



**Epuret v Mamai & another (Environment & Land Case
180 of 2016) [2023] KEELC 255 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 255 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 180 OF 2016**

**BN OLAO, J
JANUARY 19, 2023**

BETWEEN

BONIFACE OJUMA EPURET PLAINTIFF

AND

WYCLIFFE MAMAI 1ST DEFENDANT

WILLIAM EMOJONG 2ND DEFENDANT

RULING

1. By a judgement dated February 9, 2022, Omollo, J decreed that the Estate of John Mamai represented by Wycliffe Mamai (the 1st defendant) has acquired by way of adverse possession a portion measuring 182 by 67 steps out of the land parcel No Teso/Amukura/1072 (the suit land) while William Emojong the 2nd defendant had similarly acquired by way of adverse possession a portion measuring 1 ½ acres out of the same parcel of land. Omollo, J awarded costs of the suit to the defendants.
2. Aggrieved by that judgment the plaintiff herein (Boniface Ojuma Epuret filed a notice of appeal dated February 15, 2022 and which was lodged herein on March 2, 2022.
3. The Plaintiff has now moved to this Court vide his notice of motion dated April 4, 2022 and premised under the provisions of Articles 38 and 154 (2) of the *Constitution*, sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* and order 42 rule 5 and 6 at the *Civil Procedure Rules* as well as all the other enabling provisions of the law. He seeks the following orders:
 1. Spent.
 2. Spent.
 3. That this honourable court be pleased to issue stay of execution of the orders issued herein on February 9, 2022 and all consequential decrees/orders issued pursuant thereto pending the hearing and determination of the intended appeal.



4. That costs of this application be provided for.
4. The application is the subject of this ruling and is predicated on the grounds set out therein and is also supported by the affidavit of the plaintiff dated April 4, 2022.
5. The gist of the application is that following the judgment herein, the 1st and 2nd defendants have obtained orders for the transfer to them of portions of land measuring 182 by 67 steps and 1½ acres respectively out of the suit land a decision which the plaintiff has appealed but is yet to be supplied with proceedings and judgement. That unless the execution of the judgment is stayed, the defendants may proceed to execute it to his detriment. That this application has been filed without unreasonable delay and this court has the jurisdiction to grant the orders sought.
6. Annexed to the application are the following documents:
 1. Memorandum of Appeal.
 2. Notice of Appeal dated February 15, 2022.
 3. Letter by counsel for the Plaintiff dated March 18, 2022 and addressed to the Deputy Registrar requesting to be supplied with copies of the proceedings herein.
7. The application is opposed and the 1st defendant has filed a replying affidavit dated May 20, 2022 in which he has deponed, inter alia, that the intended appeal is a delaying tactic with slim chances of succeeding. That as regards execution of costs, the same can be refunded should the appeal succeed and the plaintiff has not set out grounds for the Honourable Court to execute its discretion in his favour.
8. When the application was placed before Omollo, J on April 6, 2022, she directed that it be canvassed by way of written submissions to be highlighted on June 21, 2022. The highlighting of submissions appear not to have been done and although the parties did seek time to enter into some negotiations, that did not bear any fruits and when the matter was mentioned before me on November 24, 2022 following Omollo J's transfer to Nairobi ELC, the Court was informed that both parties had filed their submissions. I directed that the ruling would be delivered on January 19, 2023 by way of electronic mail.
9. I have considered the application, the rival affidavits and annexures thereto as well as the submissions filed by Mr Okeyo instructed by the firm of Okeyo Ochiel & Company Advocates for the plaintiff and by Mr Juma instructed by the firm of JV Juma & Company Advocates for the defendants.
10. Although the plaintiff also cites the provisions of articles 38 and 154(2) of the *Constitution*, these provisions are inapplicable since Article 38 provides for political rights while article 154(2) deals with the establishment of the office of Secretary to the Cabinet.
11. The relevant provision is order 42 rule 6(1) and (2) of the *Civil Procedure Rules* which provides as follows:

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- (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.

12. It is clear from the above that the plaintiff is required to satisfy the following conditions to warrant the grant of an order for stay of execution pending appeal:

1. Show sufficient cause.
2. Demonstrate that he will suffer substantial loss unless the orders for stay or execution pending appeal are granted.
3. File the application without unreasonable delay.
4. Offer security.

13. In the case of *Visbram Ravji Halai & another v Thornton & Turnpin (1963) Ltd* [1990] KLR 365, the Court of Appeal circumscribed the jurisdiction of this court in such an application by saying:

“Thus the superior court’s discretion 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.”

14. The fulcrum of an application for stay of execution pending appeal was set at by Plat Ag JA (as he then was) in *Kenya Shell Ltd v Benjamin Kibiru & another* [1986] KLR 410 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 event. Substantial loss in its various forms is the cornerstone at 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.” Emphasis mine.

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

“It is not sufficient by merely stating that the sum of Kshs 20,380 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted.”



15. Guided by the above precedents and others, I find that the plaintiff moved to this court on April 5, 2022 two (2) months after the delivery of the judgement on February 9, 2022. The record shows that the judgement was delivered in open court in presence of all the parties including Mr Okeyo counsel for the plaintiff. And although the plaintiff has deponed in paragraph 6 of his supporting affidavit, “that this application has been made without unreasonable delay,” I do not consider a delay of two (2) months to be reasonable taking into account that the judgment was delivered in open court in the presence of all the parties. Besides, there has been no attempt made to explain why it took the plaintiff two (2) months to file this application. The remedy sought is a discretionary one and the plaintiff was required to place before this court sufficient evidence to explain why it took him two (2) months to file this application a delay which is not only unreasonable in the circumstances but has not been explained.
16. The plaintiff has not also demonstrated what substantial loss he will suffer if the order for stay of execution pending appeal is not granted. Nowhere in his application has the plaintiff mentioned the substantial loss that he may suffer if this application is dismissed yet, as is now clear from *Kenya Shell Ltd v Benjamin Kibiru* (*supra*) such “substantial loss in it’s various forms is the cornerstone” of the jurisdiction for the grant of an order of stay of execution. The furthest that the plaintiff has gone in paragraph (c) of the grounds of the application is by stating:

(c) “That unless stay of execution orders are granted, the Respondents may proceed with execution against the Applicant to the detriment of the Applicants.”

And in paragraph five (5) of his supporting affidavit, the plaintiff states:

“5. That unless stay of execution orders are granted, the Respondents may proceed with execution against me to my detriment.”

The plaintiff does not however tell the court what “detriment” he will suffer or whether indeed it will be “substantial loss.” The word “substantial” is defined in Black’s Law Dictionary 10th Edition as;

“Considerable in amount or value; large in volume or number

Having permanence or near permanence; long lasting

And as was held in *Machira t/a Machira & Company Advocates v East African Standard (No 2)* [2002] 2 KLR 63.

“If the applicant cites as a ground substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given and the conscience of the Court looking at what will happen unless a suspension or stay is ordered must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order before disposal of the applicant’s business (eg, appeal or intended appeal).”

The court went on to add that “a court will not order a stay upon a mere vague speculation.” It is not therefore sufficient for the plaintiff herein to allege that if execution proceeds, he will suffer “detriment” without specifying what “detriment” he will suffer. The plaintiff has also failed to satisfy this crucial limb set out in order 42 rule 6(1) and (2) of the Civil Procedure Rules and which, as I have already stated above, is the “cornerstone” of such an application.

17. The plaintiff was also required to offer security for the due performance of any decree or order as may ultimately be binding on him. No such security has been offered nor even an averment that he is willing



to abide by any condition which this court may impose upon him for the grant of the order of stay. 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 plaintiff has also failed to satisfy this requirement of the law.

18. Counsel for the plaintiff has submitted, citing the case of *Ishmael Kagungi Thande v HFCK* Civil Application No 156 of 2006 that:

“We humbly submit that the Applicant’s intended appeal has chances of success as the court erred in law and in fact by totally failing to appreciate the evidence on record thus arriving at an erroneous finding that the Applicant has to transfer his land to the defendants.”

The case of *Ishmael Kagungi Thande v HFCK* (*supra*) does not aid the plaintiff at all because in that case, the Court of Appeal was dealing with an application filed before it vide rule 5(2) of the *Court of Appeal Rules* pending the hearing of an appeal from the decision of the High Court and where under that rule, the arguability of the appeal is among the principal considerations. In this case, and as is clear from the provisions of Order 42 rule 6(1) and (2) of the *Civil Procedure Rules*, it is not one of the considerations under that provision that the pending appeal is arguable. In any event, the intended appeal herein arises out of a judgement of Omollo J a judge of concurrent jurisdiction. This court cannot possibly be in a position to gauge the arguability or otherwise of that appeal which, if and when it is eventually prosecuted, will be handled by the Court of Appeal.

19. The only requirement which the plaintiff has satisfied is that he has shown sufficient cause having already filed a notice of appeal. However, he was required to satisfy the threshold set out in order 42 rule 6(1) and (2) of the *Civil Procedure Rules* by meeting all the four (4) requirements not only some of them.
20. The up-shot of the above is that the notice of motion dated April 4, 2022 is devoid of merit. It is dismissed with costs.

RULING DATED, SIGNED AND DELIVERED AT BUSIA ON THIS 19TH DAY OF JANUARY, 2023 BY WAY OF ELECTRONIC MAIL AS WAS ADVISED TO THE PARTIES ON 24TH NOVEMBER 2022.

BOAZ N OLAO

JUDGE

JANUARY 19, 2023.

