



REPUBLIC OF KENYA



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**Roh v Bhachu; Sang (Interested Party) (Environment and Land Appeal
5 of 2019) [2023] KEELC 812 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 812 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND APPEAL 5 OF 2019
MC OUNDO, J
FEBRUARY 16, 2023**

BETWEEN

JOSHUA KIBE ROH APPELLANT

AND

AVTAR SINGH BHACHU RESPONDENT

AND

SAMWEL KIPRONO SANG INTERESTED PARTY

*(Being an appeal from the Judgment of Hon. S.K Mookua,
Chief Magistrate in CMELC Case No. 19 of 2018)*

RULING

1. Before me for determination is a Notice of Motion dated 10th February 2021 brought under the provisions of Order 42 Rule 6 the Civil Procedure Rules, Sections 1A, 1B, and 3A of the Civil Procedure Act, and Article 159 of the Constitution where the Applicant seeks for orders of stay of execution of the judgement and Decree issued on the 30th July 2020 pending the hearing and determination of his intended Appeal lodged in the Court of Appeal in Nakuru Civil Appeal No.E13 of 2020.
2. That he is apprehensive that the Respondents might imminently levy the execution of the impugned judgment ultimately evicting him from the suit property thus occasioning him substantial loss.
3. The Application is supported by the grounds set on its face as well as on the sworn affidavit of Joshua Kibe Roh the Applicant herein, sworn on the 10th February 2021.
4. The said Application was opposed vide the Respondents' Grounds of Opposition dated the 16th March 2021 for reasons that the orders sought by the Applicant in the instant application could not be granted by this court in view of the fact that the Record of Appeal had already been lodged in the Court



of Appeal. That secondly, the Application had been filed eight (8) months after of delivery of the Judgment without any explanation of the delay. That the appeal filed did not raise serious and arguable grounds with likelihood of success hence application lacked merit, was baseless and a non-starter.

5. By an order of the court of 21st November 2022, parties had been directed to dispose of the Application by way of written submission wherein only the Applicant complied.

Applicant's submissions

6. The Applicant based his submission one issue for determination to wit;
 - i. Whether the Applicant is entitled to an order of stay of execution of the judgment delivered on 30th July, 2020
7. In addressing this question, the Applicant relied on the provisions of Order 42 Rule 6(*sic*) to submit that he had met the conditions set out therein, namely that, he stood to suffer substantial loss in the event that stay was not granted, that he was ready and willing to deposit such security as may be required or any condition that may be imposed by the court and, that the Application had not been made after unreasonable delay.
8. On the issue of substantial loss, the Appellant submitted that the suit property was his sole abode and thus were he to be evicted in implementation of the impugned judgment, he would be rendered destitute and stood to suffer substantial loss. Reliance was placed on the findings in *Peter Ngugi Kainamia & Another v Tabitha Wambui Munyao & 7 others* [2020] eKLR.
9. The Applicant further submitted that he had duly offered to submit such security as may be required by the court for the due performance of the decree herein. In any event, he had already deposited security of Kshs 150,000/= upon launching this appeal *vide* receipt No. 0483244 annexed as "JKR" 3 in his application, which security had not been spent and which he pleaded with the court to consider while addressing this issue.
10. That the delay of about six months had been occasioned by his Counsel's illness and therefore the court to consider the delay as having been duly explained hence reasonable. That in conclusion, the Applicant had met all the conditions precedent to warrant grant of the orders sought in the instant application.

Determination

11. I have considered the Applicant's unopposed Application for stay of execution of the court's judgement and decree of 30th July 2020, pending the hearing and determination of his intended Appeal. I have also considered the reasons given for seeking that the orders be granted as sought in the said Application.
12. The Applicant contends that he would suffer substantial loss if stay was not granted, and the appeal was a success because he was apprehensive that the Respondent would evict him and his family from the suit land which was their only abode.
13. It is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that a Respondent who fails to file his submissions on an application as ordered by the court is deemed as a party who has failed to oppose the application and therefor that application is deemed as unopposed.



The Defendant having failed to file his submissions as ordered by the court, I shall proceed to consider the undefended Application on its merit.

14. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the [Civil Procedure Rules](#) which stipulates as follows:

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.

15. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the [Civil Procedure Rules](#) to which :

- i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
- ii. The application is brought without undue delay and
- iii. 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.

16. I find issues for determination arising therein namely:

- i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
- ii. What orders this Court should make

17. For the Applicant to succeed in the present application the onus was on him to satisfy the conditions as set down under Order 42 Rule 6 of the [Civil Procedure Rules](#). Indeed the purpose of stay of execution is to preserve the substratum of the case. In the case of Consolidated *Marine v Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi), the Court held that:-

“The purpose of the application for stay of execution pending Appeal is to preserve the subject matter in dispute so that the right of the Appellant who is exercising his undoubted right of Appeal are safeguarded and the Appeal if successful is not rendered nugatory”.



18. The Applicant's contention is that if the stay orders were not granted, he stood to suffer substantial loss in that he would be evicted. Indeed in the case of *Charles Wahome Getbi v Angela Wairimu Getbi* [2008] eKLR, the Court of Appeal held that;

“...The Applicant does not claim that the Respondent intends to sell the portion of land in dispute and that it will not be in existence by the time the appeal is determined.....

.....In the circumstances of this case, the Applicant would suffer substantial loss rendering the appeal, if successful nugatory only if the suit land is disposed of before the appeal is determined. The Applicant does not claim that the suit land would be disposed of. The Applicant has not in our view, established that unless stay is granted, he will suffer substantial loss and that the appeal, if successful would be rendered nugatory.”

19. The Court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the Appeal so that his Appeal is not rendered nugatory, and the interest of the Respondent who is seeking to enjoy the fruits of his judgment. In other words the Court should not only consider the interest of the Applicant but to consider also, in all fairness, the interest of the Respondent who could be denied the fruits of his Judgment. In this matter the Applicant has neither claimed that the suit land would be disposed of or even annexed any evidence to depict that Respondent intends to sell the portion of land in dispute. In any event should his Appeal be successful the he can always take back possession of the suit land.

20. In an Application of this nature, the Applicant was bound to show what damages he stood to suffer if the order for stay was not granted since by granting stay it would mean that the status quo should remain as it were before the judgment and that would be denying a successful litigant of the fruits of his judgment which should not be done if the Applicant has not given to the Court sufficient cause to enable it to exercise its discretion in granting the order of stay. See *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410

21. I find in the present circumstance, that the Applicant has not established sufficient cause to warrant the court to exercise its discretion in his favour and therefore this ground must fail.

22. On the second condition, I find that the Application herein filed the application on the 10th February 2021 wherein the impugned judgment had been delivered on the 30th July 2020 which was a period of six (6) months. His explanation was that his counsel had been unwell, but no supporting documentary evidence had been annexed in support therein. I find that the delay period of the unexplained six months was inordinate in the circumstance.

23. On the last condition as to provision of security, I find that Order 42 Rule 6 (2) (b) of the *Civil Procedure Rules* stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. The Applicant has already furnished security of 150,000/- as security for due performance of such decree or order as may ultimately be binding on him.

24. The grant of stay remains a discretionary order that must also take into account the fact that the Court ought not to make a practice of denying a successful litigant the fruits of their judgment.

25. In the persuasive decision, the court in the case of *Loice Khachendi Onyango v Alex Inyang'u & Another* [2017] eKLR held that;

“The relief is discretionary but the discretion must be exercised 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. In determining whether sufficient cause has been shown, the Court should be guided by the three pre-requisites provided under Order 42 Rule 6 of the Civil Procedure Rules. Firstly, the Application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicants unless stay of execution is granted; and thirdly 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....”

26. I have considered whether there exists any special circumstances which can sway my discretion to either grant or refuse the application for stay wherein I have also balanced the scales of justice which in my view would not render the Appeal nugatory while at the same time ensuring that the successful party is not impeded from the enjoyment of the fruits of his judgment. The two conditions necessary for grant of Orders for stay of execution to issue under Order 42 Rule 6(2) of the Civil Procedure Rules having not been met by the Applicant and further in regard to the provisions of the law as stipulated under Section 3A of the Civil Procedure Act, I am not inclined to grant the Order of stay of execution so sought.

27. The Application dated 10th February 2021 is herein dismissed with costs.

DATED AND DELIVERED AT KERICHO VIA TEAMS MICROSOFT THIS 16TH DAY OF FEBRUARY 2023

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

