



Tanui (Suing as the administrator of the Estate of Kaptingei Chemwor (Deceased) & 40 others ((Suing as the administrator of the Estate of Kaptingei Chemwor (Deceased)) v Chelugui & another & 4 others ((Sued as administrators of the Estate of Norah Kimngeny Chelugui (Deceased)) (Environment & Land Case 404 of 2013) [2023] KEELC 897 (KLR) (17 February 2023) (Ruling)

Neutral citation: [2023] KEELC 897 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 404 OF 2013**

**JM ONYANGO, J
FEBRUARY 17, 2023**

BETWEEN

**RAEL JEBET TANUI & 40 OTHERS PLAINTIFF
(SUING AS THE ADMINISTRATOR OF THE ESTATE OF KAPTINGEI
CHEMWOR (DECEASED)**

AND

**SUSAN CHERUBET CHELUGUI & DAVID CHELUGUI (SUED AS
ADMINISTRATORS OF THE ESTATE OF NORAH KIMNGENY CHELUGUI
(DECEASED) 1ST DEFENDANT
STANLEY ARAP METTO 2ND DEFENDANT
RAMJID D VEKARIA 3RD DEFENDANT
ATTORNEY GENERAL 4TH DEFENDANT
NATHANIEL K LAGAT 5TH DEFENDANT
(SUED AS ADMINISTRATORS OF THE ESTATE OF NORAH KIMNGENY
CHELUGUI (DECEASED)**

RULING

1. What is before me are two applications dated May 18, 2022 and May 24, 2022. The one dated May 18, 2022 which was filed by the 3rd Defendant/Respondent seeks a stay of execution pending appeal as well as a temporary injunction and/or maintenance of status quo pending the hearing and determination of the appeal.



2. The second one dated May 24, 2022 seeks to preserve the status quo by restraining the respondents either jointly or severally from evicting, harassing, threatening the Applicant or demolishing and/or damaging their permanent structures, schools and churches standing on the suit property I.r no. Eldoret Municipality/block 15/1816 pending the conclusion of the intended appeal to the Court of Appeal.
3. The applications are premised on the grounds set out on the face of the applications and the supporting affidavits of Rael Jebet Tanui and Hesbon Otieno Acholla sworn on his own behalf and on behalf of the 3rd -41st Plaintiffs on May 18, 2022 and May 24, 2022 respectively together with the Further affidavits sworn by Hesbon Oteino Achola on September 20, 2022 and the one of Rael Jebet Tanui sworn on September 29, 2022.
4. The gist of the applications is that the judgment in this matter was delivered on March 31, 2022 dismissing the plaintiff's suit and ordering the plaintiffs to vacate the suit property within 60 days, failing which they would be evicted. The applicants being dissatisfied with the judgment have since filed a Notice of Appeal and applied for typed proceedings and judgment. The applicants fear that they may be forcefully evicted and their permanent structures including residences, schools, churches, businesses and medical facilities demolished. Their lives and that of their children are likely to be disrupted and they will suffer mental anguish and substantial loss of investments worth millions of shillings. It is their contention that that if they are evicted, their appeal shall be rendered nugatory.
5. In her affidavit in support of the application dated 18.5.22, the 1st plaintiff depones that she is the administrator of the original plaintiff who had sold land to the other plaintiffs who have been in occupation for more than 30 years and are now facing imminent eviction. She points out that she is duty –bound to safeguard the interests of the estate of the deceased and if execution is carried out, the estate of the deceased shall suffer irreparable loss.
6. In his Further Affidavit Hesbon has annexed a copy of the valuation report in respect of the suit property indicating that it is valued at Kshs 120,000,000/= as a basis for determining the amount to be deposited as security for costs.
7. In her Further Affidavit Rael explains that the file was in Kisumu for a while after the judgment and that is why she was not able to file the application earlier. She also depones that the substantial loss that the estate of the deceased will suffer includes having to pay the taxed costs yet the appeal shall be pending.
8. The applications were resisted by the 1st and 3rd respondents through the Replying affidavits of David Chelugui sworn on June 7, 2022 and Ramji Vekania sworn on July 4, 2022. The 3rd Defendant also filed Grounds of Opposition dated 9.6.2022.
9. The applications were canvassed by way of written submissions with brief oral highlights. Written submissions were filed on behalf of the 1st Plaintiff/Applicant, 2nd – 41st Plaintiffs/ Applicants, 1st Defendant/Respondent and 3rd Defendant/Respondent.

1st Plaintiff's Submissions

10. While highlighting her written submissions learned counsel for the 1st Applicant relied on her written submissions and stated that the judgment had ordered for the eviction of the plaintiffs within 60 days and there was imminent danger of the plaintiffs being evicted from land parcel number Eldoret Municipality/block/15/1816 which they have been occupying since 1986.
11. She submitted that the applicants had satisfied the requirements for stay of execution pending appeal under Order 42 Rule 6 of the *Civil Procedure Rules*. On the question of timeliness, she submitted



that they had filed the Notice of Appeal within 14 days and the application for stay within 48 days after delivery of judgment. Regarding substantial loss, it was her contention that the Applicants had demonstrated that they would suffer substantial loss as they have permanent homes, churches, schools and business premises on the suit property.

12. She submitted that the 1st Plaintiff was willing to abide by any security as the court would direct. She added that the 3rd defendant/ respondent had never been in occupation of the suit property and all he had was the title deed and he would therefore not suffer any prejudice.

2nd-41st Plaintiffs' Submissions

13. Learned counsel for the 2nd -41st Plaintiffs relied on the Supporting and Further Affidavits of Hesbon Otieno Ochola, the chairman of the Group of residents on the suit property. He adopted the submissions of the 1st plaintiff and relied on the cases of *James Wangalwa & Another v Agnes Naliaka & Another* (2012) eKLR and *RWW v AKW* (2019)eKLR where the court addressed the issue of substantial loss.
14. He submitted that there was need to maintain the status quo so as not to render the appeal nugatory. He submitted that such an order would ensure that the prevailing circumstances were maintained. He relied on the case of *Republic v National Environment Tribunal & Palm Homes Ltd* (2013) eKLR in which Odunga J (as he then was) emphasized the need to maintain the status quo pending appeal. He also cited the case of *TSS Spinning & Weaving Co. Ltd v NIC Bank Limited & Another* (2020 eKLR where the court ordered that the status quo be maintained pending appeal. He emphasized that the Practice Directions of the Environment and Land Court provided for maintenance of status quo.
15. Regarding the question of security for costs, he submitted that the Applicants were willing to furnish such security as the court would direct. He was of the view that the valuation report filed by the 2nd-41st Plaintiffs which gave the value of the suit property as Kshs120,000,000/= was more accurate than the one filed by the 3rd Respondent which valued the suit property at Kshs 180,000,000/= as the plaintiffs are the ones who developed the suit property.

1st Respondents' Submissions

16. Learned counsel for the 1st Defendant relied on the Replying Affidavit sworn by David Chelugui, the Administrator of the estate of the 1st Defendant. He submitted that in his judgment Justice Ombwayo noted that the suit property was virtually vacant save for encroachments including a church and an academy.
17. He contended that the issue of substantial loss that would be suffered by the 2nd -41st Plaintiffs did not arise as the said Plaintiffs were not in occupation of the suit property.
18. On the question of delay, he was of the view that there was inordinate delay as the applications were filed 49 and 54 days after judgment respectively, without any satisfactory explanation. He relied on the case of *David Ogega Ngangi & Another v Alfred Matoya Chweya* (2020) eKLR where the court noted that even though the delay was only 20 days, the same had not been sufficiently explained.

3rd Defendant's Submissions

19. In his submissions learned counsel for the 3rd Defendant contended that the application dated May 24, 2022 was incompetent as the orders sought were for status quo and not stay pending appeal. He was of the view that the two prayers were distinguishable as an order for status quo is heard as an interlocutory



application before judgment as the court becomes functus officio after judgment. He relied on the case of *Rhoda Mongina Ondoro & 2 Others v Johnstone Nyanyuki Menge* (2020) eKLR.

20. With regard to the 1st Plaintiff's application dated May 18, 2022 he submitted that the same did not meet the requirements for stay pending appeal under Order 42 Rule 6 of the *Civil Procedure Rules*. It was his contention that the 1st Applicant had not demonstrated that she would suffer substantial loss. Secondly, the court could not grant the orders sought by the 1st Applicant as she was seeking to stay of a negative order since her case had been dismissed. He relied on the case of *John Osoro Ombese v John Kumenda* (2020)eKLR where the court declined to grant a stay after dismissal of the applicant's case.
21. He submitted that the Applicant had failed to demonstrate that she would suffer substantial loss as she was not in occupation of the suit property, having sold the same to the 2nd-41st plaintiffs and all she was required to do was pay the costs of the suit.
22. Counsel further submitted that the 2nd-41st plaintiffs had failed to demonstrate that they were in occupation of the suit property. He referred to the survey report filed by the Plaintiffs which indicated that only the 15th Plaintiff (Hesbon Otieno Ochola) was in occupation of the suit property. He added that he personally attended the site visit by the court to the suit property and the court observed that there was minimal encroachment on parcel 1816. On the question of delay, he submitted that the application were filed 6 days before the lapse of the 60 days within which they had been ordered to vacate, which in his view was late. Regarding security for costs, he submitted that the applicants had not furnished security for costs as required under order 42 rule 6 of *Civil Procedure Rules*.
23. He submitted that in considering an application for stay pending appeal the court should balance the interests of the parties. He submitted that that the 3rd Defendant had been paying land rent and rates since 1991 without using the suit property. It was his contention that if the court was inclined to grant the applications, the court should consider the value of the suit property in determining the amount payable as security for costs.

Issues for Determination

24. Having considered the applications, rival affidavits and the submissions of the parties the only issue for determination is whether the orders for stay pending appeal or maintenance of status quo should be granted.

Analysis and Determination

25. The principles guiding the courts while considering an application for stay pending appeal are now settled. The substantive provision for grant of stay pending appeal is to be found under Order 42 Rule 6 of the *Civil Procedure Rules*.

Order 42 Rule 6 provides in part as follows: -

6.(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 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.

(3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

26. It is therefore necessary to consider whether the applicants have met the above conditions for stay pending appeal.
27. On the question of substantial loss, the plaintiffs were at pains to demonstrate that they would suffer substantial loss. What emerged from the affidavits and submissions is that the 1st Plaintiff does not reside on the suit property as she sold it to the 2nd to the 41st plaintiffs. It also emerged that some of plaintiffs reside on the suit property and they have a church, school and some businesses thereon. In his judgment, Justice Ombwayo noted that when the court visited the suit property in the presence of the surveyor, it was ascertained that there were people settled on parcel number 1816 and there was wheat grown in the disputed area. Since those plaintiffs who have been staying on the suit property have been in occupation for more than 30 years there is no doubt that their eviction before their appeal is heard and determined would occasion them substantial loss. In this respect the argument that the dismissal of the plaintiff's suit is a negative order cannot hold as the dismissal automatically means that the plaintiffs must be evicted.
28. On the question of delay, I am satisfied that the delay of 49 and 54 days respectively has been sufficiently explained by the fact that the court file was in Kisumu for a while after the judgment was delivered as the judge had been transferred. In any event, the plaintiffs had been given a grace period of 60 days and they filed their applications before the expiry of the 60 -day period.
29. With regard to security for costs, I note that the applicants have expressed their willingness to furnish security for costs and both parties have submitted valuation reports as a basis for determining the amount to be deposited as security for costs.
30. As was held in the case of *Housing Finance Company of Kenya v Sharok Kber Mohamed Ali Hirji & another* [2015] eKLR the court needs to balance between the rights of the parties as well as guard against interference in instances where an appeal would be rendered nugatory.
31. In the instant case even though the 3rd Defendant is entitled to the fruits of his judgment, it would be futile to proceed with the appeal if the plaintiffs were evicted before the appeal is heard and determined. The 2nd – 41st Plaintiffs have submitted a valuation report indicating that the suit property is valued at Kshs 120,000,000 while the 3rd Defendant's valuation report gives a value of Kshs 180,000,000. Either way the suit property is valued at not less than Kshs 120,000,000. In the interest of justice, I grant the application for stay pending appeal on condition that that the plaintiffs furnish security in the sum of Kshs 10,000,000/= within 30 days failing which the order for stay shall automatically lapse.



Having granted the order for stay pending appeal I do not find it necessary to consider the issue of status quo.

The costs of both applications shall be borne by the Applicants.

DATED, SIGNED AND DELIVERED VIRTUALLY VIA MS TEAMS THIS 17TH DAY OF FEBRUARY 2023.

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J.M ONYANGO

JUDGE

In the Presence of;

- 1. Mr. Githaiga for the 2nd -41st Plaintiffs and holding brief for**
- 2. Miss Koech for the 1st Plaintiff**
- 3. Miss Tirop for Mr. Aseso for the 3rd Defendant**
- 4. Court Assistant: Mr. Oniala**

