



Maina & another v Kamara & another (Miscellaneous Application 56 of 2019) [2023] KEELC 16828 (KLR) (18 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16828 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
MISCELLANEOUS APPLICATION 56 OF 2019**

JM ONYANGO, J

APRIL 18, 2023

BETWEEN

ESTHER NYAGUTHII MAINA 1ST APPLICANT

JACKSON ONDARI 2ND APPLICANT

AND

RACHEL WANJIKU KAMARA 1ST RESPONDENT

JAMES GITHINJI KAMARA 2ND RESPONDENT

RULING

1. The Applicant moved the court vide an application dated September 23, 2022 seeking a stay of execution pending appeal. The application is anchored on the grounds set out in the Notice of Motion and the Applicant's Supporting Affidavit sworn on the September 23, 2022.
2. In his Supporting Affidavit the Applicant avers that he has filed a Notice of Appeal in respect of the court's ruling delivered on February 3, 2022 dismissing an application for review and he will be prejudiced if execution of the costs is effected before his intended appeal is heard and determined.
3. The application is opposed by the Respondent through his Replying Affidavit sworn on October 18, 2022 in which he avers inter alia that the Applicant has not met the threshold for stay of execution pending appeal. He points out that the Notice of Appeal was filed out of time and he has applied to have the same struck out. He avers that the application is an abuse of the court process.
4. The application was disposed of by way of written submissions and both parties filed their submissions which I have considered.
5. The only issue for determination is whether the Applicant has met the threshold for stay pending appeal.



Order 42 Rule 6 of the [Civil Procedure Rules](#) sets out the principles that should guide the court in considering an application for stay pending appeal. The said provision stipulates as follows:

6.
 - (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 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.
 - (3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
 - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

I will now proceed to determine whether the applicant has met the three conditions stipulated above.

6. With regard to the question of delay, the ruling in respect of which the stay is sought was delivered on March 3, 2022 while the application for stay was filed on September 23, 2022. The Applicant appears to have been jolted into action when he realized that the Respondent had taxed his Bill of costs. The delay of seven (7) months has not been explained.
7. On the issue of substantial loss, the court in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the court observed 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.”

8. In the instant case, the Applicant has merely stated that he will be prejudiced if execution of the costs is effected before the intended appeal is heard and determined. He has not demonstrated how the payment of costs would render the appeal nugatory.
9. With regard to the third condition which relates to security for costs, the applicant has not expressed his willingness to furnish security for costs.

In the case of *Kiplangat Kotut v Rose Jebor Kipngok* [2015] eKLR the Court observed as follows:

“Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the *Civil Procedure Rules, 2010* cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously. “

10. All in all, the applicant has not met the requirements in Order 42 Rule 6 of the *Civil Procedure Rules* to enable the court exercise its discretion in his favour.
11. The upshot is that the application lacks merit and it is dismissed with costs to the Respondent.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF APRIL 2023

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J.M ONYANGO

JUDGE

In the presence of;

1. Mr. Ogongo for Mr. Miyienda for the Plaintiff/Applicant

2. Mr. Mathai for the Defendant/Respondent

Court Assitant: Antony Oniala

