



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Yanda v Wakhwaku & 2 others (Environment & Land Case
72 of 2008) [2023] KEELC 379 (KLR) (24 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 379 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 72 OF 2008**

BN OLAO, J

JANUARY 24, 2023

BETWEEN

EDWARD WAFULA YANDA PLAINTIFF

AND

BOAZ MUSUCHA WAKHWAKU 1ST DEFENDANT

MARK MUFUMU WAKHWAKU 2ND DEFENDANT

MOSES MWANI WAKHWAKU 3RD DEFENDANT

RULING

1. Edward Wafula Yanda(the applicant herein) impleaded Boaz Musucha Wakhwaku, Mark Fumu Wakhwaku and Moses Mwami Wakhwaku(the 1st, 2nd and 3rd respondents herein) seeking against them the following orders with respect to the land parcel No Bokoli/Kituni/1796 (the suit land):

1. An order for eviction.
2. An order for injunction.
3. Mesne profits.
4. Costs
5. Such further orders that this court may deem fit to grant.

The respondents denied that the applicant was entitled to those orders and filed their own counter-claim seeking that they be declared to have acquired 15 acres out of the suit land by way of adverse possession.

2. Having heard the parties, this court delivered its judgment on June 28, 2022 in which it dismissed the applicant's suit and entered judgment for the respondents as per their counter-claim.



3. The applicant was aggrieved by that judgment and filed a notice of appeal on July 20, 2022.
4. Simultaneously with that notice of appeal, the applicant filed a notice of motion predicated upon the provisions of sections 1(A), 3, 3A and 63(e) of the Civil Procedure Act, order 22 rule 22(1) of the Civil Procedure Rules and articles 159(2) (d) of the Constitution. He seeks the following remedies:
 1. Spent
 2. That there be a stay of execution of the judgment and/or decree issued by this court on June 28, 2022 and all consequential orders thereto pending the hearing and determination of the intended appeal preferred by the applicant.
 3. That the costs of this application be provided for.The application is premised on the grounds set out therein and is also supported by the applicant's affidavit also dated July 20, 2022.
5. The gravamen of the application is that the applicant intends to appeal this court's judgment delivered on June 28, 2022 and has already filed a notice of appeal. That if execution of the decree herein proceeds, it will occasion him great prejudice and defeat the whole purpose of the appeal. That he is willing to abide with all the terms and conditions that this court will deem fit to grant and further, that the order of stay will not prejudice the respondents. That the application has been made in good faith without any inordinate delay.
6. Annexed to the application are the following documents:
 1. Notice of appeal dated July 7, 2022.
 2. Letter dated July 12, 2022 from the applicant's counsel requesting the Deputy Registrar to supply him with copies of the proceedings and judgment.
 3. Memorandum of appeal dated July 20, 2022.
 4. Copy of the judgment delivered on June 28, 2022.
7. When the application was placed before me on July 21, 2022, I directed that it be canvassed by way of written submissions. The respondents were to be served with the application and submissions within 14 days after which they would have 21 days to respond. The record shows that the firm of Situma & Company Advocates who are on record for the respondents were served with the application and submissions on August 5, 2022 by one Pius Wamalwa Kundu a process server of this court. However, by the time this matter was mentioned before the Deputy Registrar on August 25, 2022 to confirm compliance, counsel for the respondents had not filed any response to the application and neither did he attend court. The application is therefore un-opposed.
8. I have considered the application, the supporting affidavit and annexures as well as the submissions by Mr Wekesa counsel for the applicant.
9. The threshold for an order of stay of execution pending appeal is provided for under order 42 rule 6(1) and (2) of the Civil Procedure Rules in the following terms:

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 in considering an application for stay of execution pending appeal, the court must be satisfied that the following conditions have been met:

1. The applicant has shown sufficient cause.
2. The applicant has demonstrated that unless the order is granted, he may suffer substantial loss.
3. The application has been made without unreasonable delay.
4. Security has been offered.

In *Butt v Rent Restriction Tribunal* 1982 KLR, it was emphasized that the power of the court to grant or refuse an application for stay of execution pending appeal is a discretionary one. The general principle is that if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appellate court reverse the trial court's judgment. And in exercise its' discretion whether to grant or refuse the order of stay, the court will consider the circumstances of each case.

10. In *Visbham Ravji Halai v Thornton & Turpin* (1963) Ltd 1990 KLR 365 the Court of Appeal held that whereas it's jurisdiction to grant a stay pending appeal is unfettered, the jurisdiction of the High Court, and therefore this court, is fettered by the following conditions namely establishment of a sufficient cause, demonstration of substantial loss, approach the court without unreasonable delay and offer security. However, as was held By Platt Ag JA (as he then was) substantial loss is the cornerstone of such an application *Kenya Shell Ltd v Kibiru* 1986 KLR 410.
11. Guided by all the above, this court notes that the application for stay was filed on July 20, 2022 some three (3) weeks after the delivery of the judgment sought to be appealed. I do not consider that delay to be unreasonable. The applicant has also already filed a notice of appeal and has also for good measure annexed a memorandum of appeal. He has therefore shown sufficient cause. The applicant has also deponed in paragraph 11 of his supporting affidavit:

"11. "That I am willing to abide by any conditions this honourable court will grant."



As was stated in *Wycliffe Sikuku Walusaka v Philip Kaita Wekesa* 2020 eKLR:

“The offer of 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 as a decoy to obstruct and delay the Respondent’s right to enjoy the fruits of his judgment.”

The undertaking by the applicant that he is willing to abide by any conditions this honourable court will grant is in my view, sufficient satisfaction of the limb of offering security.

12. On the issue of substantial loss which is the cornerstone of such an application, the applicant has not specifically stated what loss he will suffer. He has nonetheless pleaded in paragraph 10 of his supporting affidavit that “any form of execution will render great hardship and loss” to him should his appeal succeed. The applicant could have done better by demonstrating what sort of “great hardship and loss” he is likely to suffer should the respondents execute their judgment. But again and as stated in *Butt v Rent Restriction Tribunal*(supra), this court retains the discretion to grant or refuse such an application and in so doing, it will consider each case on its own peculiar circumstances. In this case, I take into account firstly that the respondents did not file any reply to the application. They are also in occupation and possession of the 15 acres out of the suit land and there is no fear of any imminent threat of their eviction therefrom following the dismissal of the applicant’s claim. There is also nothing to suggest that the respondents will be prejudiced by any orders of stay other than the delay in having the said 15 acres registered in their names should the applicant’s appeal be dismissed. In any event, having waited since 1973 to obtain the orders of adverse possession which they have now done, surely they can wait a little longer while the Appellate Court makes its determination in this dispute. I am persuaded, in the circumstances, that this is a proper case in which to grant the order of stay of execution pending appeal.
13. Ultimately therefore and having considered all the issues herein, I allow the notice of motion dated July 20, 2022 on the following conditions:
 1. The applicant shall within 15 days of this ruling deposit with the Deputy Registrar of this court the original title deed to the land parcel No Bokoli/Kituni1796 together with duly executed documents to facilitate the transfer of 15 acres thereof into the names of Boaz Musucha Wakhwaku and Mark Mufumu Wakhwaku until the appeal is heard and determined and/or until further orders of this court.
 2. The applicant shall file his appeal within 60 days of this ruling.
 3. In default of any of the above, the stay orders herein shall automatically lapse and the respondents shall be at liberty to execute the decree.
 4. No orders as to costs.

BOAZ N. OLAO

JUDGE

24RD JANUARY, 2023.

RULING DATED, SIGNED AND DELIVERED AT BUSIA ELC ON THIS 24TH DAY OF JANUARY 2023 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE



24TH JANUARY, 2023.

