



REPUBLIC OF KENYA



KENYA LAW
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**Mohabe v Matiko (Environment and Land Appeal E022 of 2022)
[2023] KEELC 614 (KLR) (24 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 614 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL E022 OF 2022
MN KULLOW, J
JANUARY 24, 2023**

BETWEEN

SAMWEL CHACHA MOHABE APPELLANT

AND

SAMSON NYAMOHANGA MATIKO RESPONDENT

RULING

1. By Notice of Motion dated November 21, 2022, the appellant/ applicant sought for the following orders: -
 - a. Spent.
 - b. This honourable court be pleased to grant temporary Order of Stay of Execution of the Decree/ Judgment of the subordinate court dated August 26, 2022 and all consequential Orders arising therefrom pending the hearing and determination of this Application.
 - c. This honourable court be pleased to grant Order of Stay of Execution of the Decree/ Judgment of the subordinate court dated 26th August 2022 and all consequential Orders arising therefrom pending the hearing and determination of the Appeal herein.
 - d. Costs of this application be provided for.
2. The application is premised on the 6 grounds on its face and on the Applicant's Supporting Affidavit sworn on even date and further supported with annexures marked "SCM" 1 - 4. The applicant avers that having been aggrieved by the judgment of the trial court, he has since filed an Appeal against the entire judgment and decree. He is apprehensive that the temporary stay of execution of 90 days issued by the trial court having lapsed, the Respondent is intent on executing the decree hence the instant Application.



3. It is his claim that he stands to suffer substantial and irreparable loss as he has settled on the suit land for the past 24 years and has considerably developed the land and built his home thereon.
4. He contends that should execution be allowed to proceed; his appeal shall be rendered nugatory hence the need to preserve the subject matter of the Appeal. He further stated that the Application was filed without undue delay and that he is ready and willing to abide by any fair and lawful conditions as the court may deem fit.
5. The application was opposed; the respondent filed a replying affidavit sworn on 07/2/2022. It is the respondent's claim that the decree is question is a negative order and thus the orders sought in the instant Application should not issue. It was therefore his position that he should not be prevented from enjoying the fruits of his judgment and urged the court to dismiss the Application.
6. I issued directions for the disposal of the Application by way of written submissions; however, on a perusal of the court record, I do note with concern that the parties herein did not file their respective submissions. Be that as it may, I will proceed to render my decision as hereunder.
7. It is my considered opinion that the sole issue arising for determination includes;
 - i. Whether an Order for Stay of Execution can issue against the judgment and decree dated 26/08/2022.
8. 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. See *Consolidated Marine. vs. Nampijja & another*, Civil App.No.93 of 1989 (Nairobi).
9. The principles guiding the grant of an Order of Stay of Execution are provided under Order 42 6(2) which states 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 first element to be proved is whether substantial loss may result to the Applicant unless stay of execution is granted. Substantial loss was explained by the court in *Kenya Shell Limited v Kibiru* [1986] KLR 410, where it was held as follows: -

“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 events. Substantial loss in its various forms, is the corner stone of both jurisdictions 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....” (See also *Silverstein v Chesoni* [2002] 1 KLR 867)
11. An applicant has a duty to demonstrate the loss he is likely to suffer in the event that the order for stay of execution sought is not granted. He must give sufficient cause to enable the court exercise its discretion in granting the orders sought in his favor. It is not sufficient to merely state that substantial loss may occasion without any explanation and demonstration of the said substantial loss.



12. The Applicant contends that he has been in occupation of the suit parcel for the past 24 years where he has built his home and considerably developed the said land. Thus, unless the orders sought are granted, he stands to be evicted from the suit land and be rendered homeless and destitute.
13. The respondent on the other hand maintained that the decree in question is a negative order incapable of execution and hence the orders sought should not issue.
14. On the issue of negative orders; the court in the case of *Western College of Arts and Applied Sciences v Oranga & others* [1976] KLR 63 held as follows: -

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs.....

The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.”
15. I have had the benefit of looking at the judgment of the trial court and I do note that the trial magistrate ordered the eviction of the defendant/applicant from the suit land within 90 days from the date of the judgment. This in my view cannot be said to be a negative order. The defendant/applicant was ordered to move out of the suit parcel and restrained from going back and committing further trespass. This in my view is a positive order capable of execution and/or enforcement.
16. Having settled the issue of negative orders as alleged by the respondent; I now wish to determine whether the applicant has adequately demonstrated the issue of substantial loss that he is likely to suffer should the orders sought not be granted.
17. It is not in dispute that the applicant herein is in occupation of the suit land where he contends that he has built his home and done several developments. I therefore find that should execution issue, then he stands to lose his home and be rendered homeless and destitute. This in my opinion, is a proper demonstration of substantial loss.
18. It is therefore my finding that the applicant has satisfactorily demonstrated the substantial loss that he is likely to suffer.
19. On the second and third requirements to be met; I do note that the Application herein was filed without undue delay and before the lapse of the temporary orders of stay of execution issued by the trial court. Further, at paragraph 13 of his supporting affidavit, the Applicant has demonstrated his readiness and willingness to abide by any lawful conditions to be set by the court.
20. The purpose of a Stay of Execution Order pending Appeal was discussed in *RWW v EKW* [2019] eKLR where the court stated as follows: -

“The purpose of an Application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the 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...”



21. In view of the foregoing; I find that the applicant has sufficiently proved all the three grounds as provided under Order 42 Rule 6(2) above, to the required threshold and is therefore entitled to the reliefs sought

Conclusion

22. In the upshot, I accordingly find that the Application dated November 21, 2022 is merited and I proceed to allow the same on the following terms: -
- a. An Order for Stay of Execution of the Decree and Judgment dated August 26, 2022 together with all consequential orders arising therefrom be and is hereby issued pending the hearing and determination of the Appeal.
 - b. The applicant to deposit a sum of Kshs. 30,000/= 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. Upon filing of the Record of Appeal, parties are hereby directed to file and exchange their respective written submissions within 28 days; each party to have 14 days to file their submissions. Matter to be fixed for Mention for purposes of fixing a judgment date.
 - 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 24TH DAY OF JANUARY, 2023.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

No appearance for the Appellant/ Applicant

Mr. Singei for the Respondent

Court Assistant- Tom Maurice/ Victor

