



Jepkorir (Suing in her Capacity as the Legal Representative and Administratrix of the Estate of Geoffrey Kiplagat Maswai) v Kogo (Environment & Land Case 141 of 2021) [2023] KEELC 319 (KLR) (24 January 2023) (Ruling)

Neutral citation: [2023] KEELC 319 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 141 OF 2021
MN MWANYALE, J
JANUARY 24, 2023
FORMERLY ELDORET ELC CASE NO 53 OF 2016(OS)**

BETWEEN

PAULINE JEPKORIR (SUING IN HER CAPACITY AS THE LEGAL REPRESENTATIVE AND ADMINISTRATRIX OF THE ESTATE OF GEOFFREY KIPLAGAT MASWAI) PLAINTIFF

AND

ERNEST KIPROP ARAP KOGO DEFENDANT

RULING

1. By a Notice of Motion dated December 19, 2022 brought under Order 42 rule 6, Order 51 of the [Civil Procedure Rules, 2010](#), Section 51 1A, 1B, 3, 3A of the [Civil Procedure Act](#) and all enabling provisions of the Law, the Applicant herein seeks the following orders;
 - a. Spent
 - b. Spent
 - c. There be a temporary stay of execution of the judgment delivered on September 20, 2022 and the decree arising therefrom together with all emanating orders therefrom pending the hearing and determination of the main appeal at the Court of Appeal.
 - d. Costs of this application be provided for.
2. The said application was supported by the grounds on the face of it and an Affidavit sworn by Pauline Jepkorir on December 19, 2022. The Applicant averred that judgment in this matter was delivered on September 20, 2022 in her favour granting her ownership over 0.6 acres of the suit property by dint of adverse possession. That being dissatisfied by the said judgment she lodged an appeal against it and



served Notice of Appeal upon the Respondent. It was also deponed that there was delay in obtaining certified copies of proceedings and judgment for purposes of the appeal. Further that it was necessary to seek orders of stay of execution pending the intended appeal since the Applicant was apprehensive that the Respondent will commence process of execution of judgment of the Court thereby rendering the appeal nugatory.

3. The Respondent, Ernest Kipro Kogo, opposed the Application vide Replying Affidavit dated January 20, 2023. He deponed that this Court lacked jurisdiction to entertain the instant application since this matter is active in the Court of Appeal. He stated further that there was inordinate delay has not been executed. This was exhibited via letter to the County Surveyor and photographs annexed to the Replying Affidavit. In the circumstances he urged that the instant application be dismissed with costs.
4. On January 23, 2023 I invited counsels to submit orally on the application.
5. Counsel for the Applicant submitted that this Court was seized with the jurisdiction to hear and determine the present application. Mr Wafula relied in the Court of Appeal case of *Peterson Ndung'u and 5 others v Kenya Power and Lighting Company* (2015) eKLR to buttress this position. It was also submitted that the Application was meritorious and Applicant deserving of the orders sought since the same was filed without unreasonable delay. Counsel for the Applicant informed Court that the Respondent had caused sub divisions of the sit property and fenced the same and was in the process of disposing the suit property. Therefore in order to safeguard the substratum of Appeal and not render it nugatory there was need to issue orders sought. He urged this Honorable Court to allow the application as prayed.
6. On the other hand, Mr. Nabasenge Counsel for the Respondent submitted that the application was premised on the wrong provisions of the law. Particularly that Order 42 rule 6 did not apply to appeal pending before the Court of Appeal. That there was inordinate delay in bringing the instant application which delay was also not explained. Further that order 42 rule 6 provides for security for performance of judgment which must be provided by Applicant for grant of stay pending Appeal. Counsel went further to state that the decree in this matter was already executed hence the application, overtaken by events. In the circumstances this Court was urged to dismiss the application.
7. In response to the oral submission by Respondents Counsel, the Applicant's Counsel submitted that the application was anchored on other provisions of the law and urged the Court to invoke Article 159 (2) (d) of the *Constitution* to cure any procedural technicalities arising.

Analysis and Determination: -

8. I have considered the Application as well as rival affidavit and submissions by Counsel. The issue that arises for determination is whether the Applicant has satisfied the conditions for stay pending appeal.
9. The conditions for granting stay of execution pending appeal are provided for under Order 42 rule 6 (1) of the *Civil Procedure Rules* which provide as follows;

“No appeal or a 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 which such appeal is preferred shall be at liberty, on an application being made, to consider such application and to make such orders thereon as may to it seem



just, 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 the orders set aside.”

10. Order 42 rule 6 (2) lists the conditions to be met which include;

“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 undue delay; and
 - b. Such security as the Court orders for due performance of such decree or order as may ultimately be binding on him as been given by the Applicant.”
11. Counsel for the Respondent submitted that Order 42 rule 6 of the *Civil Procedure Rules* did not apply in the instant application. I beg to disagree. In my view Order 42 rule 6 of the *Civil Procedure Rules* applied to stay of execution applications before the trial Court. The Court of Appeal in the case of *Elijab Kimani Kimuyu and 2 others -vs- Francis Mburu Kamau* (2021) eKLR held as such. This being a trial Court, it is clothed with jurisdiction to hear and determine such applications.
12. That said, I wish address myself on an undisputed fact before delving into the issue as to whether the Applicant has met the conditions for grant of stay pending appeal. The Respondent as well as the Applicant’s counsel asserted that the Respondent had already surveyed and fenced off his portion of the suit property. This means that the decree in this matter has been executed. In my considered view granting executed decree is inconsequential and incapable of being implemented. This Court therefore finds, that the instant Application has been overtaken by events and is incapable of being stayed, it will clearly be an academic exercise to analyze the conditions for grant of stay of execution in the circumstances. I dismiss the same.
13. To further the interested of justice and the right of the Applicant to have her appeal heard and determined by the Court of Appeal as well as preserve the suit property this Court shall preserve the status quo of the suit property both in the register and on the ground pending hearing and determination of the appeal. This finding is informed by the Court of Appeal decision in the case of *Mugab v Kunga* (1988) KLR 748 as well as paragraph 28 (k) Practice directions in Gazette Notice No 5178/2014 where the practice of issuing status quo orders in land matters was upheld.
14. For avoidance of doubt status quo in the register means that the suit property should not be transferred or charged to any other party or any other transaction or dealing affecting the register pending hearing and determination of the appeal. While status quo on the ground means that the Respondent occupies 10 acres of suit land while Applicant continues occupation of 0.6 acres of the suit property, that no party should sub-divide, sell or enter into any transaction or dealings on the ground or erect any structures pending hearing and determination of the Appeal.
15. Each party to bear their own costs.
16. Orders accordingly.

DATED AND DELIVERED IN KAPSABET THIS 24TH DAY OF JANUARY, 2023.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

Mr. Nabasenge for Judgment debtor/Respondent



Mr. Wafula for Decree holder/Applicant

