



**Mulli v Mulli (Environment & Land Case 205 of 2019)
[2023] KEELC 16928 (KLR) (13 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16928 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 205 OF 2019
EK WABWOTO, J
APRIL 13, 2023**

BETWEEN

ANNA ITUMBI MULLI PLAINTIFF

AND

BENEDETTA MUTUNGE MULLI DEFENDANT

RULING

1. This is a ruling in respect to a Notice of Motion dated February 10, 2023 in which the Defendant seeks stay of execution pending appeal.
2. The Defendant contends that judgment against her was delivered on January 19, 2023. Being dissatisfied with the said judgment, she has preferred an appeal to the Court of Appeal. She therefore prays that there be stay of execution of the said judgment as she pursues her appeal.
3. The application is opposed by the Plaintiff through grounds of opposition dated February 28, 2023. The Plaintiff contends that the application has not met the threshold for grant of stay pending appeal. The Plaintiff further contends that the Defendant has not shown that she will suffer any substantial loss if stay is not granted.
4. During the plenary hearing of the application on March 1, 2023, Counsel for the parties were allowed to make oral submissions in support and opposition to the said application.
5. I have considered the application, oral submissions made by the counsel for the parties, the affidavit and ground of opposition filed. The only issue for determination is whether the Defendant has met the threshold for grant of stay pending appeal.
6. The issue of whether to grant stay pending appeal is a matter of discretion. This discretion is fettered by four conditions. First, an applicant must demonstrate that there is just cause to grant stay. Second, the Applicant has to demonstrate that he or she will suffer substantial loss should stay not be granted.



Third, there has to be security provided for the due performance of the decree as may ultimately be binding upon the Applicant. Fourth, the application has to be brought without unreasonable delay.

7. The principles are further outlined under Order 42 Rule 6 (1) and (2) of the [Civil Procedure Rules](#), which provides:

- (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.

8. A stay of execution under order 42 of the [Civil Procedure Rules](#) is an interim order to suspend the rights of one party who is aggrieved with the judgment of the trial court or tribunal and wishes to exercise his or her right of appeal. Its main objective is to protect the substratum of the suit by delaying the execution process until the determination of the appeal. Being a discretionary remedy the applicant must demonstrate that he or she has approached the court of equity with clean hands as succinctly stated in the case of *Jajbhay v Cassim* 1939 AD 537-551 the court held on this maxim that: “All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice.”

9. The general principle of law is that the successful litigant in possession of a valid court judgement is entitled to the fruits of judgement unless there exist exceptional circumstances to deny him or her that right. Further The Court of Appeal in the case of *Visbham Ravji Halai vs Thornton & Turpin* [1990] KLR 365 stated that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 (now Order 46 Rule 2) of the [Civil Procedure Rules](#) is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.

10. In considering an application for stay of execution I am guided by the case of *Butt v Rent Restriction Tribunal* Civil App No Nai 6 of 1979 (Madan, Miller and Porter JJA) where the following guidelines were given:

“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.



The general principal 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. 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. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

11. The first limb of consideration is whether the application was filed without unreasonable delay. Judgment was delivered on January 19, 2023 and the Defendant filed her notice of motion under certificate of urgency on February 10, 2023. There was no much delay in the filing of this instant application.
12. It is clear that for the Court to grant stay of execution, the Applicants needs to satisfy the Court that they will suffer substantial loss. In the case of *Century Oil Trading Company Ltd v Kenya Shell Limited* Nairobi (Milimani) HCMCA No 1561 of 2007 the court stated: -

“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue.

The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”
13. The Applicant should not only state that she is likely to suffer substantial loss but must also demonstrate that she will suffer the same. The Applicant bears the burden of proving that by refusal to grant stay of execution she stands to suffer substantial loss.
14. The mere filing of a Notice of Appeal does not automatically warrant the issuance of orders of stay of execution of the decree. In the present application, the Defendant has filed Notice of Appeal dated January 23, 2023.
15. The Defendant submitted that if the Plaintiff is allowed to execute the judgement then the appeal will be rendered nugatory. I note that if the Plaintiff was to execute the decree, it will indeed render the appeal nugatory as the Plaintiff would have been evicted from the suit property. This is a case for grant of stay of execution pending appeal.
16. On the issue of security, it is evident that the defendant has been on the suit property for over 40 years and are still in occupation and in the circumstances an order for security for the due performance of the decree is not necessary at this stage.



17. In the end, I therefore find that the application dated February 13, 2023 is merited. The same is allowed as follows: -

- i. An order staying the execution of the Judgment and Decree delivered on January 12, 2023 is hereby granted pending the hearing and determination of the Appeal.
- ii. Each party to bear their own costs of the application.

20. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF APRIL 2023.

E. K. WABWOTO

JUDGE

In the Presence of: -

Ms. Alusiola for the Plaintiff.

Mr. Nzaku for the Defendant.

Court Assistant: Caroline Nafuna.

