



**Meisashi v Ole Nairenke (Environment & Land Case 12 of 2021)
[2023] KEELC 15813 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15813 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND CASE 12 OF 2021
EM WASHE, J
FEBRUARY 23, 2023
FORMERLY ELC CASE NO. 50 OF 2019 (O.S)
IN THE MATTER OF: LIMITATION OF ACTIONS ACT, CAP
22 LAWS OF KENYA
AND
IN THE MATTER OF A CLAIM OF ADVERSE POSSESSION
PURSUANT TO SECTION 38 OF THE LIMITATION OF
ACTIONS ACT, CAP 22 LAWS OF KENYA**

BETWEEN

DAVID OLTIMPAN MEISASHI PLAINTIFF

AND

FRANCIS L OLE NAIRENKE DEFENDANT

RULING

1. The plaintiff (hereinafter referred to as “the applicant”) filed a notice of motion application dated November 8, 2022 (hereinafter referred to as “the present application”) seeking for the following Orders; -
 - a. The Application herein be certified urgent and the same be heard ex-parte in the first instance. (spent)
 - b. Pending the hearing and determination of this application, the honourable court be pleased to grant interim orders of stay of execution of the court, staying the implementation and/or enforcement of the court judgement/decree issued by this honourable court on the 26th day of September 2022. (spent)



- c. The honourable court be pleased to grant an order of stay of execution and/or enforcement of judgement/decree issued in favour of the defendant/respondent by this honourable court, pending hearing and determination of the intended appeal to the Court of Appeal commenced vide the notice of appeal dated the 4th day of October 2022.
 - d. That in the alternative, the honourable court be pleased to grant an order of status quo pending the hearing and determination of the intended appeal to the Court of Appeal by the applicants.
 - e. Costs of this application be provided for.
 - f. Such other and/or further orders as this honourable court may deem just and expedient be granted.
2. The grounds in support are contained in the present application as well as the affidavit of the applicant sworn on the November 8, 2022.
 3. The summary of these grounds can be outlined as follows; -
 - i. The court herein pronounced its judgement in relation to the originating summons dated October 7, 2019 on the 26th of September 2022.
 - ii. The applicant being dissatisfied with the judgement of this court pronounced on the September 26, 2022 has filed a notice of appeal in the Court of Appeal.
 - iii. The respondent on the other hand is in the process of extracting a decree of the judgement pronounced on the 26th of September 2022 with a view of executing the same.
 - iv. If the stay orders sought herein are not stayed, then the Respondents will proceed to enforce the said Decree against the Applicants and thereby cause serious hardship to the Applicant as well as render the intended Appeal nugatory.
 - v. The Applicant further submits that the right to appeal is a constitutional right under Article 50 of the *Constitution of Kenya* should not be infringed.
 - vi. Further, the Applicant has committed himself to pay whatever security the court will direct to be held pending the hearing and determination of the intended Appeal.
 4. The present Application was served on the Respondent who filed Grounds of Opposition dated November 21, 2022.
 5. The grounds pleaded in the Grounds of Opposition dated November 21, 2022 can also be summarised as follows; -
 - i. The Applicant has not demonstrated the nature or kind of loss or harm he is likely to suffer is the stay orders are not granted.
 - ii. The Application does not meet the threshold set in the provisions of Order 42 Rule 6 of the *Civil Procedure Rules, 2010*.
 - iii. The present Application is meant to delay, obstruct and or defeat the due process of execution.
 - iv. The present Application deprives the Respondent the fruits of a successful litigation.
 6. The Court thereafter directed the present Application to be canvassed by way of written submissions.



7. The Applicant filed his submissions on the 2nd of December 2022 while the Respondent filed his on the December 29, 2022.
8. The issue for determination in the present Application is whether or not the Applicant should be granted a Stay of Execution pending the hearing and determination of his intended Appeal.
9. Order 42 Rule 6 (1), (2) and (7) of the [Civil Procedure Rules, 2010](#) gives the Court discretion to either grant a stay pending Appeal or not.
10. A party aggrieved by a decision has a right under Article 50 of the [Kenyan Constitution](#) to file an appeal against the said decision.
11. This is one of the forms in which every citizen enjoys the avenues of a fair hearing within the confines of the law.
12. However, the Kenyan Courts have generally discussed the principles which a Court should always consider while dealing with applications for stay pending appeal under Order 42 Rule 6 (1) (2) and (7).
13. In the case of NBI Milimani HCCC No 795 of 1997 Between [Samvir Trustee Limited-versus-Guardian Bank Limited](#) the Court opined 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.”



14. In another case of *Machira T/A Machira & Co Advocates vs East African Standard (No 2)* [2002] KLR 63 the Court expressed itself as follows; -

“ to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

15. Turning to the present Application and the judgement pronounced on the September 26, 2022, the Court confirms that the Orders contained therein direct the Applicant to demolish, vacate and/or hand over vacant possession of the portion he occupies within the property known as LR No Transmara/Enaenyeny/411 within Ninety (90) Days from the date of the said judgement.
16. The failure to comply with the order of vacant possession outlined hereinabove would result to an eviction order being issued forthwith.
17. At the time of delivering this ruling, the 90 days period provided in the judgement pronounced on the 26th of September 2022 had since lapsed and indeed there is a livelihood that the Respondent will execute the Decree anytime from now.
18. The net-effect of executing the judgement of September 26, 2022 will be demolish, remove and/or completely dislodge the Applicant from the portion which is a subject matter of the intended Appeal.
19. In other words, the intended Appeal will now be rendered nugatory as the Applicants will no longer be in a position to own the structures and/or other assets which are currently on the portion under litigation and subject to the intended Appeal.
20. Similarly, the vacating and/or eviction of the Applicant will require a search of a new place to stay and/or construct new structures which in this current economic situation will cause substantial financial expenses and, in the event, the intended Appeal will succeed, then the Applicant will have suffered irreparable loss.
21. The scenarios above persuade the Court herein to the view that indeed in the interest of justice and for the preservation of the subject matter of the intended Appeal, then it would only be reasonable that a stay of execution be issued pending the hearing and determination of the intended Appeal.
22. The Applicant however is required to deposit some security especially towards the costs of the litigation in the Trial Court as well as the intended Appeal to be filed in the Court of Appeal.
23. To this end, the Court hereby directs the Applicant to deposit a sum of Kshs 300,000/- within the next Sixty (60) days to be held as a security pending the heading and determination of the intended Appeal.
24. In conclusion therefore, the Court hereby makes the following orders as appertains the application dated November 8, 2022; -



1. An order of stay of execution be and is hereby issued against the judgement pronounced on the 26th of september 2022 and the subsequent decree thereof pending the hearing and determination of the intended appeal filed by the plaintiff/applicant.
2. The plaintiff/applicant is hereby ordered to deposit a sum of Kshs 300,000/- within the next 60 days as security of costs pending the hearing & determination of the intended appeal failure to which the stay orders issued hereinabove shall lapse.
3. The costs of this application will abide the outcome of the substantive appeal.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON THE 23RD FEBRUARY 2023.

EMMANUEL.M.WASHE

JUDGE

In the presence of:

Court assistant: Ngeno

Advocates for the Applicant: Wakiaga

Advocates for the Respondent: Mireri

