



Holy Spirit Church of East Africa Registered Trustees v Friends Church in Kenya [Quakers) Nairobi Yearly Meeting Trustees} (Environment & Land Case E405 of 2024) [2024] KEELC 13968 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13968 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E405 OF 2024
JO MBOYA, J
DECEMBER 19, 2024**

BETWEEN

HOLY SPIRIT CHURCH OF EAST AFRICA REGISTERED TRUSTEES APPLICANT

AND

FRIENDS CHURCH IN KENYA [QUAKERS) NAIROBI YEARLY MEETING TRUSTEES} RESPONDENT

RULING

Introduction and Background

1. The Defendant/Applicant has approached the court vide Notice of Motion Application dated 22nd November 2024; brought pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules 2010; in respect of which the Applicant has sought the following reliefs;
 - i.spent
 - ii. Pending hearing and determination of this Application inter parties this Honourable Court be pleased to grant the Defendant/Applicant a stay of execution of the Ruling delivered on 7th November 2024 and the orders arising therefrom.
 - iii. Pending hearing and determination of the intended appeal against the Ruling delivered by the court on 7th November 2024, the Honourable Court be pleased to grant the Defendant/Applicant a stay of execution of the ruling delivered on 7th November 2024 and the orders arising therefrom.
 - iv. The costs of this Application be provided for.



2. The Instant Application is anchored on various grounds which have been highlighted in the body thereof. Furthermore, the Application is supported by the Affidavit sworn by one Abisai Ambenge Oyigo on 7th November 2024 and a Further Affidavit sworn by the same deponent.
3. Upon being served with the instant Applicant, the Plaintiff/Respondent filed Grounds of Opposition dated 2nd December 2024; Notice of Preliminary Objection dated 9th December 2024 and a Replying Affidavit sworn by Bishop Banard Mugazia Adeka on 9th December 2024. Instructively, the Plaintiff/Respondent has contended that the Applicant herein has neither established nor demonstrated that same [Applicant] is bound to suffer substantial loss or otherwise.
4. The Application beforehand came up for hearing on 9th December 2024 and whereupon the advocates for the parties covenanted to canvass and dispose of the Application by way of written submissions. To this end, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.
5. The Applicant filed written submissions dated 11th December 2024 whereas the Respondent filed written submissions dated 13th December 2024. The two [2] sets of written submissions form part of the record of the court.

Parties' Submissions:

a. Applicant's Submissions

6. The Applicant herein adopted the grounds contained in the body of the Application beforehand and also reiterated the averments contained in the Supporting Affidavit sworn on 22nd November 2024. Additionally, the Applicant has also highlighted the averments in the body of the Further Affidavit.
7. Furthermore, the Applicant has ventured forward and highlighted three [3] salient issues for consideration. Firstly, learned counsel for the Applicant has submitted that the Applicant herein felt aggrieved and dissatisfied with the ruling of the court rendered on 7th November 2024. In this regard, learned counsel has submitted that arising from the ruling under reference, the Applicant proceeded to and filed a Notice of Appeal demonstrating its desire to pursue an appeal before the Court of Appeal.
8. To the extent that the Applicant has since filed and lodged a Notice of Appeal, it has been contended that the Applicant has established the existence of a sufficient cause. In particular, it has been contended that where an applicant, the current Applicant not excepted, is pursuing its undoubted right of appeal, it behoves the court to grant an order of stay so as to enable the applicant to access the jurisdiction of the appellate court.
9. Secondly, learned counsel for the Applicant has submitted that the Application beforehand has been filed timeously and without unreasonable delay. In particular, it has been submitted that the impugned ruling was rendered on 7th November 2024 whereas the Application was filed on 22nd November 2024. Pertinently, it has been contended that the timeline between the delivery of the ruling and the filing of the Application is neither unreasonable nor inordinate.
10. Thirdly, learned counsel for the Applicant has submitted that unless the orders of stay of execution are granted in the manner sought, the Respondent herein will proceed with the enforcement/execution of the ruling of the court rendered on 7th November 2024. In this regard, it has been submitted that the enforcement of the terms of the ruling and in particular, the demolition of the perimeter wall which was erected around the suit property, shall subject the Applicant to substantial loss.



11. It was the further submission by the learned counsel for the Applicant that the Respondent herein is also likely to proceed to and alienate and/or dispose of the suit property and that such actions shall place the suit property beyond the reach of the Applicant.
12. Flowing from the foregoing submissions, learned counsel for the Applicant has submitted that the Applicant herein has therefore established and demonstrated that substantial loss is likely to arise and/or accrue, unless the orders of stay are granted. To this end, learned counsel for the Applicant has invited the court to grant the reliefs sought at the foot of the Application dated 22nd November 2024.

b. Respondent's Submissions:

13. The Respondent filed written submissions dated 13th December 2024 and wherein same [Respondent] reiterated the contents of the Grounds of Opposition dated 2nd December 2024 as well as the Notice of Preliminary Objection dated 9th December 2024.
14. Additionally, learned counsel for the Respondent has highlighted and ventilated three [3] pertinent issues for consideration and determination by the court. First and foremost, learned counsel for the Respondent has submitted that the Further Affidavit that was filed by and on behalf of the Applicant was filed without leave of the court. In this regard, it has been contended that the Further Affidavit therefore ought to be struck out and expunged from the record of the court.
15. Secondly, learned counsel for the Respondent has submitted that the Applicant herein has neither established nor demonstrated that same [Applicant] shall be disposed to suffer substantial loss if the orders sought are not granted. In particular, it has been submitted that the suit property which is the subject of the dispute beforehand lawfully belongs to and is registered in the name of the Respondent.
16. Furthermore, learned counsel for the Respondent has submitted that by virtue of being the registered owner of the suit property, the Respondent herein is obliged to use and benefit from the suit property without any restriction or limitations. To this end, learned counsel for the Respondent has cited and referenced the provisions of Sections 24 and 25 of the [Land Registration Act](#) [2012].
17. Other than the foregoing, learned counsel for the Respondent has also submitted that the demolition of the impugned wall which was erected around the suit property shall not cause and/or occasion any substantial loss to the Applicant. In any event, it has been contended that the value/cost of the perimeter wall is capable of being quantified and ascertained.
18. It was the further submission by the learned counsel for the Respondent that once the cost of the perimeter wall is quantified, subject to the outcome of the intended appeal, the Respondent herein shall be capable of meeting such costs/damages. In this respect, it has been posited that the loss to be suffered, if any, is not substantial.
19. Arising from the foregoing, learned counsel for the Respondent has therefore submitted that the Applicant has neither proved nor established the requisite ingredients that underpin the grant of an order of stay of execution pending the hearing and determination of an appeal. Consequently, learned counsel for the Respondent has implored the court to find and hold that the Application is devoid of merits.

Issues For Determination:

20. Having reviewed the Application dated 22nd November 2024 and the responses thereto and upon taking into consideration the written submissions filed on behalf of the parties, the following issues crystallise and are thus worthy of determination.



- i. Whether the Applicant has established and demonstrated the existence of a sufficient cause.
- ii. Whether the Applicant shall be disposed to suffer substantial loss unless the orders sought are granted, or otherwise.
- iii. What order/reliefs ought to be granted?

Analysis And Determination

Issue No. 1 Whether the Applicant has established and demonstrated the existence of a sufficient cause.

21. The instant suit was filed/commenced by the Respondent herein who contended that the suit property, namely, L.R. 209/18222, lawfully belongs to and is registered in its name. To this end, the Respondent tendered and produced before the court a copy of the Certificate of Title duly registered in the names of its trustees, albeit on behalf of the Respondent Church.
22. Notwithstanding the fact that the suit property belongs to and is registered in the name of the Respondent Church, it was contended that the Applicant herein has since proceeded to and erected a perimeter wall fence round the suit property. In this respect, the Respondent sought and procured an order of mandatory injunction whose purport was to compel the Applicant to pull down the offensive perimeter wall fence.
23. Following the delivery of the ruling, which was rendered on 7th November 2024, the Applicant herein felt aggrieved and dissatisfied. To this end, the Applicant proceeded to and lodged a Notice of Appeal dated 14th November 2024. In this regard, the Applicant has therefore demonstrated its desire to challenge the ruling rendered on 7th November 2024 and the consequential orders.
24. Suffice it to state that any person, the Applicant not excepted, who desires to pursue an appeal to the Court of Appeal is obliged to file/lodge a Notice of Appeal. To this end, it is common ground that upon the lodgement of a Notice of Appeal, the said Notice of Appeal is deemed to constitute an appeal. [See Order 42 Rule 6(4) of the Civil Procedure Rules, 2010].
25. To the extent that the Applicant herein has since filed/lodged a Notice of Appeal, it is therefore apposite to underscore that by dint of Order 42 Rule 6(4) of the Civil Procedure Rules, 2010, an appeal stands lodged. Having filed the Notice of Appeal, it then suffices to state that the Applicant has demonstrated a sufficient case.
26. Nevertheless, there is no gainsaying that the question as to whether or not the intended appeal is arguable or otherwise, does not fall within the jurisdictional remit of this court. For coherence, such an issue belongs to the Court of Appeal and not otherwise.
27. Be that as it may and without belabouring the point, I come to the conclusion that the Applicant herein has indeed established and demonstrated the existence of a sufficient cause. In this regard, sufficient cause denotes the existence of an appeal which raises [sic] bona fide triable issues to be canvassed before the appropriate forum.
28. The meaning and import of what constitutes sufficient cause has similarly received various judicial interpretations. In particular, sufficient cause was elaborated upon in the case of *Wachira Karani v*



Bildad Wachira (Civil Suit 101 of 2011) [2016] KEHC 6334 (KLR) (11 March 2016) (Ruling) where the court stated thus:

The applicant is required to satisfy to the court that he had a good and sufficient cause. What does the term "sufficient cause" mean.? The Court of Appeal of Tanzania in the case of *The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others* [9] discussing what constitutes sufficient cause had this to say:

"It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant" (Emphasis added)

29. Consequently and in the premises, my answer to issue number one (1) is to the effect that the existence of the Notice of Appeal which has been filed by the Applicant herein indeed constitutes a sufficient cause.
30. Notwithstanding the foregoing, it is instructive to underscore that the existence of a sufficient cause only constitutes a precursor or a prelude of partaking of an order of stay of execution. It is indeed the launchpad to seeking an order of stay.
31. Put differently, the existence of a sufficient cause is the key that unlocks the door of justice to enable an applicant to venture forward and address the critical ingredient that underpins the grant of an order of stay of execution. To this end, it is not lost on the court that the demonstration of sufficient cause per se does not entitle one to the order of stay of execution.
32. Nevertheless, where an applicant does not establish and/or demonstrate a sufficient cause, then a court of law will have no business venturing to address the question of substantial loss.

Issue No. 2 Whether the Applicant shall be disposed to suffer substantial loss unless the orders sought are granted, or otherwise.

33. Having addressed the question of sufficient cause, and having found that the Applicant has established sufficient cause, it is imperative to state that the Applicant must then venture forward to address the question of substantial loss. For good measure, substantial loss is the key pillar and the cornerstone upon which an order of stay of execution pending the hearing of an appeal is anchored.
34. In the circumstances, the Applicant herein is obligated to place before the court evidence towards proving substantial loss. What constitutes substantial loss varies from case to case. Nevertheless, the demonstration of substantial loss must go into establishing that a failure to grant an order of stay would occasion irredeemable loss to the Applicant or better still, would negate the intended appeal.
35. To this end, it suffices to cite and reference the decision in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR where the court stated as hereunder:
 11. No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the



successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above.

36. Pertinently, substantial loss has been held to be the cornerstone of an application for stay of execution. In this regard, it suffices to take cognisance of the holding in the case of Kenya Shell Limited v Benjamin Karuga Kibiru & Another [1986] eKLR where Platt J.A stated as hereunder:

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 corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.

37. Guided by the ratio decidendi in the decisions supra, it is now apposite to revert to the facts of the instant matter and to discern whether the Applicant herein has established that substantial loss is likely to arise and/or accrue unless the orders sought are granted.
38. To start with, the Applicant contends that if the order of stay of execution is not granted then the Respondent would enforce the terms of the order of mandatory injunction. In particular, it has been contended that the enforcement of the mandatory injunction will culminate into the demolition of the perimeter wall that was erected by the Applicant.
39. On the other hand, learned counsel for the Applicant has also contended that the Respondent herein shall be at liberty to alienate and/or sell the suit property and thus place the same [suit property] beyond the reach of the Applicant.
40. It is worthy to recall that though the Applicant claims ownership rights to an in respect of the suit property, it is not lost on the court that the Applicant herein has neither placed before the court any document to attest to its claim.
41. On the contrary, there is no gainsaying that the Respondent holds a Certificate of Title to the suit property. To this end, it is common ground that until and unless the Certificate of Title in the name of the Respondent is impeached, the Respondent should be at liberty to partake of and benefit from ownership of the suit property. [See Sections 24 and 25 of the *Land Registration Act* (2012)].
42. Additionally, it is worth stating that the perimeter wall which the Applicant contends shall occasion substantial loss if demolished has a value. Instructively, the cost/value of the perimeter wall can be subjected to quantification and ascertainment by an expert including a quantity surveyor.
43. In my humble view, if the perimeter wall is demolished and the Applicant herein succeeds in the intended appeal, same [Applicant] shall be at liberty to engage a quantity surveyor to prepare a bill of quantities stipulating the cost thereof. Thereafter, the cost adverted to and highlighted at the foot of the bill of quantities shall become payable.
44. To my mind, the enforcement and execution of the terms of the ruling of the court shall not cause and/or occasion any substantial loss to the Applicant herein. In fact, it is the Respondent herein who currently holds the Certificate of Title to the suit property who shall be exposed to suffer substantial loss and deprivation. [See the holding of the court in the case of Mohansons (Kenya) Limited v Registrar of Titles, Mary Murtazza Ondatto & Attorney General (Petition 103 of 2012) [2017] KEELC 2730 (KLR) (6 June 2017) (Ruling). See also Moya Drift Farm Limited v Theuri 1973 E. A 114].



45. From the foregoing analysis, I am afraid that the Applicant herein has neither established nor demonstrated the existence of a substantial loss. At any rate, the contention that the Respondent may proceed to alienate the suit property is neither substantiated nor verified. Instructively, a court of law does not act on the basis of mere apprehension and wild allegations devoid of proof.

Issue No. 3 What order/reliefs ought to be granted?

46. The Applicant herein is the one who sought to procure and obtain an order of stay of execution pending the hearing and determination of the intended appeal. In this regard, it was therefore incumbent upon the Applicant to place before the court plausible, cogent and credible evidence to demonstrate the ingredients highlighted at the foot of Order 42 Rule 6(2) of the Civil Procedure Rules 2010.
47. However, while discussing issue number two (2) hereinbefore, the court has come to the conclusion that the Applicant has not established that substantial loss is likely to arise and/or accrue. To the extent that the Applicant has not demonstrated substantial loss, it suffices to underscore that the Applicant herein has not met the requisite/statutory threshold for the grant of an order of stay of execution.
48. Notably, the obligation of the Applicant to satisfy the court that same is entitled to such an order was highlighted and elaborated upon in the case of J. P. Machira T/A Machira & Co Advocates vs East African Standard Ltd [2002] eKLR

To be obsessed with the protection of an appellant or intending appellant in total disregard or fitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion.

The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put in effect by the way we handle applications for stay of further proceedings or execution, pending appeal.

Of course, in the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in the courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.

49. Simply put, I am not persuaded that the Applicant is deserving of the orders of stay of execution. In any event, I am afraid that the grant of an order of stay of execution shall be tantamount to furthering the trespass onto the suit property, which currently belongs to and is registered in the name of the Respondent.

Final Disposition:

50. In the premises, the Application dated 22nd November 2024 is not only premature and misconceived but same [Application] is also devoid of merits.
51. In the circumstances, the final orders that commend themselves to the court are as hereunder:
- i. The Application dated 22nd November 2024 be and is hereby dismissed.
 - ii. Costs of the Application be and are hereby awarded to the Respondent.



52. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER 2024

OGUTTU MBOYA,

JUDGE.

In the presence of:

Hilda – court Assistant.

Mr. Ogendo and Ms Owuor holding brief for Mr. John Tito for the Defendant/Applicant.

Mr. Leo Masore Nyang'au for the Plaintiff/Respondent.

