



**Harambe v Shiundu (Environment & Land Case 3 of 2013)
[2023] KEELC 753 (KLR) (14 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 753 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 3 OF 2013
DO OHUNGO, J
FEBRUARY 14, 2023**

BETWEEN

ALICE AYUYA HARAMBE PLAINTIFF

AND

FREDRICK A SHIUNDU DEFENDANT

RULING

1. Judgment was delivered in this matter on December 7, 2021, in favour of the plaintiff, as follows:
 1. The defendant, his relatives, servants and/or agents to vacate parcel of land No Isukha/Shirere/4914 within the next 6 (six) months from the date of this judgement and in default eviction order to issue forthwith.
 2. Each party to bear its own costs.
2. By notice of motion dated June 21, 2022, the defendant now seeks the following orders:
 1. [Spent]
 2. [Spent]
 3. That pending the hearing and determination of an intended appeal to the Court of Appeal challenging the decision and judgment of this honourable court an order of stay of execution of the said judgment and or decree be issued by this honourable court.
 4. That costs of this application be provided for.
3. The application is supported by an affidavit sworn by the defendant on June 21, 2022. He deposed that being dissatisfied with the judgment, he filed a notice of appeal and sought



certified proceedings and judgment for purposes of the appeal. He added that he faces eviction imminent risk of eviction and that he will suffer irreparable loss if stay of execution is not granted since he has no other home apart from the suit property.

4. The plaintiff opposed the application through a replying affidavit in which she deposed that there has been inordinate delay in bringing the application since the defendant was given 6 months to peacefully vacate the suit property. She urged the court to dismiss the application with costs.
5. The application was canvassed through written submissions. The plaintiff/respondent opted not to file any submissions and instead relied entirely on the replying affidavit.
6. The applicant submitted that evicting him before the Court of Appeal hears him on the appeal will not only render the appeal nugatory but also cause him irreparable harm. He further submitted that his case falls squarely within the provisions of order 42 rule 6 (2) of the [*Civil Procedure Rules*](#). He therefore urged the court to grant the orders sought.
7. I have considered the application, the affidavits, and the submissions. The court's jurisdiction to grant stay of execution pending appeal is guided by order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010 which provides 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.

8. An applicant seeking stay of execution pending appeal must demonstrate that substantial loss will result to him if stay is not granted, and that the application has been made without



unreasonable delay. The applicant is further required to give such security as the court may order for the due performance of the decree. See *Kenya Power & Lighting Co. Ltd v Kigaita Ngare Unduthu & 36 others [2020] eKLR* and *Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR*.

9. The judgment was delivered on December 7, 2021, in the presence of counsel for the defendant. Thus, the defendant was fully aware of the of the six months stipulated in the judgment. Yet in the face of the timelines given in the judgment, the defendant waited until June 21, 2022, after the expiry of the period given in the judgment, to apply for stay. I find that there has been unreasonable delay. In those circumstances, any eviction that ensues cannot be said to be substantial loss but merely the inevitable consequence of the applicant's lackadaisical approach to the matter.
10. Order 42 rule 6 and (2) of the Civil Procedure Rules makes it clear that no order for stay of execution shall be made unless the conditions under subrule (2) (a) and (2) (b) are satisfied. Besides establishing substantial loss, an applicant must provide security for the due performance of such decree. The applicant herein has maintained a loud silence on the issue of security.
11. Stay of execution is a discretionary remedy. A party who seeks a discretionary relief bears an extra obligation to demonstrate equitable conduct. I am not persuaded that the applicant has acted in a manner that makes him worthy of exercise of discretion.
12. I find no merit in notice of motion dated June 21, 2022 and I therefore dismiss it with costs to the plaintiff.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 14TH DAY OF FEBRUARY 2023.

DO OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the plaintiff/respondent

Ms Kegehi for the defendant/applicant

Court Assistant: E Juma

