



**Trustees of Kiplombe Kaptich School v Registered Trustees of  
Catholic Diocese of Eldoret & another (Environment and Land Appeal  
31 of 2022) [2023] KEELC 843 (KLR) (14 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 843 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT AND LAND APPEAL 31 OF 2022  
JM ONYANGO, J  
FEBRUARY 14, 2023**

**BETWEEN**

**THE TRUSTEES OF KIPLOMBE KAPTICH SCHOOL ..... APPELLANT**

**AND**

**REGISTERED TRUSTEES OF CATHOLIC DIOCESE OF  
ELDORET ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the appellant’s application dated September 26, 2022 seeking the following orders:
  - a. Spent
  - b. That pending the hearing and determination of this application inter partes, this honourable court be pleased to stay the decree/judgment /orders issued on October 1, 2021 an all the execution proceedings emanating therefrom.
  - c. That this honourable court be pleased to stay the implementation of the decree/judgment / orders issued on October 1, 2021 and all the execution proceedings herein pending the hearing of the intended appeal.
  - d. The costs of this application be in the cause.
2. The application is based on the grounds stated on the face of the notice of motion and the supporting affidavit of Fredrick Kiptarus Kemei sworn on the September 26, 2022. The application was prompted by the ruling delivered on September 7, 2022 in which the court dismissed the applicant’s application dated July 7, 2022 seeking a review and setting aside of the judgment and also seeking leave to be



enjoined in Eldoret CM ELC Case No E593 of 2021. The applicant has preferred an appeal against the said ruling. It is the applicant's contention that the judgment in ELC Petition No 2 of 2015 *Diocese of Eldoret Trustees v National Land Commission & 2 Others* extinguished any rights the 1<sup>st</sup> Respondent may have had over parcel No Kiplombe/block 5/Kaptich/70, including any claim for compensation of the land or any fixtures thereon. He further deponed that any other interpretation of the said judgment would cause injustice to the applicant as it is the applicant who carried out the developments on the suit property and she is therefore entitled to the suit property.

3. The application is opposed by the 1<sup>st</sup> respondent through the replying affidavit of William Kipkemboi Koskey sworn on the October 12, 2022. In the said affidavit he deposes that the 1<sup>st</sup> respondent was formerly registered as the proprietor of parcel No Kiplombe/block 5/kaptich/70 via certificate of title issued in 2002 which was cancelled by the court vide ELC Petition No 2 of 2015 *Diocese of Eldoret Trustees v National Land Commission & 2 Others*. He averred the said property is currently registered in the name of the Principal Secretary, Ministry of Education in trust for Craig Secondary School. It is his further contention that pursuant to the decree issued in CM ELC Case No 593 of 2021, the 1<sup>st</sup> respondent is entitled to compensation in the sum of Kshs 3,205,533/= for the developments she carried out on the land as it was compulsorily acquired when she was in possession thereof. He avers that the court declined to make the applicant a party to the suit as there was no cause of action against her. He deposes that the applicant has not met the conditions for stay of execution in order 42 rule 6 of the *Civil Procedure Rules*.
4. The application was canvassed by way of written submissions and both parties filed their submissions.

#### **Applicant's Submissions**

5. Learned counsel for the applicant gave a brief background of the matter and set out to demonstrate that the applicant had met the conditions for stay as provided under order 42 rule 6 of the *Civil Procedure Rules*. He relied on the case of *Butt v Rent Restriction Tribunal* (1979)eKLR for the proposition that a stay ought to be granted so as not to render the appeal nugatory.
6. With regard to substantial loss, he submitted that the applicants intend to use the funds awarded to the 1<sup>st</sup> respondent to put up classrooms on the suit property to be used by the public and diverting the money to private use by the respondents was against public policy. He contended the judgment in ELC Petition No. 2 of 2015 *Diocese of Eldoret Trustees v National Land Commission & 2 Others* effectively extinguished the 1<sup>st</sup> respondents rights over the suit property including the right to be compensated for any developments thereon.
7. On the question of timeliness, he submitted that the application was filed 19 days after the ruling was delivered and there was therefore no delay. He relied on the case of *RWW v EKW* (2019) eKLR for the proposition that the purpose of an appeal is to preserve the subject matter so as to safeguard the rights of the appellant to exercise his undoubted right of appeal and that the court ought to balance the interests of the parties.

#### **1st Respondent's Submissions**

8. Learned counsel for the 1<sup>st</sup> respondent challenged the applicant's *locus standi* to bring the application given the that she was not a party to Cm Elc Case No E593 Of 2021 since her application to be joined in the suit was dismissed.
9. She relied on the case of *Law Society of Kenya v Commissioner of Lands & Others*, Nakuru HCCC No 464 of 2000 where the court defined *locus standi* as the right to be heard and observed that a person must have sufficiency of interest to sustain his standing to sue in a court of law.



10. She further relied on the case of *Julian Adoyo Ongunga v Francis Kiberenge Abano* Migori Civil Appeal No 119 of 2015 for the proposition that the impact of a party in a suit without *locus standi* can be equated to a court acting without jurisdiction. She maintained that the orders sought in the application were pointless as she lacked the locus standi to institute the instant application.
11. On whether the applicant had met the conditions for stay pending appeal in order 42 rule 6 of the *Civil Procedure Rules*, counsel submitted the application had been filed 11 months after the decree was issued without any explanation. It was her further contention that the applicant had not appealed against the judgment and therefore her application could not lie. She cited the case of *Richard Abdulrehman v Idha Marie Ahmed & 2 Others* (2020) eKLR where the court held that delay was dependent on the circumstances and even a delay of one day could be construed as delay depending on the nature of the judgment.
12. With regard to substantial loss counsel submitted that the applicant had failed to demonstrate that she would suffer substantial loss if the decretal sum was paid to the 1<sup>st</sup> respondent, the same could not be recovered. She added the decretal sum was payable by the 2<sup>nd</sup> and not the 1<sup>st</sup> respondent. She relied on the case of *Machira t/a Machira & Co Advocates v East African Standard No 2* (2002) eKLR for the proposition that it was not enough to merely state that substantial loss will result, the kind of loss must be specified.
13. Lastly, counsel submitted that the applicant had failed to furnish security for costs yet it was a mandatory requirement for stay. She relied on the case of *Arun C. Sharma v Ashana Raikundaliat/ A Raikundalia & Co Advocates* where the court explained the rationale for security for costs being to guarantee the due performance of the decree or order that may be binding on the applicant.

#### Issues For Determination

14. Having carefully considered the application, rival affidavits as well as the submissions filed by both parties the issues for determination are twofold:
  - i. Whether the applicant has the locus standi to apply for stay of execution pending appeal
  - ii. Whether the applicant has met the conditions for stay pending appeal.

#### Analysis And Determination

15. The first question I must determine is whether the applicant has *locus standi* to bring this application. Locus standi connotes the right to be heard. As was held in the case of *Law Society of Kenya v Commissioner of Lands & Others*, Nakuru HCCC No 464 of 2000, the court held that a person must have sufficiency of interest to sustain his standing in a court of law. The applicant has stated that she has a stake in the suit property because in ELC Petition No 2 of 2015 *Diocese of Eldoret Trustees v National Land Commission & 2 Others* the court held that the suit property was public land and that the same should be registered in the name of the Principal Secretary Ministry of Education in trust for Craig Secondary School (Kaptich Secondary School). The applicant has since obtained the said registration. It is therefore my finding that the applicant has locus standi to make the application.
16. With regard to stay pending appeal, the principles for an application for stay pending appeal are now settled. The substantive provision for grant of stay pending appeal is to be found in order 42 rule 6 of the *Civil Procedure Rules*.

Order 42 rule 6 provides in part as follows: -



- (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.
17. The court in the case of *Migotio Plantations Limited v Paul Wanyama Wafula* [2015] eKLR stated as follows in considering a similar issue:-
- The powers of the court to grant stay of execution of the decree are discretionary. The ultimate goal of the court is to preserve the appeal and ensure that the rights of the appellant are not defeated pending its determination. (*Butt v Rent Restriction Tribunal* [1979]eKLR.
- Therefore, whether the appellant stands to suffer substantial loss is the cornerstone of the application of stay. However, the court must also consider special circumstances and unique requirements of the case. (See *Butt V Rent Restriction Tribunal* supra at pages 419-420). At this point, there is a valid judgment in force and the court must weigh the appellant’s right to appeal against the equally weighty right of the successful party to enjoy the fruits of his judgment. *Redland Enterprises Limited v Premier Savings & Finance Limited* [2002] 2 KLR 139
18. In the case of *MOM Amin Transporters Limited & another v Alexander Ndung’u Mbugua & 2 others* [2017] eKLR the court was of the opinion that all the three conditions had to be met and satisfied simultaneously in order for the court to exercise its discretion and grant a stay of execution.
19. I will now consider whether the applicant has met the 3 conditions for stay pending appeal.

### **Substantial loss**

20. The applicant has contended that they intend to use the funds awarded to the 1<sup>st</sup> respondent to put up classrooms on the suit property to be used by the public and diverting the money to private use by the respondents was against public policy. As per the case of *Machira t/a Machira & Co Advocates v East African Standard* No. 2 (2002) eKLR *Machira t/a Machira & Co Advocates v East African Standard* No 2 (2002) eKLR, the applicants have not clearly explained whether payment of the decretal sum to



the 1st respondent amounts to substantial loss. They have not stated whether it would be impossible to recover the said amount from the 1<sup>st</sup> respondents in the event the applicants succeed on appeal. On the other hand, the 1<sup>st</sup> respondent has asserted that they have the means to refund the decretal sum if the applicant succeeds on appeal. Since the applicant has not yet been joined to the suit it is difficult to see how she would suffer substantial loss.

### **Delay**

21. The second condition the applicants must satisfy is that they must demonstrate that the application was filed without unreasonable delay. The instant appeal is against the ruling of the lower court delivered on September 7, 2022. The application for stay was filed on September 26, 2022 which is 19 days after the ruling. In my view the application was filed within a reasonable time.

### **Security for costs**

22. Lastly, on the question of security for costs, the applicant has made no attempt to furnish security for costs as required by the order 42 rule 6.
23. As was held in the case of MOM Amin Transporters Limited (*supra*) the applicant is required to satisfy all the 3 conditions for stay although she only satisfied one. In the circumstances, I am unable to exercise my discretion in her favour. Accordingly, the application is dismissed with costs to the 1<sup>st</sup> respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY VIA MS TEAMS PLATFORM THIS 14TH DAY OF FEBRUARY, 2023.**

**J.M ONYANGO**

**JUDGE**

