



**Omollo v Obiero (Environment and Land Appeal 6 of 2022)
[2023] KEELC 538 (KLR) (31 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 538 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL 6 OF 2022
MN KULLOW, J
JANUARY 31, 2023**

BETWEEN

GEORGE OTIENO OMOLLO APPELLANT

AND

BLAZIO OBIERO RESPONDENT

RULING

1. By Notice of Motion dated May 16, 2022, the Applicant sought for the following orders: -
 - a. Spent.
 - b. The execution of the Ruling/ Judgment delivered on the January 25, 2022 be stayed pending the hearing and determination of this Application inter-partes.
 - c. The execution of the Ruling/ Judgment delivered on the January 25, 2022 be stayed pending the hearing and determination of the Appeal lodged herein.
 - d. That the costs of and incidental to this Application to abide the result of the said Appeal.
2. The application is based on the 9 grounds thereof and on the Applicant's Supporting Affidavit sworn on even date. The applicant avers that judgment was issued in the matter on the January 25, 2022; whose effect was to issue an Eviction Order against him and order that he vacates the suit parcel within 90 days from the date of the judgment. That being dissatisfied with the judgment, he has since lodged an Appeal.
3. He contends that the said 90days has since lapsed and there is no order preventing the Respondent from executing the said decree in his favor whereas the Appeal is yet to be heard and determined.
4. He is apprehensive that the Respondent who has verbally threatened to evict him and his family on numerous occasions, may actualize the threats and thus render the Appeal nugatory.



5. It is further his claim that he stays on the suit parcel with his family and solely depend on the same for a living and hence evicting him from the said land will not only render them homeless and destitute but will also occasion them great injustice. He thus contends that unless the orders sought are granted; he stands to suffer substantial loss since the Respondent may proceed to execute the decree and he may not be able to recover the property in the event that he is evicted and the appeal is successful. He urged the court to allow the Application.
6. The application was opposed. However, on a perusal of the court record, I have not seen any Replying Affidavit or a Grounds of Opposition in response to the instant Application.
7. The Application was disposed of by way of written submissions; both parties filed their respective written submissions together with authorities which I have read and taken into consideration in arriving at my decision as hereunder;
8. The sole issue arising for determination is whether an Order for Stay of Execution can issue against the judgment and decree delivered on January 25, 2022 in Migori CMCC No 1014 of 2018.
9. Order 42 Rule 6(1) of the *Civil Procedure Rules, 2010* outlines the 3 prerequisite conditions that must be met for the grant of an Order of stay of execution pending Appeal. It 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.
10. 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 defeated. In *RWW v EKW* [2019] eKLR, 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. 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.”
11. The first condition to be met/demonstrated is whether substantial loss will result to the Applicant unless the Order of stay of execution is granted. Substantial loss was expressed by the Court of Appeal in the case of *Mukuma v 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.”
12. The onus is on the Applicant to show the damages he would suffer if the order for stay of execution sought is not granted 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.
13. The Applicant herein in an attempt to demonstrate the substantial loss that he is likely to suffer stated that they have been living on the suit parcel together with his family and his extended family and they



solely rely on the same as their source of livelihood. He thus contends that they risk being evicted and would be rendered homeless and destitute as a result. It was further his claim that some of his relatives have been buried on the said land and it thus holds a sentimental value.

14. It was also his claim that should the orders sought not be granted and the Respondent proceeds to execute the decree by evicting him and alienating the suit parcel; he not only stands to suffer irreparable loss but the appeal would also be rendered nugatory.
15. From the court record, there is no response filed by the Respondent; However, it was his submission that the Applicant has not demonstrated any sufficient cause that would justify granting of stay of execution orders. He further submitted that he purchased the suit land in a public auction; where the chargee was exercising its right of sale and the Respondent is thus protected by the provisions of Transfer of Property Act. It is my considered opinion that these are issues that can only be adequately determined at the hearing of the main Appeal on merit.
16. In view of the foregoing; It is my finding that the Applicant has satisfactorily demonstrated that he has been and is still in occupation of the suit parcel and the temporary stay issued by the trial court having lapsed, he risks being forcefully removed/ evicted if execution proceeds. This in my opinion is sufficient demonstration of the substantial loss that he would suffer if orders for stay of execution is not granted.
17. I have also looked at the Memorandum of Appeal herein and I do note that at the center of the dispute herein is the ownership of the suit parcel and the same forms the substratum of the Appeal. I am careful not to delve into the merits of the pending Appeal at this stage. However, it is my considered opinion that there is need to preserve the subject land in order to prevent the Appeal from being rendered nugatory.
18. On the second element; the trial court judgment was delivered on the January 25, 2022 while the instant Application was filed on the May 16, 2022, 3 months 9 days. In explaining the 3 months delay I filing the Application; the Applicant stated that having been given 90 days within which to voluntarily vacate the suit land; he proceeded to lodge the appeal within prescribed timelines with the hope that the same would be heard and determined before the lapse of the said 90 days. However, owing to unforeseen circumstances, the same was not possible hence the timely filing of the instant case before the expiration of the 90days. I find the explanation tendered for the delay to be sufficient and consequently the Applicant has met the second condition.
19. The last limb to be proved is on the deposit of security for costs for the due performance as the court my direct. From a cursory look at the Application and the Supporting Affidavit; the Applicant has not shown/ demonstrated any willingness to furnish any security as the court may direct. However, in his submissions he has stated that he is willing to abide with any condition set by the court on the deposit of the security for costs.
20. Be that as it may, this being a land matter, the circumstances of the case demand for security to be presented. The amount of security for costs to be deposited however ought to be balanced against the interests of both the Applicant and the Respondent.
21. In the upshot, I accordingly find that the Application dated May 16, 2022 is merited and I proceed to allow the same on the following terms: -
 - a. There be an order for stay of execution of the judgment dated January 25, 2022 together with all consequential orders arising therefrom pending the hearing and determination of the Appeal.



- b. The Applicant to deposit a sum of Kshs 25,000/= in the court's account being Security for Costs for the due performance of the decree within 30 days from the date of this Ruling.
- c. The Applicant to file and serve the Record of Appeal within 45 days from the date of this Ruling.
- d. Failure to comply with order (b) and (c) hereinabove, Order (a) hereinabove shall automatically lapse and the Appeal will stand dismissed.
- e. Costs of the Application to abide the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 31ST DAY OF JANUARY, 2023.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Nonappearance for the Applicant

Nonappearance for the Respondent

Court Assistant - Tom Maurice/ Victor

