



**Ronoh v Kiplagat (Environment and Land Appeal E010 of 2022)  
[2023] KEELC 17736 (KLR) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17736 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT AND LAND APPEAL E010 OF 2022**

**CG MBOGO, J**

**MAY 30, 2023**

**BETWEEN**

**THOMAS KIMUTAI RONOH ..... APPELLANT**

**AND**

**JOHN KIPYEGON KIPLAGAT ..... RESPONDENT**

*(Being an appeal from the Ruling of the Chief Magistrate's Court at Narok (Hon. S.M. Mungai, CM delivered on 25th October, 2022 in Narok CM ELC Case No.181 of 2018)*

**JUDGMENT**

1. Before this court for determination is a notice of motion application dated November 23, 2022 filed by the applicant herein which is expressed to be brought under Order 51, Order 42 Rule 6 of the Civil Procedure Rules and sections 3A, 1A and 1B of the Civil Procedure Act seeking the following orders:-
  1. Spent.
  2. Spent.
3. That pending the hearing and determination of this application, the honourable court be pleased to issue an order of stay of execution of the judgment delivered on October 26, 2021 and the ruling delivered on October 25, 2022 in Narok CM ELC Case No. 1818 of 2018.
4. That this honourable court be pleased to grant leave to the applicant/intended appellant to appeal to this honourable court against the entire order and ruling of Narok Chief Magistrate's Court ELC No. 181 of 2018 delivered on October 25, 2022 by the Hon. S.M. Mungai.
5. That pending the hearing and determination of this appeal, the honourable court be pleased to issue an order of stay of execution of the judgment delivered on October 26, 2021 and the ruling delivered on October 25, 2022 in Narok CM ELC Case No. 181 of 2018.



6. That the proceedings based on the ruling of October 25, 2022 by the Hon. S.M.Mungai dismissing the applicant's application dated April 8, 2022 be entirely set aside and uphold the applicant's application dated April 8, 2022.
7. That the costs of this application be borne by the respondent in any event.
2. The application is premised on the grounds inter alia that on October 26, 2021 the trial court rendered judgment against the appellant who moved the trial court for review and that on October 25, 2022, the application for review was dismissed.
3. The applicant was supported by the affidavit of the applicant sworn on even date. The applicant deposed that the respondent filed CM ELC Case NO. 181 of 2018 on claims that the applicant is in breach of sale agreement dated 13<sup>th</sup> May, 1997 in which the parties transacted on the sale of the suit property.
4. The applicant further deposed that he never executed the sale agreement on May 13, 1997 but on August 15, 1997 and the trial court on October 26, 2021 the court pronounced itself against the applicant. Also, that the applicant sought for review of the said decision and on October 25, 2022, the trial court dismissed the application which is now the subject of the instant appeal. Further that in the intervening period, the respondent has on the basis of the trial court ruling issued him with a notice to vacate the suit premises dated November 15, 2022.
5. The applicant further deposed that in the ruling delivered on October 25, 2022, the trial court dismissed the purported application dated April 8, 2022 which he did not file. As such it is necessary that this court grants the orders sought as he will suffer irreparably and the appeal will be rendered nugatory.
6. The application was opposed by the respondent's replying affidavit sworn on January 10, 2022. The respondent deposed that on October 26, 2021 judgment was entered in his favour and among other orders was for the applicant to vacate the suit property within 3 months which has now lapsed and the applicant has not made any effort to comply with orders of the court. Further, that the applicant did not appeal against the said decision and the orders given by the trial court were clear and not up to any further interpretation or review. The respondent further deposed that on November 15, 2021, the applicant filed an application seeking a review of the judgment and the court dismissed the application for review as it not have any valid grounds.
7. The respondent further deposed that application before the trial court did not qualify to warrant orders of review to issue as there was no mistake or error apparent on the face of the record. Further, that the applicant had the option to appeal against the said judgment which he did not pursue. Also, that the only way to correct the trial court's alleged misapprehension of the substantive law was to appeal the judgment which the applicant did not do.
8. The respondent further deposed that an order cannot be reviewed because it is shown that the magistrate decided the matter on a foundation of incorrect procedure/substance and that the application is just but a tactical delay method to ensure that the respondent does not enjoy the fruits of his judgment in time. Further, that all grounds raised for review were at the least grounds for appeal and not grounds for review and thus the lower court was right in dismissing the application for review. The respondent relied on the case of *National Bank of Kenya v Ndungu Njau* Civil Appeal No 211 of 1996 [1995-98] 2 EA 249.



9. Further, that the applicant is now in contempt of clear court orders to vacate the suit property and should at the very least be instructed to deposit security before his application which is clearly tailored to buy more time.
10. The application was canvassed by way of written submissions. The respondent filed written submissions dated April 5, 2023. The respondent raised one issue for determination which is whether the applicant's application is merited and should be allowed.
11. The respondent submitted that the affidavit sworn by the applicant in his application for review dated November 15, 2022 did not amount to any averment of new evidence that was not within his knowledge and which could not be produced at the time when the decree was passed and that the documents sought to be relied upon were not new matters or evidence which after the exercise of due diligence were not within the knowledge of the applicant.
12. Further, the respondent submitted that a perusal of the review application manifested that the applicant was dissatisfied with the decision of the trial court and more so the decision concerning the validity of the sale agreement. That the applicant alluded to no error apparent on the face of the record as a basis for his application for orders of review. The respondent relied on the case of *National Bank of Kenya (supra)* as well as the case of *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* [2016] eKLR.
13. The respondent further submitted that the applicant did not demonstrate or state any sufficient grounds that would have warranted the court to review its orders. The respondent relied on the case of *Nasibwa Wakenya Moses v University of Nairobi & another* [2019] eKLR.
14. The respondent further submitted that the trial court was clear in its judgment and that in dismissing the application for review, the court correctly held that to entertain the application would be tantamount to sitting on appeal of its own judgment as the court was even invited to reconsider its position, adopt the applicant's argument and alter its initial judgment in the absence of any ground for review. Also that it worth noting that an appeal as against the judgment of the lower court delivered on October 26, 2021 has never been lodged.
15. Also, the respondent submitted that this court should not be misguided that the lower court dismissed the application dated April 8, 2022 as it rightly dismissed the applicant's application dated November 15, 2022.
16. The applicant did not file written submissions. Be that as it may, this court will proceed to determine the matter that is before it and having carefully analyzed and considered the application, replying affidavit and the written submissions filed by the respondent, the issue for determination is whether this court ought to order stay of execution of the ruling delivered by the trial court on October 25, 2022.
17. The principles upon which the court assesses an application for stay of execution are laid down in Order 42 Rule 6 of the *Civil Procedure Rules* which provides as follows: -
  - “(2) 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.”

18. It will be seen that the above provisions are couched in mandatory terms and three conditions must thus be satisfied before an applicant succeeds on an application for stay pending appeal. First, the court must be satisfied that substantial loss will be occasioned to the applicant unless the order of stay is made. Secondly, the application for stay pending appeal must be made without unreasonable delay; and finally, there must be security for the due performance of the decree.
19. The Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how a court should exercise discretion and held that:
- “ 1. 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.
  2. The general principle 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.
  3. 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.
  4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
  5. The court in exercising its powers under Order XLI rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
20. I will begin with unreasonable delay. The applicant herein filed the instant application and memorandum of appeal both dated November 23, 2022. Interestingly, the said documents bear the court’s stamp said to have been filed in court on November 22, 2022. The receipt evidencing the said payments indicate that payments were made on November 25, 2022. The ruling that is the subject matter of trial court was delivered on October 25, 2022. Without any explanation as to the varying dates in stamping of application, memorandum of appeal and the receipt of payment, this court may say that the application has been made without delay.
21. On whether substantial loss will be occasioned in the event the orders sought are not granted, the applicant contended that he risks being evicted from the suit property as the per the eviction notice issued by the respondent which will render the appeal nugatory. On this, I find the ground for stay reasonable in ensuring that the appeal is not rendered nugatory or an academic exercise and this court will therefore exercise discretion and allow the stay of execution of the ruling delivered on October 25, 2022.



22. On the third limb which is security for costs, the applicant was completely mute on this aspect. As it can be seen from the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*, the requirements are in mandatory terms including deposit of security for costs. On the other hand, I am alive to the fact that execution is a lawful exercise and which forms part of procedure in realisation of the fruits of the judgment to a successful litigant.
23. It is my considered view that a reasonable amount would suffice to adequately protect the respondent in the process of appeal. As such, the sum of Kshs. 500,000/- is suitable for this purpose.
24. Arising from the above, the notice of motion application dated November 23, 2022 is allowed in the following terms:-
- i. That a stay of execution is hereby issued pending the hearing and determination of the appeal on condition that the applicant deposits the sum of Kshs. 500,000/- in a joint interest earning account within 45 days from the date of this ruling and in the alternative to deposit in court a bank guarantee letter of the same amount from a reputable bank within the same number of days.
  - ii. In the event that the applicant is unable to deposit such sums and in the alternative deposit a bank guarantee letter within the period as stated in item i. above, the respondent will be at liberty to execute.
  - iii. Costs of this application to be borne by the applicant.

It is so ordered.

**DATED, SIGNED & DELIVERED VIA EMAIL on this 30<sup>th</sup> day of MAY, 2023.**

**HON. MBOGO C.G.**

**JUDGE**

**30/5/2023.**

**In the presence of:**

CA:Chuma

