



REPUBLIC OF KENYA



**Namachitu & another v Wanyama (Environment and Land Appeal
12 of 2020) [2023] KEELC 406 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 406 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL 12 OF 2020
BN OLAO, J
JANUARY 25, 2023
FORMERLY BUNGOMA HCCA NO. 52 OF 2020**

BETWEEN

FLORENCE NAMACHITU 1ST APPELLANT

RONALD KERRE 2ND APPELLANT

AND

DORIS WANYAMA RESPONDENT

RULING

1. On July 4, 2022, this Court delivered judgment herein dismissing the Appellants appeal arising out of the judgement of Hon SO Mogute delivered on May 15, 2020 in Bungoma Chief Magistrate's Court Civil Case No 85 of 2018.
2. Florence Namachitu and Ronald Kerre (the 1st and 2nd Appellants respectively) are aggrieved by that judgment and on July 14, 2022, they lodged a Notice of Appeal signifying their intention to appeal that judgment.
3. By a Notice of Motion dated July 27, 2022 and filed on the same date, the Appellants citing the provisions of sections 1, 1A, 1B, 3 and 3A of the [Civil Procedure Act](#) and order 42 rule 6 of the [Civil Procedure Rules](#) seek the following orders:
 1. Spent
 2. Spent
 3. That further proceedings and execution of the decree and judgment in Bungoma CMCC No 85 of 2018 be stayed pending the hearing and disposal of the appeal.
 4. Costs of the application be provided for.



4. The gravamen of the application is that the Appellants intend to exercise their rights of appeal but have not moved the Court of Appeal yet due to the delay in generating typed proceedings yet the Respondent has embarked on the realization of the judgment which shall render their appeal nugatory. In their joint supporting affidavit, the Appellants confirm that they are dissatisfied with this Court's judgment delivered on July 4, 2022 and which arose out of the proceedings in Bungoma CMCC NO 85 of 2018. That the suit land is matrimonial home and they stand to suffer psychologically should they remain uncertain about the proceedings in the subordinate court. That this application has been filed hardly 10 days from July 4, 2022 when the judgment was delivered and they are willing to abide by the conditions which this Court may set. It is prudent that the subject matter be preserved pending the appeal.
5. Annexed to the application are the following documents:
 1. Notice of Appeal dated July 7, 2022 and lodged in this Court on July 14, 2022.
 2. Copy of the Judgment delivered on July 4, 2022.
 3. Copy of the Decree issued in Bungoma CMCC No 85 of 2018.
6. The application is opposed and Doris Wanyama the Respondent has filed a replying affidavit dated August 29, 2022 in which she has averred that the judgment having been delivered on July 4, 2022, the Notice of Appeal should have been filed within 7 days but was filed on July 14, 2022 without leave. That the suit property is not matrimonial home and the Respondent has been living in a rental house from the time Bungoma CMCC No 85 of 2018 was filed to-date and justice delayed is justice denied. This application should therefore be dismissed.
7. When the application was placed before me on July 27, 2022, I did not certify it as urgent and directed that it be canvassed by way of written submissions.
8. Those submissions were filed by the firm of ABK Advocates LLP for the Appellants and by the firm of Lucy Nanzushi & Company Advocates for the Respondent.
9. Before I delve into the application, I want to address two issues. Firstly, the Appellants have always been represented by the firm of J. S. Khakula & Company Advocates. I have not seen any Notice of change of Advocate. The Notice of Appeal has been filed by the firm of J. S. Khakula & Company Advocates and it is not clear if the firm of ABK Advoctes who filed the submissions are the same firm practicing under the name and style of J. S. Khakula & Company Advocates.
10. Secondly, the Appellants filed a further affidavit dated August 5, 2022 without leave. The same is hereby expunged from the record.
11. I have considered the application the rival affidavits and the submission by counsel.
12. This is the second application that I am determining under the provisions of Order 42 rule 6 of the *Civil Procedure Rules*. The first application was dated August 14, 2021 and was seeking a stay of execution of the judgment of Hon SO Mugute (principal Magistrate) pending an appeal arising out of his judgment in Bungoma CMCC No 85 of 2018. That application was dismissed vide my ruling delivered on October 15, 2020. That appeal was subsequently dismissed vide this court's judgment dated July 4, 2022. The Appellants seek to file a further appeal to the Court of Appeal.
13. Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules* provides that:



- (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.

From the above, it is clear that for a party to be entitled to the order for stay of execution pending appeal, he must meet the following conditions:

1. Show sufficient cause.
 2. Demonstrate that if the order for stay is not granted, the may suffer substantial loss.
 3. Approach the court without unreasonable delay.
 4. Offer security.
14. In *Kenya Shell Ltd v Benjamin Kibiru* 1982 – 88 1 KAR 1018 [1986 KLR 410], PAT Ag JA (as he then was) stated:

“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”.

In the same case, Gachuhi Ag J. A (as he then was) added that:

“In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted.”

In *Ravji Halai & another v Thornton & Turpin (1963) Ltd* CA Civil Appeal No 15 of 1990 [1990 KLR 365], the Court of Appeal circumscribed the powers of this Court in such an application as follows:

“The Superior Court’s discretion to order a stay of execution of its order or decree 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.”

15. The judgment sought to be appealed was delivered on July 4, 2022 and the Notice of Appeal was lodged on July 14, 2022. A party who desires to appeal a decision of this Court to the Court of Appeal is required under Rule 75 of that Court’s [Rules](#) to lodge with the Registrar a notice in writing within 14 days of the decision being delivered, not 7 days as submitted by MS Nanzushi. The Notice of Appeal was therefore lodged in good time. Having filed the Notice of Appeal as required in law, the Appellants have shown sufficient cause.
16. The Appellants were also required to file this application within unreasonable delay. The judgment sought to be appealed was delivered on July 4, 2022 and this application was filed on July 27, 2022. I do not consider that delay to be unreasonable.
17. The Appellants have also deponed in paragraph 11 of their supporting affidavit that they “are willing and ready to abide by the conditions this Court shall set.” I consider that averment to be a sufficient offer of security. As was stated in [Wycliffe Sikuku Walusaka v Philip Kaita Wekesa](#) 2020 eKLR:

“The offer for security must of course come from the applicant himself as a sign of good faith to demonstrate that the application for stay of execution pending appeal is being pursued in the interest of justice and not merely a decoy to obstruct and delay the Respondent’s right to enjoy the fruits of his judgment.”

The Appellant have therefore met three of the conditions set out in Order 42 Rule 6 (1) and (2) of the [Civil Procedure Rules](#).

18. The Appellants were however required to meet all the four conditions set out in Order 42 Rule 6(1) and (2) of the [Civil Procedure Rules](#) not just some of them. And the condition which they have not met is the cornerstone of this application which is substantial loss - [Kenya Shell Ltd v Benjamin Kibiru](#) (*supra*). In their application the Appellants have pleaded in paragraph (c) that “the suit land is the matrimonial home of the 2nd Applicant and eviction from the same shall render him homeless.” However, the record shows that during the trial in the subordinate court, the 2nd Appellant adopted as his evidence, his statement dated June 11, 2019. In that statement, he states that he and the 1st Appellant were living in part of the premises constructed by Wanjala Sasita and taking care of his children since he (Sasita) did not have a steady marriage. The other part was rented to tenants. The 2nd Appellant then adds in paragraph 8 of the statement as follows with regard to Sasita:

“He died in 2001 before he got title. I and the 1st defendant have however continued to occupy the premises in care-taker capacity and cannot be evicted.”

A care-taker is defined in the [Concise Oxford English Dictionary](#) 12th Edition as:

“A person employed to look after a public building ... holding power temporarily.”

Strictly therefore, a person who is taking care of a property as a care-taker cannot claim ownership of the same. The Appellants cannot therefore claim that land in dispute and the structures thereon are their matrimonial home and that they will be rendered homeless if they are evicted therefrom. Being care-takers and the trial court have found that they are liable to eviction, it is not clear what substantial loss they can suffer. A care-taker cannot have any legal rights in the property which they have been assigned to take care of. A care-taker cannot have any interest, registrable or otherwise, in the property under his watch. His responsibility is to take care of it on behalf of the owner. And once the Court, as



has happened in this case, has determined the ownership of the property, the care-taker must yield and give way. If the Appellants had converted the suit land into their home, then they did so at their own risk and cannot say they will suffer substantial loss if they are evicted therefrom.

19. The up-shot of all the above is that the Notice of Motion dated July 27, 2022 is devoid of any merit. It is accordingly dismissed with costs.

BOAZ N. OLAO

JUDGE

25TH JANUARY 2023

RULING DATED, SIGNED AND DELIVERED AT BUSIA ON THIS 25TH DAY OF JANUARY, 2023 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

25TH JANUARY 2023

