



REPUBLIC OF KENYA



KENYA LAW
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**Dayalji & another v Kisumu Municipal Council (Environment & Land
Case 3 of 2019) [2023] KEELC 22592 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 22592 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 3 OF 2019
A OMBWAYO, J
JANUARY 19, 2023**

BETWEEN

KISHOR DAYALJI 1ST PLAINTIFF

NILESH DAYALJI 2ND PLAINTIFF

AND

KISUMU MUNICIPAL COUNCIL DEFENDANT

RULING

1. The County Government of Kisumu has come to court for orders: -
 1. That this honorable court be pleased to issue an order for stay of the execution and/or enforcement of the judgment and decree of this Court dated and delivered on 18th March, 2021, in the original Kisumu ELC Case no 3 of 2019(Formerly Kisumu HCCC no 170 of 2010) – *Kishor Dayalji & Nilesb Dayalji v Kisumu Municipal Council*, pending the hearing and determination of the Applicants intended appeal to the Court of Appeal at Kisumu.
 2. That the costs of this application be provided for.
2. The application is based on grounds that this honorable court delivered its judgment in this matter on the 18th March, 2021 by granting a permanent injunction against the defendant, its servants or agents from dumping waste matter in the plaintiff's plot number Kisumu/Municipality Block9/126.
3. The plaintiff further granted a declaration that the defendants are in an unlawful occupation of private land and property and that the defendant's forceful entry and or continued unlawful use and occupation of the plaintiff's land and or property is unconstitutional. The court granted costs of the suit and the counterclaim to the plaintiffs.
4. The applicant, being aggrieved and dissatisfied with the entire judgment of this court delivered on 18th March, 2021 lodged an appropriate Notice of Appeal dated 29th March 2021 filed on 30th March,



- 2021 and served upon the respondents' Counsel on the same date, and is still awaiting for the said proceedings to enable them file the necessary appeal.
5. The applicant's contend that the intended appeal has high chances of success, raising serious issues of law, and will be rendered nugatory unless interim orders of stay of execution is granted immediately to stop the plaintiffs from proceedings with execution of the entire judgment and decree of this court.
 6. The urgency of the current applications is that the applicant is presently faced with imminent execution of the entire judgment and decree, including the enforcement of the order on permanent injunction granted and costs of the suit, whose effect would be to cause immense prejudice and inconvenience to the applicant in the conduct of its constitutional functions directly related to the suit parcel of land to the detriment of general public interest. The applicant shall also stand condemned without a legitimate opportunity to prosecute their intended appeal to its logical conclusion.
 7. According to the applicant, the respondents do not stand to suffer any loss or inconvenience which would not be adequately addressed by way of an appropriate order for costs in their favour if orders are issued preserving the *status quo* pending the intended appeal to achieve substantial and proportionate justice.
 8. It is only fair and just that the defendant/applicant is granted an opportunity to be heard based on its constitutional and statutory right of appeal as enshrined in sections 1A,1B and 66 of the [Civil Procedure Act](#), as read with Article 50 and Article 159 (2) (d) of the [Constitution](#) of Kenya and the overriding objective of the court to achieve a just, and proportionate determination of the instant dispute.
 9. This application has been made without any unreasonable delay, noting that the respondent's Bill of costs was only taxed and a ruling delivered on the same day on 14th April 2022 thereby paving way for the said respondents to proceed with execution of the judgment and decree of this honorable court in terms of Section 94 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya.
 10. The application ought to be allowed in the interest of justice.
 11. On the 19th July 2022 this court made directions that the respondent to file a response within 14 days whereas the applicant was ordered to file a supplementary affidavit with submissions within 7 days of service. The same appear not to have been complied with.
 12. Order 42 rule 6(2) of the [Civil Procedure Rules](#) 2010 provides:-
 6. Stay in case of appeal [Order 42, rule 6.]
 - (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.
 13. Judgement was delivered on 18th March 2021. The application was made on 20th May 2022 two months after the judgment. I do find the same to be an in-ordinate delay.
 14. Moreover, the applicant has not demonstrated any substantial loss to be suffered if restrained from dumping solid waste on the respondents' parcel of land. Furthermore the applicant has failed to demonstrate that the respondents will be unable to refund the money awarded as costs if they the



applicant succeeds on appeal. On the other hand, it is the courts view that the decree holder is likely to suffer substantial loss if the applicants are allowed to continue using the land to dump the said solid waste on the said land and ultimately they do not succeed on appeal. I do find that this application is not merited and is dismissed with costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU THIS 19TH DAY OF JANUARY 2023.

O OMBWAYO

JUDGE

