



**Mwamba v Miriti & 2 others (Environment and Land Appeal
E118 of 2021) [2023] KEELC 16363 (KLR) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16363 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E118 OF 2021**

CK YANO, J

MARCH 22, 2023

BETWEEN

JOHN MARANGU MWAMBA APPELLANT

AND

HUMPHREY BUNDI MIRITI 1ST RESPONDENT

STELLA KAWIRA 2ND RESPONDENT

SCHOLASTICA NKIROTE 3RD RESPONDENT

RULING

1. This ruling is in respect of the notice of motion dated 30th August 2022 brought under Order 42 Rule 6(2) (1) of the *Civil Procedure Rules*, Section 13 of the *Environment and Land Court Act* and all other enabling provisions of the law. The appellant/applicant seeks for orders of stay of execution of the lower court judgment in Nkubu ELC case No. 45 of 2018 that was delivered on 14th October, 2021 till the hearing and determination of the appeal.
2. The application is premised on the grounds in the body of the application and the contents of the supporting affidavit of John Marangu Mwamba, the applicant, sworn on 30th August 2022. The applicant has deponed that the judgment in the lower court was delivered on 14th October, 2021 and being aggrieved with the said decision, the applicant filed an appeal on 11th November, 2021. That the appeal is arguable and has great chances of success and that the respondents have already commenced implementation of the impugned judgment. The applicant avers that the appeal is arguable with great chances of success and if the respondents continue implementing the decision, the appeal will be rendered nugatory and the applicant will suffer irreparable loss and damage as the issue at hand relates to land which had already been transmitted to the applicant after filing a succession cause, and thus the respondents may transfer the same in their names on an account of imputed trust. The applicant contends that the respondents will not suffer any prejudice if this application is allowed.



3. In the affidavit in support of the application, the applicant has annexed copies of the judgment in Nkubu PMC ELC case No. 45 of 2018, the memorandum of appeal and an application dated 20th July 2022 requiring the Executive Officer of Nkubu court to sign transfer documents in place of the applicant.
4. In opposing the application the 1st respondent filed a replying affidavit sworn on 16th January, 2023 wherein he contends that the appeal has no chances of success as the applicant is an uncle to the 1st respondent, and that the 1st respondent has lived on the suit land since his mother, who is sister to the applicant was alive to-date. That it is obvious that the title the applicant is holding in LR No. Igoji/mweru 1/201 is both the 1st respondent's two acres for him and his sisters and the balance for the applicant.
5. The 1st respondent states that should the court find in favour of the applicant, the applicant be ordered to deposit security in court in the sum of Kshs. 300,000/=.
6. The application was canvassed by way of written submissions. The applicant filed his submissions dated 4th November, 2022 through the firm of Leonard K. Ondari & Co. Advocates while the 1st respondent filed his dated 16th January, 2023 through the firm of L. Kimathi Kiara & co. Advocates.

Analysis and Determination

7. I have considered the application, the response and the submissions filed by the parties to buttress their assertions. What calls for determination in this matter is the issue for stay of execution by the appellants'/applicants pending the hearing and determination of the appeal.
8. Stay of execution pending appeal is a discretionary power bestowed upon this court by the law. The court of appeal in the case of *Butt – Vs Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how a court should exercise the said discretion and held that;
 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The court in exercising its powers under Order XLI Rule 4 (2) (b) of the [*Civil Procedure Rules*](#), can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
9. The principles upon which stay of execution pending appeal can be allowed are now well settled from the authorities from this court and from the superior courts. Generally, stay of execution is provided



for under Order 42 Rule 6 of the Civil Procedure Rules. Sub rule 1 gives the court discretionary powers to stay execution and provides as follows;

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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 undue 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.
10. As such, for an applicant to move the court into exercising the said discretion in his favour the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.
11. As for the applicants having to suffer substantial loss, in the case of Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982 – 1988) KAR 1018 the Court of Appeal pronounced itself to the effect that;

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdiction for granting stay”. (see also the case of Machira T/a Machira & co. Advocates v East African Standard(No. 2) (2002) eKLR 63)
12. The applicant has a burden to show the substantial loss he is likely to suffer if no stay is ordered. This is in recognition that both parties have rights the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination (see the case of Absalom Dora v Turbo Transporters (2013) eKLR)



13. As F. Gikonyo J. stated in *Geoffery Muriungi & another v John Rukunga M'Imonyo suing as Legal representative of the estate of Kinoti Simon Rukunga (deceased)*[2016] eKLR and which wisdom I am persuaded with,

“ ... the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process.” The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or rendering the appeal nugatory” within the juridical precincts of the Court of Appeal. And that is the loss which is sought to be prevented by an order for stay of execution pending appeal...”
14. The judgment appealed against declared that the applicant holds 2 acres out of the suit land L.R No. Igoji/Mweru 1/201 in trust for the respondents. The applicant was ordered to transfer the said 2 acres to the respondents, but the applicant did not do so. The respondents moved the trial court through an applicant requiring the Executive Officer of Nkubu Law courts to sign transfer documents instead of the appellant.
15. It is the applicant’s submission that there is a threat of execution if the respondent’s application is allowed by the trial court as this will compromise the right of the appellant to appeal. The applicant submitted that he stands to suffer substantial loss as he acquired the two acres rightfully through a succession cause and the same will be transferred in the respondents names who are strangers to the estate and the status quo of the land will be altered and may be alienated to third parties thus complicating the matrix of the suit and appeal.
16. As already stated, Order 42 Rule 6 lays out the law on stay of execution pending appeal, by giving court the discretion to order stay for sufficient cause. Sub- Rule 2 outlines the mandatory conditions that have to be met for the court to grant stay pending appeal. The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the applicant.
17. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under Order 42 Rule 6. Firstly the application must be brought without undue delay, secondly the court will satisfy itself that substantial loss may result to the applicant unless stay of execution is granted, and thirdly 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.
18. From the record the judgment in the lower court was delivered on 14th October, 2021 and the present application was only filed in court on 30th August 2022 which is a period of over ten (10) months after the judgment was given. In my opinion, the application the application was not made timeously and the applicant has not even given an explanation for the delay in bringing the application herein.
19. Regarding the second pre-requisite in Order 42 Rule 6, that is substantial loss occurring to the applicant the court has already referred the consideration to be made in the case of Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu (*supra*)
20. In this case, the applicant has stated that he will suffer substantial loss and the appeal rendered nugatory unless stay of execution is granted because the two acres may be transferred to the respondents and therefore the original land parcel will cease to exist and that there is a danger of the land being alienated



to other parties and the same may not be in existence by the time the appeal is determined and this will eventually render the intended appeal nugatory thereby causing substantial loss.

21. Whereas the applicant has not offered any security, the 1st respondent has requested the court to order the applicant to deposit Khs. 300,000/= as security in the event the stay orders are granted. In other words, the 1st respondent is agreeable to a conditional stay in the above terms.
22. The question that arises is whether the applicant herein has met the condition under Order 42 Rule 6. In this case I am not satisfied that the applicant has met the three prerequisite for grant of stay. First he has not proved the substantial loss he will incur, secondly the delay in filing the application was inordinate and lastly he is unwilling to give security.
23. In the result, this court finds no merit in the notice of motion dated 30th August 2022. The same has failed to meet the threshold laid down in Order 42 Rule 6 of the [Civil Procedure Rules](#) and is hereby dismissed with costs to the 1st respondent.
24. It is so ordered.

DATED SIGNED AND DELIVERED AT MERU THIS 22ND DAY OF MARCH, 2023

In the presence of

No appearance for Ondari for appellant, but appellant present

No appearance for respondent but 1st respondent – present

Court Assistant - Kibagendi

C.K YANO

JUDGE

