



**Thige v Nduati (Environment & Land Case 535 of 2017)  
[2023] KEELC 16923 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16923 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 535 OF 2017  
EK WABWOTO, J  
MARCH 23, 2023**

**BETWEEN**

**MICHAEL MBUGUA THIGE ..... PLAINTIFF**

**AND**

**JOHN NJUGUNA NDUATI ..... DEFENDANT**

**RULING**

1. The plaintiff filed a notice of motion application dated September 7, 2022 which was accompanied by a supporting affidavit sworn by Michael Mbugua Thige. The application was brought under section 1A,1B,3A of the *Civil Procedure Act* and order 42(rule 6) of the *Civil Procedure Rules* under which the following orders were sought:
  - i. ...Spent.
  - ii. That this honourable court do order a stay of execution of the judgment and decree in ELC No 535 of 2017 stemming out of the judgement of the court delivered on August 30, 2022 pending *interpartes* hearing and determination of this application.
  - iii. That this honourable court do order a stay of execution of the judgment and decree in ELC 535 of 2017 pending the hearing and determination of applicant's appeal.
  - iv. That the costs of this application be in the cause.
2. The application was premised on the following grounds:
  - a) The plaintiff has since filed a notice of appeal and made formal request for the typep proceedings and judgement in readiness of compiling and filing the record of appeal.



- b) That the plaintiff is apprehensive that the defendant will proceed to tax its costs and execute the same against the plaintiff.
  - c) That the plaintiff has an arguable appeal with high probability of success and this present application has been brought without delay and hence the prerequisites for grant of stay pending appeal have been met.
  - d) That if the prayers hereby sought are not granted and in the likely event of the appeal succeeding, the appeal would be rendered nugatory and the plaintiff would suffer substantial and irredeemable loss.
  - e) That from the foregoing, it is in the interest of justice that the orders sought be granted as no prejudice will be occasioned to the defendant.
  - f) That the plaintiff is ready and willingly to abide by any conditions imposed by the court.
3. In submissions dated February 14, 2023, the plaintiff averred that the application was merited for two reasons. Firstly, that the application had been brought without delay. The memorandum of appeal had been filed on September 12, 2022 and the appeal was filed on October 25, 2022 as COACA No E705 of 2022; Michael Mbugua Thige v John Njuguna Nduati. Secondly, it was submitted that the application would not cause the defendant to suffer any loss if allowed. It was also argued that the decree would be for costs therefore, the prejudice suffered by defendant was minimal in comparison to the prejudice likely to be suffered by the plaintiff who would pay costs before exhausting his right to appeal.
  4. In opposition to the application, the defendant filed grounds of opposition dated January 30, 2023 where it was contended that there was nothing to stay under order 42 of the [Civil Procedure Rules](#). Additionally, it was contended that the stay was an implied review under order 45 of the [Civil Procedure Code](#) which would otherwise be unmerited.
  5. Having considered the application and submissions filed, it is clear that the issue for determination before this court is whether this court should proceed to grant a stay of execution of its judgment and decree delivered on August 30, 2022 pending the hearing and determination of the appeal.
  6. Order 42 rule 6 of the [Civil Procedure Rules, 2010](#) which provide 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 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.

No order of stay 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 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.



7. In *Machira T/A Machira & Co Advocates v 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 flitting 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 judgement 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...”[emphasis added]

8. This court is cognizant of the delicate balance of the right to appeal vis a vis the right to enjoy the fruits of the judgement. At paragraph (ii) of his submissions, the plaintiff claims:

“...the decree against the applicant is only for costs of the suit which were awarded to the respondent and therefore the respondent will not suffer any prejudice compared to the prejudice that the applicant will suffer if stay is not granted pending the hearing of the appeal. If this application, is disallowed, the applicant will be forced to pay up costs of the suit before he can exhaust his right of appeal and which he is challenging the entire judgement”

9. In the case of *Carter & Sons Ltd v Deposit Protection Fund Board & 2 others* civil appeal No 291 of 1997:

“... the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . . 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, and the application must, of course, be made without unreasonable delay.”[emphasis mine]

10. It is evident that this application was filed within one month of delivery of the judgement therefore the threshold for unreasonable delay is met. On security of costs, none has been offered by the plaintiff/applicant. On the second condition, the applicant has not deposed what substantial loss he will suffer unless this application is allowed. Substantial loss is the cornerstone of stay of execution pending appeal. Since the applicant has not demonstrated any substantial loss he will suffer if this application is not granted, the second condition fails. The third and final condition is whether the applicant has given security for the due performance of the decree that will be binding on him. Again, the applicant has not given any security or undertaking to offer any security this honourable court may require. Suffice to add that the impugned judgment was a dismissal of the suit with costs to the defendant. Taxation proceedings are yet to commence, no bill of costs has even been taken out nor filed by the defendant.

11. Having considered the application, it is evident that the plaintiff has failed to demonstrate what substantial loss he may suffer should the application not be granted.

12. In conclusion, the court finds that the application dated September 7, 2022 is unmerited and the same is hereby dismissed with no order as to costs.



13. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23<sup>RD</sup> DAY OF MARCH 2023.**

**E. K. WABWOTO**

**JUDGE**

**In the presence of: -**

**Mr. Maina for the Plaintiff/Applicant.**

**Mr. Ombwayo for the Defendant/Respondent.**

**Court Assistant; Caroline Nafuna.**

