his place of residence but also the loss of his inheritance.

15. I have also considered the Respondent's argument that the decree was executed through the subdivision of Uasin Gishu/Ilula/275 into Uasin Gishu/Ilula Scheme/2497. I however note that the said parcel was in existence even before the judgement was issued. The Appellant notes in his Affidavit that he had

averred in his defence that the Respondent moved court seeking eviction orders against the Appellant over Uasin Gishu/Ilula Scheme/2497. In fact, the decree talks of Uasin Gishu/ Ilula Scheme/2497 and not the parcel known as Uasin Gishu/Ilula/275 which is claimed by the Appellant herein. Moreover, the Title Deed annexed shows that it was issued on 9th July, 2022. I see no proof that indeed the said parcel was a subdivision arising out of parcel No. 275 after the issuance of the decree herein. I therefore have every belief that the allegations that the orders in the decree have been executed are not accurate.

16. Turning to the last requirement under Order 42 rule 6 aforesaid, the applicant is required to offer security for the due performance of the decree. Regarding security for the performance of the Decree, Gikonyo J in the persuasive case of *Arun C Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* (2014) eKLR 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.
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> 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."

17. The court was informed of the Appellant's willingness to abide by any orders of the court with regards to security for the due performance of the decree. It is trite that on matters security for the due performance of decree, the court has discretion to determine the need for security and the form it would take. This Court is entitled to take into account the security offered in deciding an application for stay of execution. The Appellant herein has not offered any security, however he has expressed willingness to abide by any order or condition of the court regarding the same. That for me is sufficient to satisfy the condition for security for costs.

18. The Appellant argued that his appeal would be rendered nugatory if the orders sought are not granted. Courts have held that the aspect of being rendered nugatory is hinged on whether or not the Appellant's case is arguable on appeal and not whether the appeal will be successful. As to whether the Appellant has an arguable Appeal, I am guided by the decision of Hancox JA in the case of *Shell vs Kibiru* (*Supra*), where he observed that:-

> " It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the questions of whether to refuse it would... render the appeal nugatory.
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> This is shown by the following passage of Cotton L J in *Wilson -Vs- Church (No 2)* (1879) 12ChD 454 at page 458 where he said:-
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> > I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.'
> >
> > As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful,

should not be deprived of the fruits of a judgment in his favour without just cause."

19. The Appellant has averred that save for the Mention of 2nd February, 2023 his advocates have never been served with any notices in the matter. The Respondent however denies this, stating instead that the Appellant's Advocate was duly served with a mention notice and later mention notice in the matter. It is also the Respondent's case that they served the Respondent's Advocates with written submissions but he still chose not to act. The Respondent's Annexure HKK-1 is a Mention Notice dated 15th February, 2023 indicating that the matter had been fixed for mention on 29th June, 2023. There is no proof that the same was served on the Appellant herein or his Advocate on record in the matter.

20. The Respondent has also annexed an Affidavit of Service sworn on 30th June, 2023 as proof of service of a Hearing Notice dated 29th June, 2023 for hearing on 17th October, 2023. The hearing notice is said to have been served through email, however the Affidavit does not indicate what email address the Respondent's Advocate used to serve the Hearing Notice. In the extract annexed to the Affidavit of Service, the Email Address shown is incomplete, and actually appears as the acronym, Mose, Mose. As to the Submissions annexed, there is no proof that they were ever served on the Appellant or his Advocate on record. Looking at these circumstances, I am convinced that the Appellant does indeed have an arguable appeal which will be rendered nugatory if the order of stay of execution is not granted.

b. Whether the proceedings in the trial court should be stayed;

21. The applicant also sought stay of proceedings in Eldoret MCELC No. E151 of 2022; *Hassan Kipchumba Koimet vs John Kimitei Arap Kipkorir*, pending the hearing and final determination of this Appeal. In the case of *Kenya Wildlife Service vs James Mutembei* (2019) eKLR, Gikonyo J held that:

> " Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent. See Ringera J in the case of *Global Tours & Travels Limited*; Nairobi HC Winding up Cause No. 43 of 2000, persuasively stated thus:-
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> > 'As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously."

22. In the above authority, the learned Judge quoted *Halsbury's Law of England*, 4th Edition. Vol. 37 page 330 and 332, where it is explained that:

> " The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of

his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue."

"This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases."

"It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case".

23. The above authorities lay down clear principles to be considered when determining an application for stay of proceedings. What is deduced is that stay of proceedings is a grave matter to be entertained only in the most deserving cases as it impacts the right to expeditious trial. The order of stay of proceedings is to be granted by the court upon consideration of the facts and circumstances of each case. See the decision of by the Court of Appeal in the case of *David Morton Silverstein vs Atsango Chesoni* (2002) eKLR, where it was held that:-

> " The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court's own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts..."

24. The Appeal herein is intended to set aside the judgment/decree and re-open the case to allow the Appellant defendant the suit. The Proceedings in the lower court that this court is asked to stay is the hearing of an application where the Respondent is asking for security to execute the judgment and/or decree. Execution of the decree herein will undoubtedly result in the eviction of the Appellant from the suit land. I would like to believe the Respondent's allegation that the said application has already been determined, however without proof to that effect, I am unable to. I have already discussed and found earlier on in this ruling that the Appellant has an arguable Appeal. For this reason, should the proceedings in the trial court be allowed to continue and execution ensues, the Appellant will indeed be prejudiced and the Appeal rendered nugatory.

25. For these reasons, it is my considered opinion that it would be in the interest of justice to exercise the court's discretion and grant stay of proceedings so as to preserve the subject matter of the Appeal. I am therefore satisfied that the Appellant has demonstrated that the circumstances herein warrant issuance of the orders being sought.

26. Taking all the above factors into account and in order not to render the intended appeal nugatory, I find and hold that the Appellant has fulfilled the requirements for grant of the orders sought. Accordingly, I hereby allow the Appellant's application dated 21st June, 2024 in the following terms:-

    a. That there be a stay of proceedings Eldoret Mcelc No E151 Of 2022; Hassan Kipchumba Koimet Vs John Kimitei Arap Kipkorir pending the hearing and determination of this Appeal.

    b. That there be a stay of execution of the decree issued on 16/1/2024 pending hearing and determination of this appeal.

    c. The costs of this Application shall abide the outcome of the Appeal herein.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 20TH DAY OF DECEMBER, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

M/s Jeruto for the Respondent.

Court Assistant –Laban

E. O. OBAGA

JUDGE

20TH DECEMBER, 2024