



REPUBLIC OF KENYA



**KENYA LAW**

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**Nyang'akamar v Tolim (Environment and Land Appeal 11 of 2021)  
[2023] KEELC 832 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 832 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT AND LAND APPEAL 11 OF 2021  
FO NYAGAKA, J  
FEBRUARY 15, 2023**

**BETWEEN**

**PTUNGU NYANG'AKAMAR ..... APPELLANT**

**AND**

**JOEL LOYWAA TOLIM ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 14/11/2022 the Appellant, moved this Court to determine brought it under Order 42 Rule 6, Order 22 Rule 22 and Order 51 Rule 1 of the [Civil Procedure Rules](#) and, Sections 3A and 63(e) of the [Civil Procedure Act](#), Chapter 21 of the Laws of Kenya and (what he referred to as) all enabling provisions of the law. He filed it on 16/11/2022. Therein he sought the following orders:-
  1. ...spent
  2. ...spent
  3. That the Respondent either by himself or through his agent Leonard Pkior Chemosol as well as their families, servants and/or their employees are hereby directed to vacate land parcel West Pokot/Kapsait/795 forthwith failing which they are forcefully evicted under the supervision of the OCS, Kapenguria Police Station and thereafter they be restrained from re-entering the suit property pending the hearing and determination of this Appeal.
  4. That there be temporary orders of stay of the judgment and decree issued on 14<sup>th</sup> September, 2021 by Hon. S. K. Mutai (S.P.M.) in Kapenguria Senior Principal Magistrate's Court E & L Case No. 12 of 2019 and all consequential pending the hearing and determination of this Appeal.
  5. That the costs of this Application be borne by the Respondent.



2. The Application was based on 26 grounds listed as a. - z. and supported by an Affidavit sworn by the Appellant, Ptungu Nyang'akamar on 14/11/2022. The grounds were that Hon. S.K. Mutai had delivered a judgment in Kapenguria SPMC E & L Case No. 12 of 2019 dismissing the same and allowing the Defendant's Counterclaim both with costs; that the Appellant immediately preferred the instant appeal; that on 14/10/2022 the Senior Principal Magistrate in the lower Court dismissed an application for stay of execution of the judgment; the effect of the judgment was to have the Respondent registered as proprietor of land parcel No. West Pokot/Kapsaita/795 which is registered in the Appellant's name; although the Appellant subdivided land parcel No. West Pokot/Kapsaita/246 into two (2) parcels, giving rise to the instant suit land and West Pokot/Kapsaita/794 he remained registered as absolute owner thereof; the alleged agreement dated 28/10/2007 is in respect of five (5) acres while the other one dated 19/07/2008 is for one (1) acre while the Respondent claims to have brought seven (7) acres which is a misrepresentation hence intended to mislead the Court about an additional acre even if the sale could be authenticated but which is not true; the purported agreement has no legal basis since the land was being sold by one Haron Plaka who had no interest on the property; the said Haron Plaka is the son of the Appellant and had no authority to sell the father's land; there was no privity of contract between the Appellant and the Respondent; the alleged vendor was not enjoined in the suit before the trial Court either as a Third Party or Interested Party hence the Counterclaim was bad in law ab initio for misjoinder and/or non-joinder; that it was a falsehood that the Respondent entered onto the parcel of land immediately upon the purchase since from the pleadings, the witnesses' statements and testimony of the Area Assistant-Chief it was on 19/04/2019 he invaded the land, with a gang; the Respondent misled the Court that he had a home on the land yet the person who had build therein is one Leonard Pkikor Chemosol who is a stranger to the Appellant and is not a party to the proceedings; the Respondent resides and has his home on Charuei Village, Chesubet Sublocation which is over seven kilometres away; the agreement was a creation of the Respondent and it was not attested by an advocate or other authorized public official as admitted by DW-3 in evidence that he was the one who drafted it and the parties indicated as being present were illiterate hence the need of attestation by a third party; the Respondent having settled a stranger on the land has intention of occupying and cultivating it and eventually disposing of it; there was need for the Court to intervene; the land was agricultural land and there was no Land Control Board consent sought and granted hence the transaction was null and void; the trial Magistrate erred in law in dismissing the Appellant's case and allowing the Respondent's Counterclaim and the decision was against the weight of the evidence; the appeal had high chances of success; that the two parcels of land namely, West Pokot/Kapsaita/794 and 795 are being occupied by strangers thus causing substantial loss to the Appellant; if the Court did not order a stay of execution, the appeal would be rendered nugatory; the appellant is a polygynist with four wives and all need a place to occupy and cultivate for upkeep hence the continued use and occupation of the land by strangers is greatly prejudicial to him; that the Appellant was willing to abide by any conditions this Court would grant; in any event the title deed was produced as an Exhibit and would serve as security; that he had satisfied the conditions for the grant of the orders sought; no prejudice could be suffered by the Respondent and interest and fairness demanded that the application be granted.
3. The Application was opposed. The Respondent swore a Replying Affidavit on 25/11/2022 and filed it on 28/11/2022. He deponed that the Application was fundamentally defective, "limping" and incurable in law, made out of bad taste and not in good faith. He deponed that judgment was entered in his favour as stated by the Appellant; he purchased the suit land measuring 7 acres on 28/10/2007 and 19/07/2008 and immediately went into possession thereof. He annexed copies of the agreements of sale and marked them as JLT1 (a) and (b). He deponed that he has extensively developed the parcel of land and had been living on them the last 14 years. He swore that he was living on the parcel of



land before the suit in the trial Court was instituted hence it was false that he intended to forcefully occupy the land. He annexed a bundle of photographs and marked them as JLT2 a, b, c, and d to show the developments referred to. He stated that he initially entered into land parcel No. West Pokot/Kapsaita/246 before it was subdivided. Further, he deponed that the appellant himself was present when the land sale agreement was made and he witnessed it hence cannot go back on it and claim to be illiterate yet he never challenged its contents or lodged any fraud case against him.

4. He deponed further that he together with the Appellant went to the Land Control Board and obtained a consent to subdivide the land and finally the subdivision resulted into two parcels of land, namely, West Pokot/Kapsaita/794 and 795 of which he was to transfer to him parcel No. 795. After the mutation and subdivision being successful the Appellant started being evasive to the Respondent and it prompted the Respondent to place a caution on the parcel of land which he had purchased. He annexed and marked JLT5 a copy of official search and notice of caution he placed on the land.
5. He deponed further that the Respondent and his household had been on occupation of the parcel of land that became No. 794 while he occupied the one that became 795. He denied that the said Leonard Pkikor Chemosol was in occupation of the land since it was he who was on it since 2007. He deponed that if indeed the said Leonard Pkikor was in occupation, the Appellant could have sued him and not the Respondent. He then swore that the Appellant was indirectly seeking orders of eviction of him through the use of the said Leonard Pkikor Chemosol who was not a party in the suit.
6. The Application was disposed of by way written submissions. The Appellant had not filed his as at 13/02/2023 when the Court was preparing this Ruling while the Respondent filed his on 24/01/2023. However, since submissions are only arguments made by parties to try and convince the Court to decide the issues before it in their favour and not evidence as was stated by the Court of Appeal in Daniel Toroitich Arap Moi -v- Mwangi Stephen Muriithi & Another [2014] eKLR, the absence of the Applicant's will not prejudice the decision of this Application on merits.
7. The Respondent began his submissions by restating the orders sought herein. He then submitted that the Application was brought under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules whose content he reproduced. He then summed it that the Appellant ought to demonstrate that he made the Application without undue delay, he will suffer substantial loss if the order is not granted, and he provides security as the Court may direct.
8. On substantial loss, the Respondent submitted that the Applicant had not demonstrated any since he was not in occupation of the suit land. He argued that the land being immovable property, it would still be available to him should the appeal succeed, and the assertions that he would dispose of it was only speculative. Regarding security, the Respondent argued that the Appellant had not given any and the argument by him that the original title deed having been produced in evidence could as well act as security was not tenable in law since that was evidence and disputed to be his.
9. Regarding the eviction of Leonard Pkikor Chemosol he submitted that the said person was not in occupation of the suit land, parcel No. 795. Again, he argued that the said person was not a Respondent in this matter but a complete stranger to him hence if he was in occupation the Appellant could have sued him in the trial Court. He said the order against the said Leonard would be issued in vain and against a stranger to the instant proceedings.

### **Determination**

10. This Court has had the opportunity to carefully read through the Application, the affidavits in support and opposition, the submissions on record, the case law relied on and the provisions cited. Two issues lie before me for determination. These are:



- a. Whether the Applicant has met the conditions for grant of an order for stay of execution pending appeal;
  - b. Who to bear the costs of this Application.
11. The parties herein, particularly the Respondent made more of their arguments to lean to the determination of the merits of the appeal herein rather than the application for stay of execution pending the Appeal. This Court will determine the Application along the parameters of an application for stay of execution.

**a. Whether the Applicant has met the conditions for grant of an order for stay of execution pending appeal**

12. The principles governing the grant of an order for stay of execution pending appeal are now settled. Before delving into them, this Court notes that the Applicant cited a number of provisions whose relevance of otherwise he did not comment. It is worth repeating that parties would do well to always submit on the law they rely on so as to guide the Court in directing its mind to the issues posed by them. To simply cite provisions of law and leave them to the ‘digestion’ of the Court is at best to demonstrate lack of unpreparedness on the part of the party, and at worst, laziness.
13. That said, the Application was brought under a number of Sections 3A the *Civil Procedure Act* which deals with the inherent powers of the Court and 63(e) which provides for Supplemental Proceedings. Each of these provisions have specific situations to apply to and not the one of stay of execution pending appeal. The phrase “all other enabling provisions of law” is at best a meaningless and hollow line inserted into an Application by many a party to waste the Court’s energy to ponder over what may have been intended to be relied on. I would advise all and sundry to depart from this phrase of lackadaisical life.
14. The procedural law governing applications for stay of execution pending appeal is Order 42 Rule 6 1(2) of the *Civil Procedure Rules*. The Rule stipulates as follows:-
- “(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. The practice of law is strewn with a plethora of decisions of Court of the highest level, the Supreme Court, the next level, the Court of Appeal, and this and courts of equal status which have discussed substantially the issue of stay of execution. This Court will be guided by one such decision of the Court of Appeal. In the case of *Halal & Another -vs- Thornton & Turpin [1963] Ltd* [1990] eKLR the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag. JA) held that:
- “...thus the superior court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must of course, be made without unreasonable delay.”



In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in the case of *Hassan Guyo Wakalo -vs- Straman EA Ltd* (2013) as follows:

“In addition, the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory.”

These two principles go hand in hand and failure to prove one dislodges the other.”

16. From the decision above, it is clear that the power for grant of an order of stay of execution is a discretionary one which must be exercised judiciously. It means courts exercising it must act within the confines of the law and not capriciously. On that point I am guided further by the Court of Appeal decision in *COI & Another v Chief Magistrate Ukunda Law Courts & 4 Others* [2018] eKLR.
17. For a Court to be said to have acted judiciously it means that the Court considered the law and all facts attendant thereto and applied them onto the law and made a reasoned judgment. In Brian A. Garner (2019). *Black's Law Dictionary*, 11th Edition, Thompson Reuters, MN, the term “judiciously” is defined to mean “to use sound judgment.” It means that the Court ought to apply its mind to the circumstances of the case and the law as any person vested with reason would and demonstrate it in its determination that it did so.
18. Having said that, an order for stay of execution pending appeal is meant to serve a specific purpose. That aim is to preserve the subject matter of the appeal so much so that in then if the Appeal were to succeed it would not be an exercise in futility or as often said, an academic exercise. It is to help sustain the subject of the appeal so that the grain is subsisting when at the end of the day the appeal succeeds. If the subject is not maintained before the determination of the appeal then the appeal would be nugatory or meaningless. In *RWW vs EKW* (2019) eKLR, a persuasive decision, Lady Justice A. Ongeri held:

“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 appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”
19. Bearing the above in mind, the law is clear that the fact that an appeal has been preferred against a decision is not an automatic entitlement to a stay of execution. The Court has the discretion to grant or refuse it depending on the circumstances of the case. In so doing, the Court must, on the one hand, balance the interests of both the successful party in litigation so as not to unnecessarily bar him/her from enjoying the fruits of the judgment or ruling, and those of the Appellant whose appeal may succeed and be rendered nugatory if stay of execution is not granted, on the other. So much so that, a successful party may be said to already have a bird in hand and it should not be unnecessarily taken away from him by the grant of a stay of execution while the one in the bush is kept at bay while being sought. Therefore, that must be done where there is clear demonstration that the appeal has high chances of success and is not a frivolous one. That is where there is need for the Applicant to demonstrate very clearly that the holder of the bird was not necessarily entitled to have it in hand in the first place. And even where that is shown, the Appellant should be ready and willing to give security for the due performance of the decree. Coming to the Court of equity (as the application is an equitable one) empty handed will entitle the Court to refuse the Application.



20. In the instant Application, a judgment was given in favour of the Respondent. It was appealed against, to this Court. This Court is supposed to determine whether or not that Applicant has made out a case for the grant of the order of stay. It has to apply its discretion judiciously on the facts and the law in the case. Sequentially, the Court has to answer the hurdles the Applicant has to pass. First, is there a pending appeal against the judgment? The answer to that is, yes there is. Therefore, to that extent the Applicant is on the right track. That does not entitle the Applicant to an automatic stay of execution. But he has to demonstrate that the Appeal has high chances of success and not a frivolous one. I have looked at the memorandum of appeal filed here. It raised substantial grounds which are arguable. But the Applicant has to satisfy other conditions. Thus, second, is whether the Applicant will suffer substantial loss or not. Substantial loss goes beyond mere assertions that the Applicant will suffer the sort of loss he refers to. He must demonstrate to the Court that there is a likelihood of the loss and what kind of loss in a quantifiable manner it is in order to justify the grant of the orders sort.
21. In Warsame, J (as he then was) in *Samvir Trustee Limited vs. Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997 where he expressed as follows:-
- “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...”
22. About the same principle, in *Kenya Shell Limited vs. Kibiru* [1986] KLR 410, at page 416 Platt, Ag.JA (as he then was) expressed himself as follows:
- “It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.
23. In the same matter, Gachuhi, Ag.JA (as he then was) at 417 held:
- “It is not sufficient by merely stating that the sum of Kshs.20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”
24. The Applicant deponed that if the stay was not granted the parcels of land being occupied by strangers and him being denied access thereto would amount to substantial loss. He also deponed that there was a risk of his land being transferred to a stranger, to his detriment. But if the record is anything to go by, the facts as presented before the trial Court were that the Respondent has been in occupation of the land during the pendency of the suit herein, and perhaps from earlier times. He has built on it, he entered into an agreement to purchase the same and these were the ones in controversy at the trial and in this appeal. It has not been demonstrated how that will occasion substantial loss to the Applicant. Should the title be transferred before the appeal is heard and determined, the transfer can be cancelled.



In any event the record of appeal has been prepared and served and the original court file of the trial Court availed to this Court hence the appeal can be heard within the shortest time possible.

25. As to whether the Application has been brought without delay, this Court notes that judgment was delivered on 14/09/2021. An Application for stay thereof was filed in the trial Court and was determined on 14/10/2022. The instant application was brought on 14/11/2022. I find that the delay in bringing the Application had a basis and it was therefore not long.

**b. Who to bear the costs of this Application**

26. On the basis of the analysis above I find that the Application has merits. I grant only prayer four (4) of the Application to the effect of there being issued an order of stay of the execution of the decree issued on 14/09/2021 by the Hon. S. K. Mutai (SPM) in Kapenguria SPMC E & L Case No. 12 of 2019 and all consequential orders pending the hearing and determination of the instant appeal, on condition that the same be mentioned before this Court on 28/02/2022 at 8.30 a.m. for giving Directions and fixing a date for hearing. As long as the above condition is met, or this Court gives further orders thereto, the order of stay of execution shall be in force.

27. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 15<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**HON. DR.IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE**

