



**Eastwest Holdings Limited v Hutchinson (Sued in her capacity as Administratrix of the Estate of Raphael Alfonso Hutchinson (deceased) and also beneficiary of such Estate) & 5 others (Environment & Land Case 815 of 2013) [2023] KEELC 16599 (KLR) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16599 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 815 OF 2013**

**JA MOGENI, J  
MARCH 27, 2023**

**BETWEEN**

**EASTWEST HOLDINGS LIMITED ..... PLAINTIFF**

**AND**

**ELIZABETH HUTCHINSON (SUED IN HER CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF RAPHAEL ALFONSO HUTCHINSON (DECEASED) AND ALSO BENEFICIARY OF SUCH ESTATE) ..... 1<sup>ST</sup> DEFENDANT**

**JEAN WANJIKU HUTCHINSON (SUED IN HER CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF RAPHAEL ALFONSO HUTCHINSON (DECEASED) AND ALSO BENEFICIARY OF SUCH ESTATE) . 2<sup>ND</sup> DEFENDANT**

**ALISON HUTCHINSON ..... 3<sup>RD</sup> DEFENDANT**

**ARLENE HUTCHINSON ..... 4<sup>TH</sup> DEFENDANT**

**ROBERT ANDREW HUTCHINSON ..... 5<sup>TH</sup> DEFENDANT**

**JEAN ELIANOR ALBRITTON ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. Before this Court for determination is the Defendants/Applicants' Notice of Motion Application dated February 23, 2023 brought pursuant to Article 159 of the [Constitution](#), the [Environment and Land Court Act](#), Section 1A, 1B & 3A of the [Civil Procedure Act](#), Order 42 Rule 6 and Order 51 of the [Civil Procedure Rules 2010](#) and all enabling provisions of the law. The Defendants/Applicants' are seeking for the following orders: -

1. Spent.



2. That the honourable court be pleased to order stay of execution of the judgment delivered on February 15, 2023 in ELC No 815 of 2013 and consequential orders therein pending the hearing and determination of this Application.
  3. That the honourable court be pleased to order stay of execution of the Judgment delivered on 15 February, 2023 in ELC No 815 of 2013 and all consequential orders therein pending the hearing and determination of the relevant Appeal to be filed in the Court of Appeal.
  4. That the costs of this application be provided for.
2. The application is premised on the grounds stated on the face of the application, the Supporting Affidavit of Wangeci Akedi, counsel representing the Applicants herein sworn on the February 23, 2023.
  3. The application is opposed. There is a Replying Affidavit by Rajesh Maneklal Rughani, a director at the Plaintiff Company, sworn on 6/03/2023.
  4. On March 14, 2023, counsels agreed to file written submissions to the application and the Court gave directions on the same. The parties duly filed their submitted and I have considered them. The Defendants/Applicants filed their written submissions dated 21/3/2023 and filed on March 28, 2023 and the Plaintiff/Respondent filed their written submissions dated 22/3/2023 and filed on the even date.

#### **Defendants/Applicants' Contention**

5. The long and short of this is that this Honourable Court entered judgment in favour of the Plaintiff/Respondent on February 15, 2023, where the Court held that the 1<sup>st</sup> - 6<sup>th</sup> Defendants/Applicants are to hold all that property known as LR No 21/1/39 in trust of the Respondent and awarded orders of specific performance in favour of the Respondent among other orders.
6. The Applicants are aggrieved by the whole of the decision of the Honourable Court and have lodged a Notice of Appeal dated February 21, 2023 before this Court with the intention to file an appeal against the whole judgment at the Court of Appeal upon obtaining the typed proceedings. That the Applicants have also written to the Deputy Registrar of this Honourable Court seeking to obtain the typed proceedings in this matter after filing the Notice of Appeal.
7. The Applicants contend that the Honourable Court did not issue orders for stay of execution of the judgment hence the Respondent as it stands remains free to execute the orders of the Court. That Counsel for the Respondent has already filed to obtain the Decree hence the Applicants are apprehensive that the Respondent is intent to execute the said Decree.
8. The Applicants aver that they stand to suffer substantial and irreparable loss on the actual market value of the property at the time of the execution of the Sale Agreement and at the present market value. That unless this Honourable Court allows this Application, the Applicants stand to suffer substantial and irreparable loss of ownership of the suit Property to the Respondent which was bequeathed to them by their deceased parent alongside the damages awarded to the Respondent whose loss cannot be cured by an award of damages by the appellate Court.



9. Further, they depose that unless this Honourable Court allows this Application, the Applicants intended appeal at the Court of Appeal will be rendered nugatory as the subject matter of the appeal being mainly the ownership of the suit property will have been extinguished.
10. It is their case that the Applicants are willing to pay such security for costs for the due performance of this Honourable Court's decree as may ultimately be binding on the Applicants.
11. They aver that the Applicants have a strong and arguable appeal with high chances of success on a balance of probabilities which ought to be heard by the Court of Appeal and that it is necessary that the orders sought in this Application be allowed to ensure that the ends of justice are served as is the duty of this Honourable Court.

### **Plaintiff/Respondent's Response**

12. Conversely, it is the Plaintiff/Respondent's deposition that he understood that the application is one for stay of execution pending hearing and determination of the relevant appeal to be filed in the court of appeal. That they concede that the application was filed without undue delay. They are not convinced that the applicant has not established how the applicant will suffer substantial loss.
13. The Respondent averred that ground 5 and 6 of the application do not amount to substantial loss for reasons that The difference in market value between time of execution and currently is not evidence of substantial loss since the same can be ascertained and there is no allegation or evidence that the Plaintiff/Respondent has no financial ability to pay the same; Ground 6 of the application speaks to sentimental value. Sentimental value in and of itself cannot be equated to substantial loss and Further, once a property has been offered for sale in market at a specific price (in this case Kshs 32, 500, 000.00) it acquires economic value hence the issue of sentimental value does not arise.
14. Furthermore, that the requirement for security for due performance of the decree is mandatory. That the Applicants offer to pay security for costs is improper. What the Applicant must provide is a suitable security for due performance of the decree itself. That is because the purpose of the security is to guarantee due performance of the decree. The decree herein is specific performance of the Sale Agreement dated January 24, 2012 which means transfer of the subject property to the Plaintiff/Respondent. the only possible security for due performance of the decree is deposit of the title in court together with duly signed documents of transfer together with completion documents. This will ensure that the Plaintiff decree holder can easily enforced the judgment in the event that the appeal is unsuccessful.
15. That unless the Applicants are ready and willing to offer this security (deposit of the title subject matter of this suit together with duly signed documents of transfer and completion documents) then they have not satisfied the requirements for grant of stay of execution.
16. Lastly, the Respondent opposes the Applicants' application and the prayers thereon on the above mentioned grounds.

### **Issues for Determination**

17. I have considered the instant application, the annexures thereto, the written submissions and the cited authorities together with the relevant provisions of law and found that the issue for Determination before this Court is whether the Applicants are deserving of the orders sought.



## Analysis and Determination

18. There is no doubt that Judgment was entered in favour of the Plaintiff on February 15, 2023 by this Court. The Court had entered an order of specific performance as per the terms of the sale agreement dated January 24, 2012. There is also no doubt that the Applicants herein were dissatisfied with the said Judgment and they filed a Notice of Appeal on February 21, 2023 and the instant Application on February 23, 2023.
19. The application for Stay of Execution is governed by Order 42 Rule 6(2) of the [Civil Procedure Rules 2010](#) which provides as follows: -
- “(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.”
20. As the Court considers whether to allow the orders sought or not, it will take into account that the purpose of stay of execution pending Appeal is to preserve the subject matter in dispute. See the case of *Consolidated Marine –vs- Nampijja & Another*, Civil App No 93 of 1989 (Nairobi), where 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”.
21. The Court also takes into account that in this kind of an application, there are two competing interest that must be considered. See the case of [Kenya Commercial Bank Ltd –vs- Sun City Properties Ltd & 5 Others](#) (2012) eKLR, where the Court held that:-
- “In an application for stay, there are always two competing interest that must be considered. These are that a successful litigant should not be denied the fruits of his Judgment and that an unsuccessful litigant exercising his undoubted right of Appeal should be safeguarded from his Appeal being rendered nugatory. These two competing interests should always be balanced.”
22. This Court will now consider the conditions to be considered in granting an order of stay of execution as provided by Order 42 Rule 6(2) and then juxtapose them for the available evidence and circumstances to determine whether the Applicant is deserving of the orders sought. The conditions to be considered are:-
- i. Whether the Applicant will suffer substantial loss if the order of stay is not granted.
  - ii. Whether the application is brought without undue delay.
  - iii. Whether the Applicant has provided security for the due performance of the decree.



- iv. Whether the Applicant has established sufficient cause for grant of the orders of stay of execution.
23. See the case of *Stephen Wanjohi –Vs- Central Glass Industries Ltd*, Nairobi HCC No 6726 of 1991, where the Court held that:-
  - “For the court to order a stay of execution there must be:-
    - i. Substantial loss
    - ii. No unreasonable delay
    - iii. Security and the grant of stay is discretionary”.
24. Firstly, the Applicants have to establish that they will suffer substantial loss if the orders of stay of execution are not granted. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma vs Abuoga* (1988) KLR 645 where their Lordships stated that;
  - “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
25. The onus is on the applicant to show the damages they would suffer if the order for stay of execution sought is not granted for the reason that; by granting such stay, it would mean that the status quo should remain as it were before the judgment and that would be denying a successful litigant the fruits of his judgment, which should not be done unless the applicant has given sufficient cause to the court to enable it to exercise its discretion in granting the orders sought. Besides, it not merely sufficient to state that substantial loss may occasion on the applicant. (See *New Stanley Hotel Ltd –vs- Arcade Tobacconist* (1980) KLR 757).
26. It is the Applicants’ case that they stand to suffer substantial and irreparable loss on the actual market value of the property at the time of the execution of the Sale Agreement and at the present market value. That unless this Honourable Court allows this Application, the Applicants stand to suffer substantial and irreparable loss of ownership of the suit Property to the Respondent which was bequeathed to them by their deceased parent alongside the damages awarded to the Respondent whose loss cannot be cured by an award of damages by the appellate Court.
27. The Court will be persuaded by the case of *Machira T/A Machira & Co Advocates –vs- East African Standard (No 2)* (2002) KLR 63, where the court held that:-
  - “In this kind of application for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars.... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”
28. In *Peter Rugu Gikanga & another v Weston Gitonga & 10 others* [2014] eKLR, the learned Judge Enyara Emukule reiterated as follows;
  - “In Charles Wahome Geth/ vs. Angela Wa/R/Mu Geth/ (Court of Appeal Civil Application No NAI 302 of 2007 UR 205/2007), the Court of Appeal held –
    - ... It is not enough for the applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial



loss that the applicants stand to suffer if the Respondent execute the decree in this suit against them. "

29. Beyond the Applicants' plea that they will lose on the actual market value of the property at the time of the execution of the Sale Agreement and that they will also lose ownership of the suit Property to the Respondent which was bequeathed to them by their deceased parent, I am not convinced that the Applicants have demonstrated what tangible loss they stand to suffer if the order of stay is not granted. As has been stated by the Respondent, once the Applicants put a value for the sale of the land as per the sale agreement dated January 24, 2012, it lost sentimental value. Equally in this matter, it is therefore my finding that the Applicants have not shown what substantial loss they will suffer if the stay of execution is not issued.
30. On whether the application was brought without undue delay, I find that the application was filed timeously. It is evident that the judgment was delivered on February 15, 2023 and the applicants filed an application for stay of execution on February 23, 2022 eight days after the delivery of judgment so there was no inordinate delay.
31. On whether the Applicants have provided security for the due performance of the decree as provided by Order 42 Rule 6(2)(b) of the Civil Procedure Rules which provides: -
  - "(2) No order for stay of execution shall be made under sub rule (1) unless—
  - (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."
32. It is my finding that the Applicants have not provided any security for the due performance of the decree. Nevertheless, at paragraph 8 on the face of the Application and paragraph 11 of the Supporting Affidavit, the applicants deposed that they are willing pay such security for costs for the due performance of this Honorable Court's decree as may ultimately be binding on the Applicants.
33. In the case of Aron C Sharma vs Ashana Raikundalia T/A Rairundalia & Co Advocates the court held that:

"The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose."
34. Even though the requirement on the amount of security to be deposited ought to be balanced against the interests of both the Applicants and the Respondent, the said amount should be adequate and not be disadvantageous to the party depositing the security as was properly held in Rosengerens Ltd -vs- Safe Deposit Centre Ltd 919840M 3Aller 198.
35. The issue at hand is the ownership of the suit property. I understand that the Applicants have to offer security unequivocally and that they need to demonstrate that if they lose the appeal, they are able to pay the security for due performance of the decree. The court has the discretion to grant or refuse to



grant an order of stay but the discretion must be applied judiciously. In the case of *Kenya Power & Lighting Company Ltd –vs- Esther Wanjiru Wokabi* [2014] eKLR, where the court held that;

“Order 46 Rule 6(2) lays down the conditions which an applicant must satisfy in order to deserve the orders of stay of execution pending appeal. However, the court stated that it noted that the conditions set out in Order Rule 6 (2) only serve as guidelines which the court can use as beacons in exercising its unfettered discretion in deciding whether or not to grant stay of execution pending appeal depending on the circumstances of each case.”

36. It should also be borne in mind that the court has to balance the right of the applicant to appeal and that of the successful litigant to enjoy the fruits of his/her judgment as was held in the case of *Machira T/A Machira & Co Advocates –vs- East African Standard (No 2)* [2002] KLR 63 it was held that:

“To be obsessed with the protection of an appellant or intending appellant in total disregard or fitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

37. In the circumstances, I am inclined to give a conditional grant of stay of execution pending appeal but I order that the Applicants deposit the title to LR No 21/1/39 in Court as security for due performance of the decree within 21 days’ failure to which the order lapses.

### **Disposal Orders**

38. In the end, I hereby enter a conditional order of stay as follows:

- a. The Application dated February 23, 2023 is allowed in terms of Prayer (2) and (3).
- b. The Applicants/Defendants shall deposit the original title to LR No 21/1/39 in Court as security for the due performance of the decree within twenty-one (21) days from the date of this Ruling.
- c. Failure to comply with order (b) hereinabove, Order (a) hereinabove shall automatically lapse.
- d. Costs of the Application to abide the Appeal.

39. It is so ordered.

**DATED, SIGNED AND DELIVERED THIS 27<sup>TH</sup> DAY OF MARCH 2023**

**MOGENI J**

**JUDGE**

In the virtual presence of:



Ms. Mureithi holding brief for Mrs Aredi for Defendants/Applicants

No appearance for Plaintiff/Respondents

Caroline Sagina: Court Assistant

