



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyanza Enterprises Limited v Orina & 2 others (Environment & Land  
Case 825 of 2015) [2023] KEELC 460 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 460 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 825 OF 2015**

**E ASATI, J**

**JANUARY 26, 2023**

**BETWEEN**

**NYANZA ENTERPRISES LIMITED ..... PLAINTIFF**

**AND**

**JOSHUA O. ORINA ..... 1<sup>ST</sup> DEFENDANT**

**HASS EMPORIUM (K) LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**COMMISSIONER OF LANDS ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This Ruling is in respect of 2<sup>nd</sup> Defendant/applicant's Notice of Motion application dated March 24, 2022 brought pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules, Sections 1A, 1B & 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya. The application seeks for an order of stay of execution of the decree herein pending the hearing and determination of Court of Appeal Civil Appeal No 28 of 2022 filed by the 2<sup>nd</sup> Defendant/applicant. It is based on the grounds that having been aggrieved by the judgement of this court dated March 6, 2020, the applicant appealed to the Court of Appeal, that there is a likelihood that the decree might be executed before the appeal is determined and that the application has been made without unreasonable delay. The application is supported by the contents of the Supporting Affidavit sworn by Abdulkadir Ahmd Hussein on March 20, 2022.
2. The applications is opposed vide the contents of the Replying Affidavit sworn by Shatish Bhayani on May 10, 2022 to the effect that the application is misconceived and frivolous as the 2<sup>nd</sup> Defendant has not demonstrated any special circumstances to warrant the court grant the orders sought. That the Respondent is the registered owner of the suit land namely Kisumu Municipality/block 6/461. That there is no imminent threat of execution of the judgement.



3. The Application is brought pursuant to the provisions of order 42 Rule 6 [Civil Procedure Rules 2021](#). The same provides that:

' 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 of execution 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.'

4. The grounds for grant of orders of stay of execution of decree/judgement are provided for in Order 42 Rule 6(2) of the Civil Procedure Rules 2010 as follows:

' No order for stay of execution may 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.'

5. Firstly, the court must be satisfied that the Applicant will suffer substantial loss if the order of stay of execution is not granted. Substantial loss has been described in [Dr Daniel Chebutuk Rotich -vs- Morgan Kimaset Chebutuk Nakuru HCCC No 368 of 2001](#) thus:

' Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an Applicant is likely to suffer if stay of execution is not granted and the Applicant is therefore forced to pay the decretal sum.'

6. The burden of proof lies with the Applicant to prove that substantial loss will result to him if the order sought is not granted. In the case of [Charles Wabome Gethi vs Angela Wairimu Gethi \[2008\]eKLR](#) the Court of Appeal held-

' It is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the applicants stand to suffer if the Respondent execute the decree in this suit against them'

In the case of [Shell Kenya Ltd vs Benjamin Karuga Kibiru & Another \[1986\] eKLR 410](#) the court stated that

' If it is shown that execution would render a proposed appeal nugatory then a stay can properly be granted.'

7. In the case of [Rhoda Mukuma vs John Abuoga \[1988\]eKLR](#) the court held that the issue of substantial loss is the cornerstone of both the jurisdiction under order 42 rule 6 Civil Procedure Rules and Rule 5 of the Court of Appeal Rules. That substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.



8. In the instant case the Applicant states that he has already filed the appeal namely Court of Appeal Civil Appeal No 28 of 2022. The Respondent contends that the merits of the appeal cannot be one of the grounds for grant of the order of stay of execution but that an applicant must demonstrate sufficient cause, substantial loss, furnish security and that the application must be brought without unreasonable delay.
9. The Respondent further contended that there is no execution likely to take place immediately, given the nature of the judgement herein. That execution of the judgement requires the convening of a meeting of representatives of both parties through the office of the County Surveyor for purposes of embarking on a boundary identification exercise. To this the applicant responded that the judgement whose execution is sought to be stayed requires certain things to be done on the suit land the effect of which is likely to affect the status of the property on the ground and might result in the applicant being removed from the suit land or part of it.
10. I have perused the judgement. It inter alia directed the County Land Registrar and Surveyor to call a meeting of the representatives of the parties herein within 90 days of the judgement and point out to them the boundary of the suit land. The judgement directed further that should it be found that the applicant is occupying the suit land or any part of it, the applicant should move out and remove any of its structures thereon and hand over vacant possession to the Respondent within 30 days of the land Registrar's determination.
11. Given the nature of the orders in the judgement as indicated hereinabove, it is evident that execution of the judgement may cause substantial loss to the applicant and render the appeal nugatory.
12. Other ground stated under O 42 Rule 6(2) is provision of security for due performance of such decree or order as may ultimately be binding on the applicant. Apart from an undertaking in paragraph 17 of the Supporting Affidavit not to sell, charge or otherwise part with possession of the suit property pending the hearing and determination of the appeal, there is no mention in the application of provision of security as provided by law. The purpose of the requirement for security as stated in the case of *Aron C Sharma vs Ashana Raikundalia t/a Raikundaria & Co Advocates & 2 others [2014]eKLR* is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. In *Focin Motorcycle Co Ltd -vs- Ann Wambui wangui & Another [2018] eKLR* the court held that it is a mark of good faith and commitment when an Applicant undertakes to provide security as the court will order or even proposes the kind of security he offers. The court stated that:

' My view is that it is sufficient for the Applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security.'

13. Taking all the relevant factors into account and in order to secure the rights/interests of both parties, I allow the application. I grant an order of stay of execution of the judgement and decree herein on condition that the applicant deposits, within 30 days hereof a sum of Kshs 500,000 in a joint interest earning account in a reputable financial institution in the joint names of Counsel for the applicant and Counsel for the Plaintiff/Respondent pending hearing and determination of the appeal. Failure to deposit the security as directed herein, the order of stay of execution will lapse. Costs of the application to the Respondent.

Orders accordingly.

**RULING DATED AND SIGNED AT KISUMU, DELIVERED VIRTUALLY THIS 26<sup>TH</sup> DAY OF JANUARY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.**

**E. ASATI**



**JUDGE.**

**In the presence of:**

**Maureen: Court Assistant.**

**Maganga Advocate for the Plaintiff/Respondent**

**No appearance for the 2<sup>nd</sup> Defendant/Applicant**

