



Njonjo v Nyambura & 2 others (Environment and Land Appeal E078 of 2021) [2023] KEELC 16844 (KLR) (13 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16844 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E078 OF 2021**

JG KEMEI, J

APRIL 13, 2023

**A.THE APPLICANT TO DEPOSIT IN COURT THE SUM OF KSHS 100,000/-
BEING THE AMOUNT TO COVER THE SECURITY FOR THE DUE
PERFORMANCE OF THE DECREE WITHIN A PERIOD OF 30 DAYS.**

B.THE APPLICANT TO EXPEDITIOUSLY FILE HIS APPEAL IN THE COURT OF APPEAL.

**C.IN DEFAULT OF (A) ABOVE THE ORDERS OF STAY OF
GRANT OF EXECUTION SHALL LAPSE AUTOMATICALLY.**

D.THE COSTS SHALL BE IN FAVOUR OF THE 2ND RESPONDENT.

BETWEEN

FRANCIS MAINA NJONJO APPELLANT

AND

NANCY LYDIA NYAMBURA 1ST RESPONDENT

JOSEPH KIBE NGUGI 2ND RESPONDENT

RUIRU LAND REGISTRAR 3RD RESPONDENT

RULING

1. What is before me is an Application dated the 6/10/2022 filed by the Applicant seeking orders of stay of execution of the Judgement and orders issued on the 22/9/2022 pending hearing and determination of the appeal filed in this matter.
2. The Application is premised on the grounds annexed thereto and the Supporting Affidavit of the Applicant deponed on the 6/10/22. The main grounds are that the Applicant is dissatisfied with the Judgement of this Court rendered on the 22/9/2022 and has appealed against the same. The Applicant stated that he has filed the appeal without delay seeing that he has applied for typed proceedings and the decree thereto. That the cancellation of his title is prejudicial to him as the 2nd Respondent will proceed



- with the execution of the Judgement rendering his appeal an exercise in futility. That he has an arguable appeal. That the need to preserve the property pending appeal is pertinent to the success of his appeal.
3. The Notice of Appeal, draft memorandum of appeal together with a request for typed proceedings have been annexed to the Applicant's Affidavit.
 4. The Application is opposed vide the 1st and 2nd Respondents Grounds of Opposition dated the 24/10/2022 on the grounds interalia; the Application is misconceived and bad in law, Applicant has not established the threshold of stay of execution, no positive orders were granted and no risk of substantial loss has been demonstrated by the Applicant which is incapable of compensation by way of damages.
 5. With leave of the Court granted on the 10/11/2022 the parties elected to canvass the Application by way of written submissions. I note that despite the directions of the Court and further accommodation the 1st and 2nd Respondents failed to comply.
 6. On the factors that the Court should consider in granting orders of stay of execution, the Applicant placed reliance on order 42 rule 6 of the [Civil Procedure Rules](#) and enumerated them as demonstration of sufficient cause, demonstration of substantial loss, absence of unreasonable delay and security and grant of stay is discretionary.
 7. Further the Applicant submitted that by the very nature that he was a bonafide purchaser for value, his title ought not to have been adjudged cancelled and hence has a strong case on appeal with a high chance of success. That the order of cancellation of the Applicants title in itself is a positive order capable of execution by the Respondents. His apprehension is that if the orders of stay are not granted and the title is registering in the name of the 2nd Respondent, the 2nd Respondent could sell the land rendering his appeal nugatory.
 8. In addition he submitted that the Applicant has filed the Application without delay and on the issue of provision of security, he stated that as an advocate of the High Court of Kenya he has a fixed place of business easily traceable and in addition he patronizes Courts almost on a daily basis and believes that the issue of security being discretionary, he should be allowed to prosecute his appeal unencumbered. Nevertheless, he added that he is ready to abide with the directions of the Court.
 9. The Applicant has relied interalia on the case of [Butt v Rent Restriction Tribunal](#) (1979) eKLR; [Kenya Shell v Kibiru & Anor](#) (1986) KLR; [George Kimande v Ephantus Kamande Macharia](#) (2018) eKLR; [Kuria Kimani v James Karungu Kimani & Anor](#) (2018) eKLR. I have read and considered these precedents.
 10. Having considered the Application in its totality, the Grounds of Opposition and the written submissions and all the materials placed before me, the key issue for determination is whether the Application is merited.
 11. The starting point is the legal framework that govern the granting of orders of stay of execution.
 12. The legal provisions for stay of execution are anchored in order 42 rule 6 of the [Civil Procedure Rules](#) that;

“6. Stay in case of appeal [Order 42, rule 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.”

13. It is trite that for an Applicant to succeed in an Application of this nature, one must establish three conditions namely; establishment of substantial loss upon timely filing of the Application and the furnishing of security for the due performance of the decree.
 1. I concur with the Applicant and equally rely on the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal namely; -
 - a. 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.
 - b. 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.
 - c. 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.
 - d. 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.
15. Flowing from the above I make the following findings in this case; the Application was filed within time thus timeously; the Applicant has demonstrated that the cancellation of this title will render his appeal nugatory therefore am persuaded that he has established substantial loss seeing that if stay is not granted the 2nd Respondent shall be at liberty to deal with the property howsoever he wishes including disposing it to the prejudice of the Applicant’s pending appeal; the Applicant has shown willingness to abide with the directions of the Court with respect to the provision of security of costs.
16. In the end I allow the Application on the following terms;



- a. The Applicant to deposit in Court the sum of Kshs 100,000/- being the amount to cover the security for the due performance of the decree within a period of 30 days.
- b. The Applicant to expeditiously file his appeal in the Court of Appeal.
- c. In default of (a) above the orders of stay of grant of execution shall lapse automatically.
- d. The costs shall be in favour of the 2nd Respondent.

17. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 13TH DAY OF APRIL, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Mr. Njonjo for Appellant

Ms. Mwangi HB Njenga for 1st and 2nd Respondents

3rd Respondent – Absent

Court Assistants – Kelvin/Lilian

