



Konchella v Kendeya & another (Environment and Land Appeal E007 of 2022) [2023] KEELC 33 (KLR) (17 January 2023) (Ruling)

Neutral citation: [2023] KEELC 33 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL E007 OF 2022**

**EM WASHE, J
JANUARY 17, 2023**

BETWEEN

KIRUITA NKARIO KONCHELLA APPLICANT

AND

MENSA NAIGEYO KENDEYA 1ST RESPONDENT

BENKI OLE NAIGEYO 2ND RESPONDENT

RULING

1. The Appellant (hereinafter referred to as “the Applicant”) has filed the Notice of Motion Application dated 21st September 2022 (hereinafter referred to as “the present Application”) seeking for the following Orders; -
 - i. The application herein be certified urgent and the same be heard ex-parte in the first instance.
 - ii. Pending the hearing and determination of this application, the Honourable Court be pleased to grant an interim Order of stay of execution and/or implementation of the judgement and decree vide Kilgoris SPM ELC No. 123 Of 2018 dated 25th August 2022, together with all consequential orders and in particular, the limbs relating to permanent injunction restraining the Appellant/Applicant from dealing with L.R.NO. Transmara/enanyieny/881 and directed the Appellant/Applicant herein to transfer 10 acres and 2 acres respectively out of L.R.NO. Transmara/enanyieny/881 and 882 (hereinafter referred to as the suit properties.)
 - iii. Pending the hearing and determination of the instant application, the Honourable Court be pleased to grant an interim order of injunction restraining the Respondents be themselves, agents, servants and/or anyone claiming under the said Respondents, from entering upon, trespassing onto, cultivating , grazing, fencing, alienating, transacting, interfering with the Appellant’s/Applicant’s occupation, building on and/or otherwise taking possession of L.R



No.transmara/enanyieny/881 & 882 or any portion thereof (hereinafter referred to as “the suit properties”).

- iv. In the alternative and without prejudice to the foregoing, pending the hearing and determination of the instant application, the Honourable Court be pleased to order and/or direct the maintenance of status quo, currently obtaining over and in respect of L.R.no.transmara/enanyieny/881 & 882 and more particularly, barring and/or prohibiting the Respondents interfering with and/or in any other manner dealing with the suit properties, transacting, alienating, transferring, interfering with the Appellant’s/Applicant’s occupation on the L.R.NO. Transmara/enanyieny/881 & 882.
 - v. The Honourable Court be pleased to grant an order of stay of execution of the judgement and Decree vide Kilgoris SPM ELC No.123 OF 2018 dated 25th August 2022, together with all consequential proceedings and/or orders and in particular, the limbs relating to permanent injunction restraining the Appellant/Applicant from dealing with the L.r.no.transmara/enanyieny/881 and directing the Appellant/Applicant herein to transfer 10 Acres and 2 Acres respectively out of L.R.NO.transmara/enanyieny/881 & 882 pending the hearing and determination of the instant Appeal.
 - vi. The Honourable Court be pleased to grant an order of Temporary injunction restraining the Respondents by themselves, agents, servants and/or anyone claiming under the Respondents, from entering upon, trespassing onto, fencing, cultivating, grazing, interfering with the Appellant’s occupation, building on and/or otherwise taking possession of L.R.no.transmara/enanyieny/881 & 882 or any portion pending the hearing and determination of this Appeal.
 - vii. The OCS Kilgoris Police Station be ordered and/or directed to enforce and/or ensure compliance with the Court Orders herein.
 - viii. Costs of this Application be borne by the Respondents jointly and severally.
 - ix. Such further and/or other orders be made as the Court may deem fit and expedient.
2. The prayers mentioned hereinabove have been supported by the grounds contained in the body of the present application and further supported by the affidavit sworn by the Applicant on the 21st September 2022.
 3. In a summary, the substantive grounds in support of the prayers being sought in the present application are as follows; -
 - a. The Applicant herein is the registered owner of the two properties namely L.R.NO. Transmara/enanyieny/881 & 882 (hereinafter referred to as “the suit property”).
 - b. By virtue of being the registered owner of the suit properties, the Applicant is entitled to absolute and exclusive possession and ownership rights thereof.
 - c. Without any legal right and/or consent by the Applicant, the Respondents entered into and purported to occupy the property known as L.R.NO. Transmara/enanuieny/881.
 - d. As a result of the above illegal occupation by the Respondent, the Applicant instituted the proceedings known as Kilgoris SPM ELC 123 of 2018 against the Respondents seeking inter-alia a permanent injunction restraining any further interference of the suit properties.
 - e. In response, the Respondents filed a Defence and Counter-Claim claiming a purchasers’ interest in the suit properties having purchased the same in the year 1991 and therefore



sought for a cancellation of the Applicant's titles and thereafter fresh titles to be issued to the Respondents.

- f. Upon hearing of the suit known as Kilgoris SPM ELC No. 123 of 2018, the Trial Court dismissed the Applicant's suit and upheld the Counter-Claim filed by the Respondents.
 - g. The Applicant being aggrieved with the above judgment has now filed an Appeal against the judgement pronounced on the 25th August 2022 in Kilgoris SPM ELC No. 123 of 2018.
 - h. The Applicant submits that the Appeal filed on the 22nd September 2022 is an arguable one with a high chance of success for the following reasons; -The Respondents claim emanating from the purported Agreement for Sale entered in the year 1991 was time barred. The suit properties are agricultural properties which require the procuring of consents from the Land Control Board to be able to lawfully transact on the same. The Applicants have been in occupation of the suit properties for the last 70 years to the exclusion of the Respondents together with his family thereof.
 - i. The Applicant's submission is that based on the above grounds, this Court do issue a Stay of execution against the judgement of the Trial Court pronounced on the 25th of August 2022 in the proceedings known as Kilgoris SPM ELC No. 123 of 2018 pending the hearing and determination of the Appeal filed in this Court.
 - j. The Applicant further informed the Court that if this Court does not grant the stay of execution pending the hearing and determination of this Appeal, the Respondent will most likely implement the Orders of the Trial Court which will dispose him of the suit properties as well as cancel his ownership thereby causing him irreparable loss and harm.
4. The present Application was duly served on the Respondents who opposed the same by filing a Replying Affidavit sworn by the 1st Respondent on the 30th of September 2022.
 5. The Respondents substantive grounds for opposing the present applicant can be summarised as follows; -
 - a. First and foremost, the Respondents submitted that the Applicant can not be granted a prayer of injunction after a substantive judgement has been pronounced in a suit.
 - b. The Applicants herein have not attached and/or placed before this Court a copy of the Decree that is about to be executed emanating from the judgement pronounced on the 25th August 2022 and therefore, this present Applicant is premature and misconceived.
 - c. The Applicants have not demonstrated or placed before the Court any substantive evidence to show substantive loss to enable the Court issue any stay of execution pending the hearing and determination of the Appeal.
 - d. The Applicants have failed to specify the kind of security that they are willing to deposit in Court as a condition of being granted the stay of execution.
 - e. Lastly is that the Applicants are attempting to argue the issues which should be canvassed during the hearing of the substantive Appeal.
 - f. Consequently, the Respondents prayer was that this Court do dismiss the present Application with costs.



6. The Court directed that the present application be canvassed by way of written submission and in compliance thereof, the Applicant filed their submission on 27th October 2022 while the Respondent filed their submissions on 14th November 2022.
7. The Applicant in the present Application has invoked the provisions of Order 42 Rules 6(1) (2) and (6) of the Civil Procedure Rules, Section 25,26 and 28 of the Land Registration Act, No.3 of 2012, Section 150 of the Land Act, No. 6 of 2012 and Sections 13(7), 19 and 26 of the Environment & Land Court Act, 2011.
8. The substantive provisions that align with the orders sought in the present application are Order 42 Rules 6 (1)(2) and (6).
9. The provisions of Order 42 and in particular Rules 6(2) give guidelines in the manner in which Courts should exercise their discretion in considering an application for stay of Decrees pending Appeal.
10. However, looking at the prayers contained in the present Application, the Court takes note that Prayers No.1,2,3 and 4 have since lapsed and/or overtaken by events.
11. The substantive prayers for consideration in this Ruling are No. 5 and 6 in present Application.
12. Consequently therefore, the issues for determination can now be outlined as follows; -
 Issue No. A- Is The Applicant Entitled To A Stay Of Execution Of The Judgement Pronounced On 25th August 2022 Pending The Hearing & Determination Of The Pending Appeal?
 Issue No. B- Is The Applicant Entitled To An Order Of Temporary Injunction Against The Respondents Against The Occupation And Use Of The Suit Properties Known As L.R.NO. Transmara/enanyeny/881 & 882 Pending The Hearing And Determination Of The Appeal?
13. The Court having identified the issues for determination as outlined hereinabove, the same are hereby discussed below.
 Issue No. A- Is The Applicant Entitled To A Stay Of Execution Of The Judgement Pronounced On 25th August 2022 Pending The Hearing & Determination Of The Pending Appeal?
14. Section 42 Rule 6(2) of the Civil Procedure Rules, 2010 provides 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 orders as may ultimately be binding on him has been given by the applicant.”
15. In the case of Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997, the Court held as follows; -
 “Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice



by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

16. Similarly, in the case of *Butt-versus- Rent Restriction Tribunal*(1979) eKLR, the Court of Appeal stated as follows; -

“The Court of Appeal has categorically stated that in exercise of its discretion, the power should be exercised in such a way as not to prevent an appeal, if there is no overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory, a judge should not refuse stay if there are good grounds for granting it merely because a better remedy may become available to the applicant at the end of the proceedings ; the court should consider special circumstances of the case and unique requirements;”

17. Turning back to the present Application, it is clear that the Applicant is aggrieved by the judgement of the Trial Court pronounced on the 25th of August 2022 in the proceedings known as Kilgoris SPM ELC No. 123 of 2018.
18. The Applicant has already lodged the appropriate Memorandum of Appeal dated 21st September 2022.
19. In addition to the Memorandum of Appeal dated 21st September 2022, the present Application was filed on the 26th of September 2022.
20. Indeed, the present application has been duly filed without any undue delay which is one of the principles for consideration when handling an application for stay of execution pending Appeal.
21. The second principle is whether there is any substantial loss which will be caused to the Applicant if the stay of execution is not granted pending appeal.
22. The judgement pronounced on the 25th of August 2022 dismissed the Applicant's Plaintiff and allowed the Respondent's Counter-Claim.
23. The Counter- Claim by the Respondents was as follows; -



- a. A permanent injunction does issue, restraining the Plaintiff herein by himself, his servants, agents or anyone acting under him or under his authority, or otherwise whosoever from dealing with parcel of land Transmara/enanyieny/881 situated in Narok County.
 - b. An order directing the Plaintiff herein to transfer 10 acres comprised in land parcel no. Transmara/enanyieny/881 and transfer two extra acres to be curved from parcel NO. Transmara/enaenyieny/882 to the Defendant.
 - c. Costs of the suit and interest at court rates.
24. The granting of the Respondents Counter-Claim in the judgement pronounced on the 25th of August 2022 by the Trial Court in Kilgoris SPM ELC No. 123 of 2018 is in the interpretation of this Court going to alter both the occupation and ownership of the suit properties known as L.R.NO. Transmara/enaenyieny/881 and 882.
 25. The Applicant has stated that he was born and lived on the suit properties for the last 70 years, a fact that the Respondents have not disputed in their Replying Affidavit.
 26. It is therefore the Court's considered view that the implementation of the Orders issued in the judgement pronounced on the 25th of August 2022 by the Trial Court in Kilgoris SPM ELC No.123 of 2018 will substantially alter the Applicant's livelihood and/or right to property before the right to Appeal provided under *the Constitution* of Kenya 2010 is exhausted.
 27. In conclusion therefore, the Court is satisfied that the Applicant stands to suffer substantive loss if the stay of execution is not granted pending the hearing and determination of the Appeal.
 28. On the issue of security, the Court takes note that this is a land dispute and it would be difficult to make orders of security in terms of monetary value.
 29. However, the Court has a duty to ensure that the Applicant during the pendency of the Appeal is not allowed to alienate, put up new developments and/or undertake activities so as to make it difficult for the Respondents to realise the fruits of their judgement if the Appeal is dismissed.
- Issue No. B- Is The Applicant Entitled To An Order of Temporary Injunction Against The Respondents Against The Occupation And Use of The Suit Properties Known As L.R.NO. Transmara/enanyieny/881 & 882 Pending The Hearing And Determination Of The Appeal?
30. This second issue really relies on the outcome for the first issue discussed hereinabove.
 31. The Court having made a finding that indeed there will be substantive loss to the Applicant if the orders issued in the judgement pronounced on 25th August 2022 by the Trial Court in Kilgoris SPM ELC No.123 of 2018 are implemented, it would also be necessary that the Respondents be prohibited from interfering with the quite occupation of the Applicants.
 32. It is therefore the Court's considered view the Applicant should be allowed to use and/or occupy the suit properties pending the hearing and determination of the Appeal filed herein.
 33. In conclusion, this Court hereby makes the following Orders as regards the Application dated 21st September 2022; -
 - A. An Order of Stay of Execution be and is hereby granted against the execution of the judgement and Decree vide Kilgoris SPM ELC NO.123 of 2018 dated 25th August 2022, together with all consequential proceedings and/or orders and in particular, the limbs relating to permanent injunction restraining the Appellant/Applicant from dealing with the L.R.no.transmara/



enanyieny/881 and directing the Appellant/Applicant herein to transfer 10 Acres and 2 Acres respectively out of L.R.NO.transmara/enanyieny/881 & 882 pending the hearing and determination of the instant Appeal.

- B. The Honourable Court be pleased to grant an order of Temporary injunction restraining the Respondents by themselves, agents, servants and/or anyone claiming under the Respondents, from entering upon, trespassing onto, fencing, cultivating, grazing, interfering with the Appellant's occupation, building on and/or otherwise taking possession of L.R.NO.transmara/enanyieny/881 & 882 or any portion pending the hearing and determination of this Appeal.
- C. Costs will abide the outcome of the substantive Appeal.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 17TH JANUARY 2023.

EMMANUEL.M.WASHE

JUDGE

IN THE PRESENCE OF:

Advocates For The Applicant: Ochwal For Applicant

Advocates For The Respondents: Ayienda For Respondent

