



Nabukwangwa ((Suing as the Attorney of Andrew Pani Wasike Munyole (Donor)) v Manyilila & another (Civil Case 85 of 2009) [2023] KEELC 382 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 382 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
CIVIL CASE 85 OF 2009
BN OLAO, J
JANUARY 26, 2023**

BETWEEN

**ANNAH NABUKWANGWA PLAINTIFF
(SUING AS THE ATTORNEY OF ANDREW PANI WASIKE MUNYOLE
(DONOR)**

AND

**PIUS JUMA MANYILILA 1ST DEFENDANT
MARTIN WAFULA OSALE 2ND DEFENDANT**

RULING

1. Vide a judgment delivered on January 23, 2020, this Court dismissed the suit by Annah Nabukwangwa suing as the Attorney of Andrew Pani Wasike Munyole (the plaintiff herein) as against Pius Juma Manyilila and Martin Wafula Osale (the 1st and 2nd defendants respectively) with respect to the land parcel No East Bukusu/South Wanduyi/761 (the suit land). The plaintiff had sought orders to evict the defendants from the suit land. The defendants on the other hand made a counter-claim that the plaintiff held 2 acres of the suit land in trust for the 1st defendant and 4 acres in trust for the 2nd defendant.
2. Upon hearing all the parties, this Court found in favour of the defendants and directed that the plaintiff shall within 30 days of the delivery of the judgment execute all the necessary forms to facilitate the transfer of 2 acres out of the suit land to the 1st defendant and 4 acres to the 2nd defendant. In default, the Deputy Registrar of this Court would execute such documents on behalf of the plaintiff.
3. The plaintiff was aggrieved by that judgment and promptly lodged in this Court a Notice of Appeal dated February 4, 2020 and lodged on February 7, 2020.



4. The plaintiff then approached this Court by her Notice of Motion dated 20th February 2020 and premised under the provisions of order 42 rule 6(1) of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act in which she sought the following orders:
 1. Spent
 2. Spent
 3. That there be a stay of execution of the judgment/decree herein pending hearing and final determination of the appeal.
 4. That costs be in the cause.
5. The application is predicated on the grounds set out therein and is also supported by the affidavit of the plaintiff.
6. The gravamen of the application is that the plaintiff is aggrieved by the judgment delivered by this Court on January 23, 2020 and has instructed her counsel to file an appeal. That the appeal raises triable issues and has high chances of success yet the defendants may execute the judgment. That the plaintiff is ready and willing to maintain the status quo and so no party will be prejudiced. That the application has been brought in good faith, promptly and is in the best interest of all the parties:
7. Annexed to the application are the following:
 - a. Notice of Appeal dated 4th February 2020.
 - b. Draft Memorandum of Appeal.
 - c. Letter dated February 4, 2020 from the plaintiff's counsel addressed to the Deputy Registrar requesting for the copies of proceedings.
 - d. Ruling in *Bilia Wambeti Jotham -v- Janet Gaceke Nguo* 2020 eKLR.
8. The application is opposed and the 1st defendant filed a replying affidavit dated July 22, 2020 in which he has deponed, inter alia, that the application does not meet the threshold under order 42 rule 6(1) and (2) of the Civil Procedure Rules and neither does the appeal raise triable issues. That the plaintiff has kept them in Court for the past 12 years and they will continue to be prejudiced if they are not allowed to enjoy the fruits of their judgment. That the appeal has simply been filed to frustrate the defendants from processing the title deeds to the land which they have occupied for over 20 years.
9. When the application was placed before me on June 28, 2022, I directed that it be canvassed by way of written submissions.
10. The submissions were subsequently filed both by Mr Mukabane instructed by the firm of Mukabane Kagunza Advocates for the plaintiff and by Mr Kundu instructed by the firm of Situma & Company Advocates for the defendants.
11. I have considered the application, the rival affidavits and submissions by counsel.
12. This being an application for stay of execution pending appeal, it has to be considered within the ambit of the provisions of order 42 rule 6(1) and (2) of the Civil Procedure Rules which provides that:
 - 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.

- (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. Emphasis mine.

It is clear from the above that the plaintiff was required to satisfy the following conditions in order to be granted the order of stay of execution pending appeal:

1. Show sufficient cause.
2. Demonstrate that she will suffer substantial loss unless the order is granted.
3. File the application without unreasonable delay.
4. Offer security.

In *Vishram Ravji Halai & Another -v- Thornton & Turpin (1963) Ltd* 1990 KLR 365 the Court of Appeal circumscribed the jurisdiction of this Court while considering such an application as follows:

“Thus the superior Court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

13. Substantial loss is the cornerstone of such an application. Platt Ag J.A (as he then was) had the following to say in the case of *Kenya Shell Ltd -V- Benjamin Kibiru & Another* 1986 KLR 410:

“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 form is the cornerstone of both jurisdiction 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”.

14. The plaintiff filed a Notice of Appeal on 4th February 2020 just about 10 days following the delivery of this Court’s judgment. There is no delay at all. The filing of the Notice of Appeal is a clear manifestation of the plaintiff’s intention to appeal this Court’s judgment. That is sufficient cause.
15. The plaintiff has also deponed in paragraph (c) of the application that she is ready and willing to abide with any conditions which this Court may set. I find that to be sufficient offer of security.
16. The plaintiff has therefore satisfied the requirements of filing the application without delay, showing sufficient cause and offering security.
17. On the issue of substantial loss, the plaintiff has not told this Court what loss she will suffer, substantial or otherwise, if the judgment herein is executed. There is nothing to suggest that the defendants intend to transfer the six (6) acres of land to other parties or otherwise deal with land to put it out of the



plaintiff's reach should the appeal succeed. But to her credit, the plaintiff has made the following significant averment in paragraph six (6) of her supporting affidavit:

6. "That to ensure that the suit parcel status is not interfered with either by sub-division and or effecting change of the register, the plaintiff/applicant is ready and willing to maintain the status quo in the suit land pending the hearing and determination of the appeal thus no party will be prejudiced upon conclusion of the aforesaid appeal."

18. It is common ground that the defendants have in been occupation and possession of their respective parcels of land, which they now claim, for over 30 years although the title remains in the name of Andrew Dani Wasike Munyole. They are unlikely to be evicted therefrom and any fears of that happening have now been dashed following the dismissal of the plaintiff's case. The defendants are therefore unlikely to be prejudiced by any orders of stay of execution because they will continue to be in occupation and possession of those parcels of land but will have to wait a little longer for the appeal process to run it's cause before the land is registered in their names as decreed by this Court if the judgment is up-held. In view of all the above, I am persuaded to allow the application but with conditions.

19. The up-shot of all the above is that the Notice of Motion dated February 20, 2020 is allowed as follows:

1. The plaintiff shall within 15 days of this ruling deliver to Deputy Registrar of this Court the original title deed to the land parcel No East Bukusu/south Kanduyi/761 together with all the documents necessary to transfer 2 acres to the 1st defendant and 4 acres to the 2nd defendant duly executed.
2. In default of (1) above, the stay order shall automatically lapse and the defendants will be at liberty to proceed with the execution process.
3. Parties meet their own costs.

BOAZ N. OLAO

JUDGE

26TH JANUARY 2023

RULING DATED, SIGNED AND DELIVERED AT BUSIA ELC ON THIS 26TH DAY OF JANUARY 2023 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

26TH JANUARY 2023

Explanatory Notes:

This ruling was due on 6th October 2022 a date which had been fixed prior to my transfer to BUSIA ELC on 3rd October 2022. The delay in delivery is regretted but was un-avoidable in the circumstances.

BOAZ N. OLAO

JUDGE

26TH JANUARY 2023

