



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kaburu (Suing as the Guardian ad-litem and heir of the Estate  
of the Late Isiah Mabellini) v Mabellini & 3 others (Land Case  
65 of 2018) [2023] KEELC 16920 (KLR) (26 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16920 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
LAND CASE 65 OF 2018  
MAO ODENY, J  
APRIL 26, 2023**

**BETWEEN**

**ANN KINANU KABURU ..... PLAINTIFF  
SUING AS THE GUARDIAN AD-LITEM AND HEIR OF THE ESTATE OF THE  
LATE ISIAH MABELLINI**

**AND**

**ORIANO MABELLINI ..... 1<sup>ST</sup> DEFENDANT  
AHMED HASSAN KOTAR ..... 2<sup>ND</sup> DEFENDANT  
LAND REGISTRAR MOMBASA ..... 3<sup>RD</sup> DEFENDANT  
ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated 28<sup>th</sup> February 2022 by the 1<sup>st</sup> defendant seeking the following orders;
  - a. Spent.
  - b. That pending the hearing and determination of this application inter parties and the 1<sup>st</sup> defendant/ Applicant's Notice of Motion dated 24<sup>th</sup> February 2022, this honourable court be pleased to issue an order staying the execution and/or implementation of the ruling dated 10<sup>th</sup> February 2022 and all consequential orders arising therefrom.
  - c. That pending the hearing and determination of the intended appeal, this honourable court be pleased to issue an order staying the execution and /or implementation of the ruling dated 10<sup>th</sup> February 2022 and all consequential orders arising therefrom.



- d. That this honourable court be pleased to grant any other relief that it may deem fit and just.
- e. That the costs of this application be provided for.
2. The application is premised on the supporting affidavit of Oriano Mabellini who deponed that the suit properties which have been developed into a hotel known as Africa Dada Resort were registered in the name of his late brother Isiah Mabellini having acquired the suit properties in the year 1991.
3. He averred that the late Isiah formally transferred the suit properties to him for a lawful consideration in the year 2016 and that he has always paid all statutory dues and charges in respect of the suit properties. In addition, he stated that the decision by the deceased to sell the suit properties to him was as a result of the deceased's request to have him contribute in the development and/or construction of the hotel to which he has invested more than Euros 600,000 which led to him paying Euros 240,000 and bought him out. He further deponed that he leased the suit properties to the 2<sup>nd</sup> defendant in the year 2015 for a period of 4 years.
4. Mr. Oriano Mabellini further deposed that the plaintiff was a wife to the deceased and at the time of the death of the deceased they were in the midst of divorce proceedings. Further that a year after the death of his brother, the plaintiff initiated proceedings alleging that he had fraudulently transferred the suit properties to himself and that the suit properties constituted her matrimonial home which allegations are not true.
5. The Applicant further deponed that the suit was certified ready for hearing on 4<sup>th</sup> March 2020 after he had responded to the plaintiff's claim but due to the Covid 19 Pandemic the matter did not proceed. That on 10<sup>th</sup> March 2021, the plaintiff filed an application inter alia seeking rental income from the suit properties be deposited in court and that he renders an account for the rents received over the years. Subsequently, a ruling was delivered in February 2022 which ruling he intends to appeal against thus the instant application.
6. In response, the plaintiff filed a replying affidavit sworn by Jackline Chepkurui Chepkwony counsel for the plaintiff stating that the impugned ruling was delivered on notice and sufficient notice was issued to all parties as there was a Notice on the Court's noticeboard and on Malindi Telegram page and absence of the 1<sup>st</sup> defendant's counsel was their own making. Further, after the ruling was delivered, she notified the Applicant of the same showing that there was no ill motive.
7. Counsel agreed to canvas the application by way of written submissions which were duly filed.

### **1<sup>st</sup> Defendant's Submissions**

8. Counsel submitted that the court has discretion to grant stay as per the case of *Butt v Rent Restriction Tribunal* [1979] eKLR and further stated that the Applicant has been in possession and control of the suit property since the year 2016 and from the ruling issued on 10<sup>th</sup> February 2022 the applicant is required to deposit at least Euros 50,000 which translates to Kshs 6.3 Million and that the orders undermine the applicant's ability to prosecute his defence and will cause him substantial loss. Counsel cited the cases of *Silverstein v Chesoni* [2002] 1KLR 867 and *Job Kilach v Nation Media Group & 2 Others*.
9. Counsel further submitted that there was no delay in filing the application. On the issue for security for costs, it was counsel's submission that the applicant is ready and willing to execute and file in court an appropriate undertaking as to damages that may be suffered or occasioned. Counsel relied on the case of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another* [2018] eKLR and urged the court to allow the application as prayed.



## Plaintiff's Submissions

10. Counsel for the plaintiff submitted that the application is meant to delay justice and block the plaintiff from prosecuting the main suit to its logical conclusion as the applicant has been illegally collecting rent from a property he fraudulently transferred to himself.
11. Ms Chepkwony further submitted that no prejudice will be suffered by the applicant if the rent collected is deposited in court as it is the duty of the court to preserve the subject matter pending the determination of the main dispute. That the Applicant has not established any substantial loss he will suffer if stay is not granted.
12. Counsel also submitted that the Applicant has not offered any security for the due performance of the orders as may ultimately be binding on the Applicant and cited the cases of *Equitorial Commercial Bank Ltd & 2 Others v Retreat Villas Limited* [2006] eKLR, and *Charles Kariuki Njuri v Francis Kimaru Rwara (Suing As Administrator Of Estate Of Rwara Kimaru Alias Benson Rwara Kimaru (Deceased))* [2020] eKLR on the stay of execution limb that an applicant must meet this threshold on security. Counsel urged the court to dismiss the application as the applicant has not met the threshold of Order 42 Rule 6(2) of the *Civil Procedure Rules*.

## Analysis and Determination

13. This application was supposed to be heard together with one dated 24<sup>th</sup> February 2022 seeking for leave to appeal the order by Olola J dated 10<sup>th</sup> February 2022 and a Notice of Appeal dated 18<sup>th</sup> February 2022 be deemed as properly filed.
14. The court unfortunately only delivered a ruling dated 15<sup>th</sup> October 2022 in respect of the application dated 24<sup>th</sup> February 2022 allowing the application. This ruling is therefore in respect of the application dated 28<sup>th</sup> February 2022 for stay of execution of the order dated 10<sup>th</sup> February 2022 directing the 1<sup>st</sup> Defendant to deposit Euros 50, 000 being rental income from the suit property.
15. The principles guiding the grant of a stay of execution pending appeal are well settled as provided for under Order 42 rule 6(2) of the Civil Procedure Rules which states:

“No order for stay of execution shall be made under subrule (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.”
16. An Applicant must satisfy the three conditions in order to be granted an order for stay of execution, namely (a) that the Applicant may suffer substantial loss if an order of stay is not granted, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
17. On the first limb whether the application was filed timeously without unreasonable delay, the application was filed approximately 21 days after the ruling was delivered. However, of the issue of inordinate delay, it depends on the circumstances of the case and the reasons given for the delay as was



held in the case of *Utalii Transport Company Limited & 3 Others vs. Nic Bank Limited & Another* [2014] eKLR :

“Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying Court’s mind on the delay, caution is advised for Courts not to take the word ‘inordinate’ in its dictionary meaning, but in the sense of excessive as compared to normality.”

18. Similarly, in the case of *Cynthia Achieng Marere v Athanas Shibwom Asiavugwa* [2015] eKLR w the court held that:

“...in determining the issue of delay, the courts' concern is not how much time has lapsed after the prescribed time, rather whether or not even with the delay justice can be done. ”

19. I find that the application was filed timeously and therefore meets the threshold requiring that an application be filed without inordinate delay.

20. On the issue whether the applicant will suffer substantial loss, in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the court explained what substantial loss is as follows:

“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.”

21. The applicant herein avers that he will suffer a loss of Euros 50,000 if stay is not granted. I perused the ruling dated 10<sup>th</sup> February 2022 by Hon. Justice Olola, the orders granted were that the Applicant deposits Euros 50,000 for the rental income in respect of the suit properties and give full account of the rental income received from the 2<sup>nd</sup> Defendant between 3<sup>rd</sup> April 2015 and the date of the ruling and file in court within 30 days from the date hereof.

22. The Applicant only states what he is required to do but has not demonstrated how he will suffer substantial loss if he complies with the said orders. The applicant further stated that the amount translates to Kshs. 6.3Million but does not say whether he is unable to pay and if so what is the reason for inability to pay.

23. The applicant has not touched on the second limb of the order for furnishing accounts for the rental income to court within the 30 days that was ordered by the court.



24. On the issue of provision of security for the due performance of the decree, in the case of *Kiplagat Kotut v Rose Jebor Kipngok* [2015] eKLR the court held that:

“in an application for stay, there are always two competing interests 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. ... In a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal. / do not see why the same should not be applicable in this case.”

25. The Applicant stated that he would be willing to give an undertaking on the issue of security for the due performance of the decree. The court has discretion to either grant or disallow an order of stay of execution but the discretion must be exercised judiciously as was held in the case of *Patriotic Guards Ltd. v. James Kipchirchir Sambu*, Nairobi CA No. 20 Of 2016, (2018) KLR, the Court stated:

“It is settled law that whenever a Court is called upon to exercise its discretion, it must do so judiciously... judicious because the discretion to be exercised is judicial power derived from the law and as opposed to judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by Court to do real and substantial justice to the parties in the suit.”

26. This being an application for stay of execution of a ruling and the matter is still pending, the court should also look at the effect of delaying this matter pending the outcome of the intended appeal which essentially puts a stay of the hearing of the case.

27. I will exercise my discretion to allow a stay of execution of the deposit of the rental income on condition that the Applicant files an account of the rental income as per the order dated 10<sup>th</sup> February 2022 within 30 days from the date of this ruling. Costs of the application in the cause.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 26<sup>TH</sup> DAY OF APRIL, 2023.**

**M.A. ODENY**

**JUDGE**

