



**Njoroge v Njoroge & another (Environment and Land Appeal
E027 of 2024) [2024] KEELC 13849 (KLR) (13 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13849 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL E027 OF 2024
EO OBAGA, J
DECEMBER 13, 2024**

BETWEEN

WILLIAM MWANGI NJOROGE APPELLANT

AND

SIMION NJUGUNA NJOROGE 1ST RESPONDENT

COUNTY LAND REGISTRAR, UASIN GISHU 2ND RESPONDENT

RULING

1. This ruling is in respect to the Notice of Motion dated 5th July, 2024 and the Notice of Preliminary Objection dated 15th July, 2024.
2. By Notice of Motion dated 5th July, 2024, the Appellant sought the following orders: -
 - a. Spent.
 - b. That this Honourable Court be pleased to issue an order of Stay of Execution of the Ruling delivered on 14th May, 2024 at Eldoret CMC ELC No. 280 of 2018 pending the hearing and determination of this application inter-partes.
 - c. That this Honourable Court be pleased to issue an order of Stay of Execution of the Ruling delivered on 14th May, 2024 at Eldoret CMC ELC No. 280 of 2018 pending the hearing and determination of the appeal.
 - d. That the costs of the application be provided for.
3. The application is premised on the 10 grounds on its face and supported by the affidavit sworn by the Appellant on even date. He avers that he is the registered owner of the suit parcel L.R. No. Eldoret Municipality/ Block 16 (Kamukunji)/ 518 measuring approx. 0.1868Ha. That the trial court vide ELC



- Case No. 280 of 2018 issued a ruling, and being dissatisfied with the said ruling, he has since lodged an appeal.
4. It is his contention that his appeal raises arguable points and has a very high chance of success hence the need to preserve the suit property pending the determination of the appeal.
 5. That unless the orders of stay of execution sought are granted, there is a risk of the suit parcel being disposed off and rendering the appeal nugatory. He maintained that the respondent will not suffer any prejudice and urged the court to allow the application in the interest of justice.
 6. The Appellant also filed a Further Affidavit sworn on 17/9/2024 in response to the allegations raised in the replying affidavit. It was his assertion that the replying affidavit does not articulately establish the reasons against the grant of the orders of stay of execution but instead canvasses the substantive appeal.
 7. He reiterated that there is imminent loss that will be suffered unless the orders sought are granted since the trial court ordered for the suit land to be deregistered from his name, subdivision done and new ownership documents be issued.
 8. He further contended that his appeal raises issues touching on the ownership of the suit land and the circumstances on how he obtained the whole land. In the alternative he sought orders of status quo for the reason that he is in occupation of the entire suit land.
 9. The application was opposed. The 1st Respondent filed a Replying Affidavit and a Notice of Preliminary Objection both dated 15th July, 2024. In the Replying Affidavit; he dismissed the application as being frivolous, misplaced and without merit.
 10. He gave a brief history of the facts and circumstances of the suit; particularly on the certificate of confirmation of grant dated 21/8/2007, the registration and ownership of the suit land Eldoret Municipality/Block 16 [Kamukunji] 518 and the title deed issued thereto.
 11. It was his contention that he has no desire or plan to sell his portion of land and dismissed the claims that the suit land may be disposed off unless orders for stay of execution are granted. He averred that it would be strange for him to sell the land when the appellant has custody of the title deed. He maintained that the application and the appeal are a non-starter and urged the court to dismiss the application with costs.
 12. The Notice of Preliminary Objection was raised on the following grounds;
 - i. That the applicant has not disclosed to the court that the title deed Eldoret Municipality/Block 16 [Kamukunji] 518 was originally owned in common in equal shares by Njoroge Kirri and Simion Njuguna Njoroge (Respondent).
 - ii. That the Certificate of Confirmation of Grant issued on 21/8/2007 shows clearly that the appellant was given 0.0934Ha share of the title and not 0.1868 which is the full share of Eldoret Municipality/Block 16 [Kamukunji] 518.
 - iii. That on 3/1/2012 the County Land Registrar, Uasin Gishu, the 2nd Respondent wrote to the appellant to surrender the title deed issued to him erroneously for full share of 0.1868Ha instead of 0.0934Ha but the respondent refused to comply.
 - iv. That the application and appeal arise out of the above title and are therefore without a basis.
 13. The Respondent thus urged the court to allow the Preliminary Objection and strike out the application with costs.



14. Both the Application and the Preliminary Objection were canvassed by way of written submissions pursuant to the court's directions issued on the 22.07.2024 and 23.10.2024 respectively. The Appellant filed his submissions dated 17/9/2024 and 31/10/2024 while the 1st Respondent filed his submissions dated 1/10/2024.
15. I have read and considered the Application, the Notice of Preliminary Objection, various Affidavits thereto and the rival submissions by both parties and the various authorities cited in support of their respective claims and I have taken the same into account in arriving at my decision.

Analysis and Determination:

16. It is my considered opinion that the issues arising for determination include;
 - i. Whether the Notice of Preliminary Objection dated 15th July, 2024 meets the threshold of what amounts to a Preliminary Objection.
 - ii. Whether an Order for Stay of Execution can issue against ruling and decree issued on 14th May, 2024.
 - I. Whether the Notice of Preliminary Objection dated 15th July, 2024 meets the threshold of what amounts to a Preliminary Objection
17. The law on what constitutes a preliminary objection is now well settled. In the leading case of Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd 1969 E.A. 696; the Court defined Preliminary Objection as follows;

“...is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
18. In his submissions in support of the Preliminary Objection; counsel for the respondent outlined various factual details on the issuance of the title deed to the suit property, matters touching on the Certificate of Confirmation of Grant and the share distribution outlined therein as well as other facts relating to the circumstances of the suit/appeal.
19. The Appellant in his submissions relied on the case of Oraro vs Mbaja [2005] eKLR on what amounts to a P.O. and maintained that one of the preconditions for a valid preliminary objection is based on the assumption that the facts pleaded are correct and unopposed by the rival party which is not the case in the instant matter. It was therefore his assertion that The P.O. is anchored on matters of fact which can only be verified and proved through production of evidence and the same cannot therefore be sustained.
20. I have carefully looked at the Respondent's Preliminary Objection as filed and it is my considered opinion that the same does not raise any pure point of law but is instead marred with factual issues, touching on the certificate of Confirmation of Grant and the share distribution of the estate of their deceased father, the title deed issued in favor of the appellant and other factual details; which can only be ascertained and proved by the production of evidence and the exercise of this court's discretion.
21. In view of the foregoing and guided by the decision in Mukhisa Biscuits and Oraro vs Mbaja [2005] eKLR, correctly cited by the Appellant; it is the finding of this court that the Preliminary Objection dated 15th July, 2024 cannot be sustained and is hereby dismissed.
 - II. Whether an Order for Stay of Execution can issue against ruling and decree issued on 14th May, 2024



22. It is now well settled that no appeal shall operate as an automatic stay of execution. Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 empowers the court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. Order 42 Rule 6(2) sets out the grounds to be considered and provides as follows: -
2. No order for 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.(emphasis added)
23. Order 42 Rule (2) above thus clearly outlines the three prerequisite conditions for the grant of an Order for Stay pending Appeal as follows:-
- i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
 - ii. The application is brought without undue delay and,
 - iii. 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.
24. The purpose and objective of the order for stay of execution is to preserve the substratum of the appeal in order to ensure that the appeal is not rendered nugatory. In the case of *Consolidated Marine. vs. Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi), the Court held that: -
- “The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
25. The first ground to be established is whether the appellant/applicant will suffer substantial loss unless orders of stay of execution are granted. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma vs Abuoga* (1988) KLR 645 where their Lordships stated that;
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
26. The applicant is under a duty to demonstrate the loss he is likely to suffer if the order for stay of execution sought is not granted. This is for the reason that; by granting such stay, it would mean that the status quo should remain as it were before the judgment and that would amount to denying a successful litigant the fruits of his judgment. An Applicant has to give sufficient cause to enable the court exercise its discretion by granting the orders sought. Besides, it not merely sufficient to state that substantial loss may occasion on the applicant. (See *New Stanley Hotel Ltd –vs- Arcade Tobacconist* (1980) KLR 757).
27. I have considered the rival positions taken by both parties in respect to the issue of substantial loss and I am guided by the above case laws on what amounts to substantial loss. In this case; in an attempt to demonstrate the substantial loss that he is likely to suffer should execution of the decree proceed, the



applicant stated that he is the registered owner of the entire suit property and is currently in occupation of the said parcel.

28. He explained that the effect of the ruling issued on 14.5.2024 if executed, would be to cancel the title deed issued in his favor, subdivide the suit land into 2 portions and registration thereof the said portion in his name and that of the 1st respondent. Upon such registration, the 1st respondent would then be at liberty to deal with the ½ portion of the suit property howsoever he deems fit, including selling and/or transferring and which may in turn render the appeal nugatory.
29. In view of the foregoing, I find and hold that the Applicant has satisfactorily demonstrated the substantial loss he is likely to suffer, unless an order for stay of execution is granted.
30. On whether the Application has been filed without undue delay; the ruling in question was delivered on the 14th May, 2024 while the instant Application was filed on the 5th July, 2024, 1 month 21 days. No explanation was tendered by the applicant on the delay in filing this application other than stating that the same was filed without undue delay. The respondent did not comment on the delay in filing the application.
31. It has been held that a delay of even one day may amount to an inordinate delay where no sufficient and satisfactory explanation has been tendered by an applicant. No such explanation was given by the applicant in this case of the 1 month and 21 days delay in filing the application.
32. Be that as it may, in the spirit of substantial justice and undue regard to technicalities; this court is of the considered view that the 1 month and 21 days delay as outlined above does not amount to an inordinate delay.
33. The final element to be proved is on the deposit of security for costs as the court may direct. The amount of security to be deposited ought to be balanced against the interests of both the Applicant and the Respondent, the said amount should be adequate and not be disadvantageous to the party depositing the same; See *Rosengerens Ltd –vs- Safe Deposit Centre Ltd* 919840m 3aller 198. This court must however take cognizance of the fact that the claim herein is a land matter and not a liquidated amount.
34. The court in the case of *Arun C Sharma Vs Ashana Raikundalia T/A Raikundalia & Co. Advocates and 2 others* (2014) eKLR, held that: -

“The purpose of the security under Order 42 is to guarantee due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor....civil process is quite different because in civil process the judgment is like a debt hence the applicant 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 a security for the 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.”
35. In view of the foregoing, I find that the Applicant has satisfied the 3-limb test provided under the Civil Procedure Rules to the required standard.
36. In the upshot, I accordingly find that the Notice of Preliminary Objection dated 15th July, 2024 is not merited and is hereby dismissed while the Application dated 5th July, 2024 is merited and is hereby allowed on the following terms: -
 - a. An Order for Stay of Execution of the ruling and decree issued on 14th May, 2024 is hereby issued pending the hearing and determination of the Appeal.



- b. The Applicant is hereby directed to deposit the title deed of land parcel Eldoret Municipality/ Block 16 [Kamukunji] 518 in court as security for Costs for the due performance of the decree within 7 days from the date of this Ruling.
- c. Failure to comply with orders (b) hereinabove, Order (a) hereinabove shall automatically lapse.
- d. Costs of the Application shall be in the cause.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 13TH DAY OF DECEMBER, 2024.

E. OBAGA

JUDGE

Ruling delivered in the virtual presence of: -

M/s Kanda for Mr. Tarigo for the Appellant

Mr. Miyianda for the 1st Respondent

Court Assistant – Laban

E. OBAGA

JUDGE

13TH DECEMBER, 2024

