



**Dorcas Njoki Wanjohi, Michael Wanjohi Nderitu, Joseph Wambugu Wanjohi
(Suing as Administrators of the Estate of Dancan Kamau Kimani) & another
v Gachiengo (Administrator of the Estate of Gachiengo Gichuhi) (Civil Suit
E303 of 1999) [2024] KEHC 14847 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14847 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT E303 OF 1999
HI ONG'UDI, J
NOVEMBER 28, 2024**

BETWEEN

**DORCAS NJOKI WANJOHI MICHAEL WANJOHI NDERITU JOSEPH
WAMBUGU WANJOHI (SUING AS ADMINISTRATORS OF THE ESTATE OF
DANCAN KAMAU KIMANI) 1ST PLAINTIFF
ETHAN GITHINJI MAINA (SUING AS THE ADMINISTRATORS OF THE
ESTATE OF ETHAN KAGUANYO) 2ND PLAINTIFF**

AND

**JANE WANJA GACHIENGO (THE ADMINISTRATOR OF THE ESTATE OF
GACHIENGO GICHUHI) DEFENDANT**

RULING

1. The notice of motion application dated 6th August, 2024 by the applicant herein prays for the following orders;
SUBPARA i-ii
Spent.
 - iii That this honorable court be pleased to grant stay of execution of the Judgement, decree herein and Orders of Court issued on 24th July 2024 pending hearing and determination of the intended Appeal.
 - iv That this honourable Court be pleased to grant any other order that may be sufficient to preserve the substratum of the Appeal being Nakuru Municipality Block 10/19.
 - v That costs be in the cause.



2. The application is based on the grounds on its face and the applicant's affidavit sworn on even date. She deponed that vide the ruling dated 24th July, 2024 and delivered without notice on 24th July 2024, this Court dismissed her preliminary objection and allowed the plaintiff's/ respondent's application. Further, that the Court ordered for sale and transfer of the suit property to a third party in execution on the judgment and decree of the court dated and delivered on 14th June 2006.
3. She further deponed that she was aggrieved by the said Ruling and Order and had lodged Notice of Appeal and applied for copies of proceedings to lodge the Record of Appeal. That the plaintiff/ respondent had hastily moved to obtain the order of court in a bid to fast track the sale and transfer of the suit property to third parties. She added that the subject matter of the intended appeal was at the risk of being taken out of the court's jurisdiction hence she would be prejudiced irreparably and the appeal would be rendered nugatory.
4. In response the 2nd respondent filed a replying affidavit sworn on 20th August 2024. He gave a background of the case and averred that the applicant had not satisfied all the conditions for grant of stay of execution of the decree. He added that it was only fair and just that the application be dismissed with costs in the respondent's favour.
5. The interested party equally filed a replying affidavit sworn on 28th August 2024. She averred that the applicant had been acting in bad faith all along filing various applications including those of stay of execution to stall the execution process. She urged the court to allow the transfer of the suit property to the purchaser and the proceeds of the sale entitled to the applicant be deposited in court pending her appeal.
6. The application was canvassed by way of written submissions.

Applicant's submissions

7. These were filed by Gichuki King'ara & Company Advocates and are dated 28th August, 2024. Counsel gave a brief background of the case and submitted that the applicant had met the conditions for grant of stay of execution orders. He submitted further that the applicant had annexed a draft Memorandum of Appeal highlighting various grounds and that the decision being appealed against was made without jurisdiction. He added that the same contradicts the law and the Court of Appeal should have an opportunity to determine the issue.
8. He placed reliance on the case of Henry & 4 others *v County Government of Vibiga (Cause 76 of 2021)* [2022] KEELRC 13371 (KLR) (2 December 2022) (Ruling), where the court held that;

“In the instant case, the court further considered the impugned ruling was on jurisdiction. In the event the Court of appeal overturns the decision then the entire proceedings of the court will be rendered nullity as without jurisdiction the court acts in 'vain. See Nyarangi J in Owners Motor Vessel “Lilian S' v Caltex Oil Kenya Ltd. 1989 KLR. That would be a waste of scarce judicial time and resources.”
9. On substantial loss, counsel submitted further that the applicant sought to preserve the suit properties since the appeal would be rendered nugatory if the substratum of the same was taken away from the court. In support of this position he placed reliance on several decisions among them being the case of Beatrice Mumbe Ndwiga *v David Muimi Mwinzi* [2008] eKLR where the court held as follows;

“Land is a sensitive subject and when parties are litigating over it, the substratum thereof should never be lost”.



10. On the issue of security for costs, counsel submitted that the applicant was willing to execute an undertaking as to costs. On this he placed reliance on the case of *James Juma Muchemi And Partners Limited V Barclays Bank of Kenya Ltd* [2011] eKLR, where it was held that;

“I am satisfied that the defendant will not suffer any prejudice as the security that it holds will still be good security for the foreseeable future and interest and penalties levied, if any, on the outstanding amount may not water down the value of the security.”

11. He urged the court to hold that security was not required where there is no monetary decree requiring performance. Further, that the suit property held by the applicant and interested party would still be good security after the appeal is heard and determined. He further urged the court to allow the applicant’s application.

Respondent’s submissions

12. These were filed by Mutonyi Mbiyu & Company Advocates and are dated 28th September, 2024. Counsel identified two issues for determination.

13. The first one is the test/criteria to be applied in granting an order for stay pending appeal. Counsel submitted that the argument by the applicant that she had an arguable appeal is a criteria applied by the Court of Appeal in determining an application for stay of execution. Further, that the criteria used in the high court is set out in Order 42 rule 6 (2) of the Civil Procedure Rules. In support of this position he placed reliance on several cases among them being the case of *Charles Wahome Gethi v Angella Wairimu Gethi* [2008] eKLR where the Court of Appeal held as follows;

“The principles which guide the court in exercising its unfettered discretion under Rule 5 (2) (b), to grant a stay of execution; a stay of proceedings or an injunction as the case may be, are well established. The applicant must demonstrate, among other things, that the intended appeal or appeal is arguable, that is to say, it is not frivolous and that unless the order sought is granted, the appeal, if successful would be rendered nugatory.”

14. Secondly, counsel submitted that the applicant had not fulfilled the three (3) mandatory conditions for grant of stay pending appeal as set out under Order 42 (6) (2) of the Civil Procedure Rules. Further, that it was not enough to fulfil only one (1) or two (2) of the requirements. In support of this argument he cited the case of *Peter Ndungu Ngae & 2 others v John Mugane Karomo* [2015] eKLR where the court at Page 4 held thus:

“In its totality the Applicant has satisfied only one condition as set out in Order Rule 6 (2), that, the application was filed without delay. He has failed to satisfy this court of the other two. Even after considering the principles of justice and fairness to both parties, the court finds no merit in the application.”

15. In conclusion, he urged the court to dismiss the applicant’s application with costs.

Interested Party’s submissions

16. These were filed by Waiganjo & Company advocates and are dated 30th September, 2024. Counsel cited Order 42 rule 6 (1) of the Civil Procedure Rules and the decision in *Tabro Transporters Ltd v Absalom Dova Lumbasi* [2012] eKLR and submitted that the orders sought by the applicant were discretionary. She submitted that there was unreasonable delay in filing the application. Further that the applicant had not satisfactorily established the loss she was going to suffer if the orders are not granted.



17. She submitted further that the interests of the applicant herein could not supersede those of the interested party who was expecting proceeds from the same being also an owner of the property. She placed reliance on the case of *M/s Portreizt Maternity v James Karanga Kabia* Civil Appeal No. 63 of 1997 where the court observed as follows:

“That right to appeal must be balanced against an equally weighty right of the plaintiff to enjoy the fruits of the judgement delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”

18. Lastly, counsel submitted that the applicant herein had not offered any security which was the third limb that ought to be satisfied in an application for stay of execution. She placed reliance on the case of *Focia Motorcycle Co, Limited v Ann Wambul Wangul & another* [9018] eKLR, where it was stated that:

“Where the applicant proposes to provide security as the Applicant has done, It is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

19. In conclusion, she urged the court to dismiss the application with costs.

Analysis and determination

20. I have considered the application, affidavits and the submissions by the parties, and find the issue arising for determination to be whether the applicant has satisfied the ground for issuance of the stay of execution.

21. It is important to note that the applicant in her application seeks for stay of execution of the Judgment, decree delivered by this court on 24th July 2024 pending hearing and determination of the intended appeal. This court upon perusal of its records notes that it did not deliver any judgment on the said date. What was delivered by this court is a ruling in respect of two applications dated 16th April, 2024 and 19th March, 2024.

22. This error on the application, in my opinion is self-evident and does not require an elaborate argument to be established. Further, the said error does not make the entire application defective or prejudice the respondents since the same can be heard on merits rather than letting the same be decided on procedural technicalities. *The constitution* in Article 159 (2) (d) of *the Constitution* stated that:

“in exercising judicial authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities.”

23. Further, in the case of *Republic vs. District Land Registrar, Uasin-Gishu & Anor* (2014) eKLR Justice Ochieng held that:

“.. to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d)in exercising Judicial Authority, the courts ' in exercising judicial authority, the courts and tribunals shall be guided by



the following principles(d) justice shall be administered without undue regard to procedural technicalities.”

Also see what the Court of Appeal stated in the case of Phillip Chemwolo & Another v Augustine Kubende [1986] eKLR, on the same issue.

24. In the foregoing, it is logical to deduce that the applicant is seeking stay of the ruling delivered on 24th July 2024. This court has no reason to depart from the above authorities, and it intends to let the parties herein be on equal arms and allow the application for stay of execution dated 6th August 2024 decided on merits.

25. The principles guiding the grant of a stay of execution pending appeal are well settled. The same are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides as follows:

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.

26. In *RWW vs. EKW* [2019] eKLR, the court addressed the purpose of a stay of execution order pending appeal, in the following words:

“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.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

27. From the law and the above decision, it is clear that the purpose of stay of execution is to preserve the substratum of a case pending the hearing and determination of an appeal. Further, a successful litigant has a right and expectation to enjoy the fruits of the decision rendered in his or her favour by the court, and at the same time a respondent who has lost a case also has a right of appeal to ventilate his or her displeasure with the said decision of the court. The court has a duty to weigh and balance both situations.

28. Further, in the case of *Regional Institute of Business Management v Lucas Ondong' Otieno* [2020] eKLR the court observed as follows;

“20. Weighing the Applicants' right to have his dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of *the Constitution* of Kenya and the equally important Respondent's fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of *the Constitution* of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Applicants if they were denied an opportunity to ventilate



their Appeal on merit in the event an order for stay of execution was not granted”.

29. It is trite law that the grant of stay of execution is discretionary and the court will exercise this discretion on a case by case basis depending on the circumstances of each case. This is an old matter having been filed in 1999 and judgment was delivered on 14th June 2006. The applicant filed an application for stay of execution of the said judgment and the same was dismissed vide the ruling dated 28th March 2013.
30. This court in the ruling dated 24th July 2024 which is the subject of the intended appeal, noted that the applicant had been in constant defiance of several court orders. I find that the application herein amounts to a delaying tactic aimed at denying the respondents the opportunity to enjoy the fruits of their judgment. Further, as observed in the above cited case of Regional Institute of Business Management v Lucas Ondong' Otieno (supra) that justice delayed is justice denied. This court must balance these rights to ensure that justice is served.
31. Additionally, in the case of Stephen Gathua Kimani v Nancy Wanjira Waruingi T/A Providence Auctioneers [2016] eKLR it was stated as follows in respect of the overriding objective of the rules:

“The double O’s in the phrase Overriding Objectives are what coined what is today famously known as the term Oxygen Principle. In Hunker Trading Company Limited vs Elf Oil Kenya Limited, ([2010] eKLR) perhaps the first case to be grounded on the new provisions the *Appellate Jurisdiction Act* (Sections 3A and 3B), it was held that section 1A of the *Civil Procedure Act* came in to provide facilitation of just, expeditious and proportionate resolution of civil disputes in Kenya as the overriding objective of the Act.”
32. I also wish to make it clear that this court was not able to deliver its Ruling on 18th July, 2024 due to work related issues and had it deferred to 24th July, 2024. The court gave instructions to the Deputy Registrar to notify parties. Counsel for the plaintiffs and interested party were present when the Ruling was delivered which confirms that the Deputy Registrar notified parties as directed.
33. From the above analysis I find no good reason advanced to warrant staying the ruling delivered on 24th July, 2024 by this court.
34. The upshot is that the application dated 6th August, 2024 for stay of execution is dismissed with costs.
35. Orders accordingly.

DELIVERED VIRTUALLY, THIS 28TH DAY OF NOVEMBER, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI

JUDGE

