



**Omeno v Andajo & another (Environment & Land Case
3 of 2022) [2023] KEELC 87 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 87 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 3 OF 2022
AY KOROSS, J
JANUARY 19, 2023**

BETWEEN

PETER OKOTH OMENO PLAINTIFF

AND

AMBROSE OCHIDO ANDAJO 1ST DEFENDANT

BENEDICT ODHIAMBO OKECH 2ND DEFENDANT

RULING

1. By way of a notice of motion dated July 7, 2022 whereby this court was moved pursuant to the provisions of Section 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules, the defendants sought the following reliefs:
 - i. Spent;
 - ii. Spent;
 - iii. That the execution and proceedings to enforce the judgment and decree herein be stayed pending the outcome of the appeal; and
 - iv. That costs of the application be provided for.
2. The motion was premised on the grounds enumerated on the face of it and on the supporting affidavit that was deposed by the 2nd defendant sworn on July 7, 2022.
3. It was the 2nd defendant's case that, judgment was delivered on May 13, 2021 in which this court had declared that the plaintiff had acquired Bondo/Market/3 (hereinafter referred to as "the suit property") by adverse possession; they (defendants) were aggrieved by the judgment and had lodged an appeal against the decision; if execution was carried out, the appeal would be rendered nugatory and they would suffer irreparable loss that could not be refunded by the plaintiff; they had permanent buildings



on the suit property worth Ksh 4,600,000/- which the plaintiff had threatened to demolish; they were willing to abide by all reasonable conditions imposed by the court including depositing the title document of the suit property in court and that he (2nd defendant) had been bogged down with illness hence he had been unable to file the motion in good time.

Plaintiff's Case

4. In opposition to the motion, the plaintiff filed an undated but sworn replying Affidavit on August 30, 2022. He contended the motion was filed inordinately. It was his contention that the defendants had forcefully built on the suit property despite him cautioning them and that he was in occupation of the suit property and carried on business on it. Further, it was his position that the valuation that was filed together with the motion was a smokescreen that was intended to hoodwink the court and he urged the court to dismiss the motion with costs.

Parties' Submissions

5. As directed by the court, parties disposed of the motion by written submissions. Counsel for the defendants' M/s Anyango filed her written submissions dated September 30, 2022. Counsel submitted that the power to award stay of execution was premised on Order 42 Rule 6 of the [Civil Procedure Rules](#). She submitted that defendants needed to establish inter alia substantial loss would result if they were not awarded stay, the motion had been made without unreasonable delay and that security of costs had been tendered. Counsel cited the case of [Butt v Rent Restriction Tribunal](#) [1979] where the Court of Appeal stated that:

'If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings. It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory. The court will grant a stay where special circumstances of the case so require.'

6. It was Counsel's submission that the defendants had developed the suit property from which they earned income and if stay of execution was not granted, they stood to suffer loss and the appeal would be rendered nugatory. Counsel submitted that the appeal had high chances of success and she placed reliance on the case of [James Wangalwa & another v Agnes Naliaka Cheseto](#) [2012] eKLR where the court stated as follows:

'No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.'



7. Counsel submitted that the plaintiff had not put up a spirited fight in opposition to the motion to warrant the denial of orders sought and that the plaintiff had merely rehashed the issues that were before this court during trial.
8. Counsel for the plaintiff Mr Omondi filed his written submissions dated October 28, 2022. In a similar fashion as the defendants' counsel, he placed reliance on Order 42 Rule 6 of the Civil Procedure Rules and *James Wangalwa & another v Agnes Naliaka Cheseto (supra)* and this court need not rehash them. In addition, counsel placed reliance on the case of Antoine Ndiaye v African Virtual University [2015] eKLR where the court summarised the criteria for the grant of stay of execution as thus;

"[10] The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:

- a) The application is brought without undue delay;
- b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and
- c) 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. At (sic) Application was timely."

9. It was counsel's submission that there was inordinate delay in filing the motion in question and the defendants had not proffered reasons for the delay. Counsel stated that the onus was on the defendants to prove substantial loss; which they had not. Counsel submitted that the plaintiff was in possession of the suit property and he should be allowed to enjoy the fruits of his judgment.
10. Counsel submitted that the defendants had not offered to furnish security for costs and had therefore not satisfied the criteria for stay. In addition, Counsel stated that the defendants had not attached a memorandum of appeal to prove that they had an arguable case. On security, counsel cited the case of Arun C Sharma v Ashana Raikundalia T/A Raikundalia & Company Advocates & 2 others [2014] eKLR where the court stated that;

'the purpose of security needed under Order 42 is to guarantee the due performance of such decree or order as it may ultimately be binding on the Applicant. It is not to punish the judgment debtor.'

11. It was Counsel's submission that the motion lacked merit, was grossly inept, incompetent and bad in law and the same ought to be dismissed and that pursuant to the provisions of Section 27 of the Civil Procedure Act, the plaintiff should be awarded costs.

Analysis and Determination

12. Having carefully considered the motion, replying affidavit, rival submissions by the respective parties' counsel and the authorities relied upon including the applicable law, this court is of the considered view that the only issue falling for determination is whether the motion is merited.



13. My invitation to intervene on behalf of the defendants have been invoked by the provisions of Order 42 Rule 6 (2) of the [Civil Procedure Rules](#) which provides as follows:
- ‘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.’
14. I am in concurrence with the provisions of law and case law that have been cited by both counsels in their respective submissions and all I am left to do is to establish whether the conditions laid out in Order 42 Rule 6 of the [Civil Procedure Rules](#) and cited case law have been satisfied. As this court applies itself, it has the onus of ensuring that its discretion is carried out in manner that is judicious.
15. Though the defendants have contended that the replying affidavit was weak, the incidence of the legal burden of proof on matters which the defendants were to prove lay on them; the burden never shifted to the plaintiff.
16. 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 defendants, who are exercising their right of appeal, are safeguarded and the appeal if successful, is not rendered nugatory.
17. The 1st requirement the defendants had to meet was to establish that they would suffer substantial loss if stay was not granted. The defendants asserted that they had developments on the suit property that were worth Ksh 4,600,000/- whilst that plaintiff contended that he was in occupation.
18. Occupancy is a matter of fact and to establish the situation on the two-opposing positions, this court has to look no further than peruse the judgment. The claim before this court was on adverse possession and the court was satisfied that the plaintiff had met the ingredients of adverse possession which included uninterrupted occupation. On this basis, I am not satisfied that the defendants have established substantial loss.
19. On the 2nd requirement, the defendants were called to establish if the motion was filed timeously. It is noted that judgment was delivered on May 13, 2021 and the motion was filed on July 13, 2022; a period of a year and two months. Though the 2nd defendant had stated that he was ill and unable to sign the affidavit, he has not tendered any medical evidence to prove this assertion. He has equally not demonstrated the reason why his co-defendant could not file and prosecute the motion in his absence. This court is not satisfied by the reasons tendered by the defendants and I find that the motion was filed with inordinate delay.
20. Even though the defendants have graciously agreed to abide by such conditions as this court would impose including depositing a title document of the suit property, they had to meet the other two grounds. Had they met the 1st and 2nd criteria, I would not have hesitated but ordered them not to transact on the suit property and ordered them to deposit the sum of Kshs 478,000/- which is one half of the costs alluded to in the plaintiff’s bill of costs in a joint interest earning account of the advocates representing the parties. All the 3 ingredients of Order 42 Rule 6 of the [Civil Procedure Rules](#) had to be met and failure to meet any one ingredient was prone to make this court to dismiss the motion.
21. I must not hasten to add that in the absence of a memorandum of appeal, this court is not in a position to satisfy itself that there is an arguable appeal or not. It is the considered view of this court that having



rendered itself, the Court of Appeal would be the most appropriate forum for a party to advance such a ground.

22. For the reasons stated above, it is my ultimate finding that the motion is not merited and I hereby dismiss it. Pursuant to the provisions of Section 27 of the *Civil Procedure Act*, I award the costs of this motion to the plaintiff.

DELIVERED AND DATED AT SIAYA THIS 19TH DAY OF JANUARY 2023.

HON. A. Y. KOROSS

JUDGE

19/01/2023

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Mr. Omondi T. for the plaintiff

Ms. Anyango for the defendants

Court assistant: Ishmael Orwa

