



**Mariuki v Mwangi (Civil Appeal 54 of 2023)
[2024] KEHC 16159 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16159 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 54 OF 2023
FN MUCHEMI, J
DECEMBER 19, 2024**

BETWEEN

FRANCIS MBUGUA MARIUKI APPELLANT

AND

JOSEPH KIBUGI MWANGI RESPONDENT

RULING

Brief facts

1. The application dated 24th July 2024 seeks for orders of stay of execution in respect of the ruling in Thika CMCC No. 823 of 2014 delivered on 3rd April 2023 pending the hearing and determination of this appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 20th September 2023.

Appellant's/Applicant's Case

3. The applicant states that the ruling in Thika CMCC No. 823 of 2014 was delivered on 3rd April 2023 whereby the trial court dismissed the appellant's application dated 31st August 2022 seeking for an injunction to restrain the respondent from selling land parcel LOC.2 MAKOMBOKI/1207.
4. Being aggrieved with the decision of the trial court, the applicant lodged an appeal through his Memorandum of Appeal on 14th April 2023. The applicant argues that his appeal has high chances of success and if stay is not granted, the appeal would be rendered nugatory. The applicant further states that the suit land to be sold in satisfaction of the decree is his matrimonial home.
5. On the issue of security, the applicant states that the suit property is sufficient security and will be available to the decree holder should the appeal fail. The applicant undertakes to not dispose of his suit property until the appeal is heard and determined.



The Respondent's Case

6. The respondent states that litigation must come to an end at some point. The respondent states that the matter began in the year 2014 after the applicant failed to adhere to the terms of the sale agreement where judgment in his favour was rendered in the year 2018. The respondent states that sometimes on 20th April 2020, he entered into a sales agreement with the applicant for the sale of two plots from LR No. LOC2/Makomboki/1207 for a sum of Kshs. 500,000/- which was paid in full. The respondent further states that the applicant declined to transfer the suit land to him which resulted to the institution of Thika CMCC No. 823 of 2014 for the recover of the sum paid.
7. The respondent avers that the applicant was charged in Kigumo SPM Court in Criminal Case No. 1331 of 2012 for obtaining money by false pretenses for which he was found guilty by virtue of a judgment delivered on 26th August 2014.
8. The respondent further states that the original suit CMCC No.823 of 2014 was concluded on 12th February 2015 and execution commenced. The respondent states that he commenced the process of execution then but the applicant has always been initiating new tactics to frustrate the process by filing numerous applications which have always been declined.
9. The respondent states that the applicant has never appealed against the decree since the year 2015 when the decree was issued against him. It is not until the year 2023 when the applicant filed an application seeking to restrain Chador Auctioneers from selling land parcel LR. No. LOC2/MAKOMBOKI/120 which led to the impugned ruling.
10. The respondent states that if the honourable court will be inclined to entertain the applicant's motion, he prays that applicant will be directed to deposit the entire decretal amount of Kshs. 1,703,446.38/-.
11. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

12. The applicant relies on Order 42 Rule 6 of the Civil Procedure Rules and submits that he has demonstrated substantial loss, thus the application ought to be allowed.

The Respondent's Submissions

13. The respondent relies on Order 42 Rule 6 of the Civil Procedure Rules and the case of Nicholas Stephen Okaka vs Alfred Waga Wesonga [2022] eKLR and submits that the court should weigh the applicant's right of appeal with the respondent's right to enjoy his judgment. The respondent submits that she has been the successful party in the lower court suit. The respondent further submits that the applicant has shown no interest in offsetting the debt despite being fully aware of the state of indebtedness. The respondent urges the court to balance the rights of both parties considering that execution in the matter has been put in abeyance for too long to her detriment.
14. The respondent submits that if the honourable court is inclined to grant the orders sought by the applicant, he prays that the court directs the applicant to deposit the entire decretal sum of Kshs. 1,703,446.38/- as he never appealed against the decree issued way back in the year 2018.
15. The respondent relies on the case of DGM vs EWG [2021] eKLR and submits that costs follow the event and he has demonstrated he is deserving of the costs.
16. The main issue for determination is whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.



The Law

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

17. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-
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 orders 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 1st 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.
18. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; and
 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
19. Substantial loss was clearly explained in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR:-
- “No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
20. The applicant states that he stands to suffer substantial loss as the suit property to be sold in the satisfaction of the decree is his matrimonial home.
21. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show how execution shall irreparably affect him or will alter the status



quo to its detriment therefore rendering the appeal nugatory. In the instant case, the applicant has not shown how he stands to suffer substantial loss. The applicant has only mentioned that the land sought to be sold is his matrimonial home. There was no attempt to demonstrate substantial loss which is a requirement under Order 42 Rule 6. In my considered view the applicant has failed the test set out under the law on substantial loss.

Has the application has been made without unreasonable delay

22. The ruling was delivered on 3rd April 2023 and the applicant filed the instant application on 26th July 2023. It has taken the applicant about 3 months between the date of the ruling delivered in the trial court and the time when he filed the instant application. The applicant has however not given any reasons why it took him about 3 months to file the present application. Although the duration of 3 months may not be inordinate or inexcusable, it is my considered view that the applicant has not given any plausible reasons for the delay. Thus, it is my view that the delay is inordinate and inexcusable.

Security of costs.

23. The purpose of security was explained in the case of Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR the court stated:-

“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 the 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.

24. Evidently, the issue of security is discretionary and it is upon the court to determine the value of the security required depending on the nature of the case in question. The applicant has not offered any form of security despite knowing very well that this is a legal requirement.

25. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

26. The court in granting stay has to carry out a balancing act between the rights of the two parties. The question then begs as to whether there is just cause for depriving the respondent his right of enjoying his judgment. The matter in the lower court was instituted in the year 2014. The court rendered its decision on 12th February 2015. Thus it has been nine (9) years since the date of judgement to which the respondent has been kept away from the fruits of his judgment.



27. I have perused the grounds of appeal and without going into the merits, it is noted that the said grounds do not raise arguable points of law.
28. Consequently, it is my considered view that the applicant has not met the threshold of granting stay of execution pending appeal as required under the law.
29. Accordingly, it is my considered view that the application dated 24th July 2023 lacks merit and is hereby dismissed with costs.
30. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 19TH DAY OF DECEMBER 2024.

F. MUCHEMI

JUDGE

