



**Kipteng & another v Paro (Environment and Land Appeal E018 of 2024)
[2024] KEELC 13988 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13988 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL E018 OF 2024**

EM WASHE, J

DECEMBER 17, 2024

BETWEEN

MICHAEL LESAME KIPTENG 1ST APPELLANT

KENNETH KIPTENG 2ND APPELLANT

AND

ANTON LETEIPA PARO RESPONDENT

RULING

1. The 1st and 2nd Appellants (hereinafter referred to as “the Applicants”) filed a Notice of Motion Application dated 01.07.2024 (hereinafter referred to as “the present Application”) against the Respondent seeking for the following Orders; -
 - a. That the execution of the Judgement and Decree of Honourable Waswa delivered on the 29.02.2024 be stayed pending the hearing and determination of the Intended Appeal against the Judgement and Order.
 - b. That the costs of and occasioned by this Application be costs in the Appeal.
2. The prayers being sought in the present Application are premised on the following grounds; -
 - i. The Applicants herein purchased three portions of land through various Agreements For Sale dated 13.04.2002, 19.11.2004 and 26.06.2005 measuring approximately 1.1. acres within the property known as Lr.no.transmara/oloiborsoito/90 which was then registered in the name of Paulo Nankapo Ole Paro who is now deceased.
 - ii. Upon the execution of the three Agreements for Sale dated 13.04.2002, 19.11.2004 and 26.06.2005, the Applicants took vacant possession and use of the 1.1 acres on the property known as Lr.no.transmara/oloiborsoito/90 which they enjoy up to date.



- iii. Unfortunately, the previous registered owner of Lr.no.transmara/oloiborsoito/90 known as paulo nankapo ole paro passed away on the 02.11.2020 before transferring the Applicants portion measuring 1.1 acres on the property known as Lr.no.transmara/oloiborsoito/90.
 - iv. After the demise of the previous owner Paulo Nankapo Ole Paro, the Respondent herein instituted succession proceedings and obtained a Certificate of Confirmation of Grant on the 05.10.2021.
 - v. Based on the Certificate of Confirmation of Grant relating to the Estate of Paulo Nankapo Ole Paro, the Respondents transferred the entire property known as Lr.no.transmara/oloiborsoito/90 into his name without recognising the interest of the Applicants herein.
 - vi. The Applicants pleaded that they were not aware of the Succession proceedings instituted by the Respondent relating to the Estate of Paulo Nankapo Ole Paro and did not have an opportunity to register their interest in the property known as Lr.no.transmara/oloiborsoito/90 based on the previous Agreements For Sale and their occupation on the 1.1 acres therein.
 - vii. On the basis of this omission, the Applicant filed an Application in the Succession proceedings relating to the Estate of Paulo Nankapo Ole Paro seeking a revocation of the Certificate of Confirmation of the Grant which application was allowed on the 31.01.2024.
 - viii. In the meantime, the Respondent upon registration of the property known as Lr.no.transmara/oloiborsoito/90 in his name filed proceedings against the Applicants seeking for an eviction order and a permanent injunction against them.
 - ix. During the pendency of the proceedings relating to an eviction order and permanent injunction, the parties reached a Consent through a meeting held on 11.02.2024 that the Applicants would be transferred their portion of 1.1. acres on the property known as Lr.no.transmara/oloiborsoito/90.
 - x. Unfortunately, the Trial Court proceeded to issue an Order of Eviction and Permanent Injunction without being aware of the Consent reached by the parties on the 11.02.2024 thereby forcing the Applicants to file an Application for Review of the judgement by the Trial Court.
 - xi. The Trial Court nevertheless disallowed the Applicant's prayer for review of its judgement granting an eviction and permanent injunction against the Applicants therein hence the present Appeal.
 - xii. The Applicants are therefore seeking for the prayers sought in the present Application to ensure that the Respondent does not execute the eviction orders issued the Trial Court pending the hearing and determination of the Appeal before this Court.
 - xiii. The Applicants aver that if the Eviction Orders issued by the Trial Court in favour of the Respondents are not stayed forthwith, then they will be evicted from their lawful portions of land and consequently suffer substantial loss and harm in the process.
3. The present Application was duly served on the Respondent who opposed the same by filing Grounds of Opposition dated 14.08.2024 on the following grounds; -
- i. The Ruling and Order which is being appealed was a dismissal of the Application hence negative in nature.



- ii. Based on the fact that the Ruling and Order of the Trial Court was negative, this Court can not issue any stay orders.
 - iii. The Memorandum of Appeal before this Court is in fact invalid.
 - iv. Consequently therefore, the present Application does not meet the requisite conditions provided for under Order 42 Rule 6 of the Civil Procedure Rules, 2010.
 - v. Similarly, the Applicants did not demonstrate and/or provide any evidence of any substantial loss in the event the Orders being appealed against are not stayed.
 - vi. In conclusion, the Respondent sought this Court to dismiss the present Application with costs.
4. The Court upon receipt of the Respondent's Grounds of Opposition directed that the present Application be heard by way of written submissions.
 5. The Applicant duly filed their submissions on the 17.10.2024 while the Respondent filed his submissions on 03.10.2024.
 6. The Court has indeed perused the present Application, the Respondent's Grounds of Opposition as well as the submissions therein and the only issue for determination is whether or not an Order of Stay against the Ruling and Orders 29.02.2024 should be issued.
 7. To begin with, the present Application invokes the Court's jurisdiction pursuant to the provisions of Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules.
 8. Order 42 Rule 6 of the Civil Procedure Rules, 2010 specifically allowed for a Stay of Execution of an Order and/or Decree that is being appealed against pending the hearing and determination of the Appeal.
 9. In the case of Rww -versus- Ekw [2019] eKLR, the Court observed the purpose on an Order of Stay of Execution to be 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.”
 10. Turning to the present Application, it is important for this Court to first and foremost identify the Judgement/Ruling and Decree that is pending Appeal before it keeping in mind the various applications that were filed before the Trial Court.
 11. According to the Memorandum of Appeal dated 17.07.2024 by the Applicants, the Judgement and Decree being challenged was pronounced on the 29.02.2024 in the proceedings known as Kilgoris Spm Court Elc Case No. E069 Of 2023.



12. In Prayer No. 1 of the present Application, the Applicants are seeking for an Order of Stay of Execution of the Judgement and Decree pronounced on the 29.02.2024 in the proceedings known as Kilgoris Spm Court Elc Case No. E069 Of 2023.
13. The Judgement and Decree pronounced on the 29.02.2024 by the Trial Court in the proceedings known as Kilgoris Spm Court Elc No. E069 Of 2023 was as follows; -
 - a. Declaration that the Plaintiffs Anton Leteipa Paro and Ledama Randaine David are the rightful owners of Lr.no.transmara/oloborsoito/90.
 - b. An Order of eviction against the Defendants herein together with her agents, servants and or any other person claiming authority under the Defendants herein from Lr.no.transmara/oloborsoito/90 and or any portions thereof.
 - c. Permanent injunction restraining the Defendants herein either by herself, servants, agents and or any person claiming authority under them, trespassing, putting up further structures, building on, charging, leasing, fencing, cultivating and interfering in any other manner with the suit property Lr.no.transmara/oloborsoito/90 And
 - d. Costs of the suit be borne by the Defendants.
14. The Applicants in the present Application are therefore seeking for a Stay of Execution of the above Orders issued on the 29.02.2024.
15. The Respondent on the other hand through the Grounds of Opposition dated 14.08.2024 Opposed the issuance of any Stay of Execution Orders by this Court fundamentally on three grounds.
16. The first ground was that the Judgement and/or Decree the Applicants are seeking for a Stay of Execution is a negative Order based on the Order of Dismissal of the Review Application.
17. Consequently therefore, this Court cannot issue an Order of Stay of Execution against negative Orders.
18. It is clear based on Prayer No.1 of the present Application that the Applicants are seeking for a Stay of Execution of the Judgement and Decree issued on the 29.02.2024 in the proceedings known as Kilgoris Spm Elc Case No. 69 Of 2023.
19. The Orders issued on the 29.02.2023 by the Trial Court in the proceedings known as Kilgoris Spm Elc Case No. 69 OF 2023 included a Declaration that the Respondent was the lawful owner of the property known as Lr.no.transmara/oloiborsoito/90 and therefore the Respondents were directed to vacant the said property and/or an Order of eviction was issued against them in the event of default.
20. By all standards, the Judgement and Decree issued on the 29.02.2024 by the Trial Court in the proceedings known as Kilgoris Spm Elc Case No. 69 Of 2023 was positive in nature as it specified reliefs that were to be implemented against the Applicants herein.
21. According to the Grounds of Opposition dated 14.08.2024, there seems to have been a confusion by the Respondent that the present Application was seeking to Stay the Order and Decree of the Trial Court issued on the 05.07.2024 dealing with the Application for Review.
22. Regrettably, the present Application was dealing with the Stay of Execution of the substantive judgement and/or Decree that was pronounced on the 29.02.2024.
23. In essence, this Court does make a finding that the Judgement and/or Decree issued on the 29.02.2024 was positive in nature and capable of being stayed pending Appeal.



24. The second issue raised by the Respondent was that the Memorandum of Appeal filed herein is invalid.
25. The submission by the Respondent is that the Memorandum of Appeal was filed on the 17.07.2024 which was about 5 months from the time the Judgement and Decree dated 29.02.2024 had been issued contrary to Section 79 G of the Civil Procedure Rules, Cap 21.
26. Indeed Section 79 G of the Civil Procedure Act, Cap 21 provides as follows; -

“Every Appeal from a Sub-ordinate Court to the High Court shall be filed within a period of 30 days from the date of the Decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.”
27. The question then is whether or not the Applicants complied with the above provision of the Law to enable this Court conclude that there is a valid Appeal before it to sustain the present Application.
28. According to the Supporting Affidavit of 1st Applicant dated 15.07.2024, the Memorandum of Appeal annexed therein is not dated but shows that it was lodged before this Court on the 17.07.2024.
29. The Trial Court file of the Lower Court known as Kilgoris Spm Elc Case No. 68 Of 2023 similarly does not have any Notice of Appeal filed with the prescribed time of 30 days from 29.02.2024.
30. In essence, it is this Court’s considered finding that the Memorandum of Appeal filed by the Applicants was out of time and therefore irregular.
31. Based on this finding, this Court is not vested with proper jurisdiction to entertain and/or determine any application based on the irregular Memorandum of Appeal filed on the 17.07.2024.
32. The third issue was whether the Applicants had demonstrated and/or tabled any evidence of the substantial loss in the event the orders of Stay of Execution would not be issued.
33. However, due to the fact that the Memorandum of Appeal was filed contrary to Section 79 G of the Civil Procedure Act, Cap 21, this Court is of the considered opinion that it will not delve into the said issue for lacks of proper jurisdiction to discuss the same.

Conclusion

34. In conclusion, this Court hereby makes the following Orders in determination of the present Application; -
 - A. The Notice Of Motion Dated 15.07.2024 Is Not Merited And Therefore Dismissed Forthwith.
 - B. The Applicants Will Pay The Costs Of This Application To The Respondent.

DATED, SIGNED & DELIVERED Virtually in KILGORIS ELC Court on 17TH DECEMBER 2024.

EMMANUEL.M.WASHE

JUDGE

In The Presence Of:

Court Assistant: Mr. Ngeno

Advocates For The 1St & 2Nd Applicant: Ms. Pion

Advocates For The Respondent: Ms. Mireri

