



REPUBLIC OF KENYA



KENYA LAW
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**Mati v Mulyungi (Environment and Land Appeal E001 of 2023)
[2023] KEELC 17644 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17644 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL E001 OF 2023**

LG KIMANI, J

MAY 18, 2023

BETWEEN

LYDIA MWALALE MATI APPLICANT

AND

SABINA SAMUEL MULYUNGI RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. M. K.
Mwangi Chief Magistrate at Mwingi in MC ELC Case No.16 of 2019)*

RULING

1. The Appellant/Applicant filed an Application under Notice of Motion dated February 9, 2023 seeking the following orders:
 1. Spent
 2. Spent.
 3. That pending the hearing and determination of this Appeal, the Honourable Court be pleased to order stay of execution of the Judgment delivered on December 21, 2022 in Mwingi CMELC NO 16 OF 2019: Sabina Samuel Mulyungi vs Lydia Mwalale Mati, decree and all consequential orders and proceedings thereto.
 4. That this Honourable Court be pleased to make such further and/or other orders and issue any other relief it may deem just and appropriate to grant in the interests of justice.
 5. That the costs of this application be provided for.
2. The application is supported by the affidavit of the Applicant and is founded on the grounds that judgment was entered at the Chief Magistrate's Court at Mwingi in CM ELC NO.16 OF 2019 by Hon M K Mwangi (Chief Magistrate) against the Appellant where the Court issued an order of



permanent injunction restraining the Defendant from trespassing or interfering with the suit land Mwingi/Kiomo/1170. The Court further awarded the sum of Kshs 478,600 with costs and interests. The Applicant states that on the date of judgement counsel handling the case was indisposed and did not attend court and hence no application for stay of execution of the decree was made.

3. The Applicant being aggrieved by the decision of the trial court, filed this appeal and is apprehensive that the Respondent will commence the process of execution against her anytime. She states that the Appeal is arguable with a high probability of success and that if the orders sought are not granted she will suffer injustice, irreparable loss and damage rendering this application and the appeal nugatory. The Appellant claims that the Respondent will not suffer any prejudice if the orders are granted.
4. The Trial Court entered judgment in favour of the Respondent herein while dismissing the Defendant's defence and counterclaim.

The Respondents' Grounds of Opposition

5. The Respondent filed Grounds of Opposition dated February 28, 2023 stating that the Appellant had not met the threshold for grant of stay of execution as set out in Order 42 rule 6 of the [Civil Procedure Rules](#), in that she did not offer any security for the performance of the decree that might eventually be binding upon her. The Respondent further stated that the Applicant had not demonstrated what irreparable loss or damage she stands to suffer in the event the stay of execution is not granted and that she has a right to enjoy the fruits of her judgment.

The Applicants' Written Submissions

6. Counsel for the Applicant submitted on the elements necessary for grant of stay of execution as: whether substantial loss may result unless the order was made, whether the application has been made without unreasonable delay and whether such security as the court orders has been given by the Applicant. Counsel cited Order 42 rule 6 of the [Civil Procedure Rules](#) (2010).
7. On substantial loss, the Applicant submitted that the award of Ksh 478,600 plus costs and interests is colossal and quite detrimental to her, especially because she claims ownership of the suit property through inheritance from her late husband. The Applicant further submitted that the application was filed without undue delay since judgment was entered on December 21, 2022 whereas the application herein was filed on February 9, 2023.
8. Regarding the matter of security for costs, the Applicant submitted that it is a matter of discretion and they relied on the case of [Pascal Otieno Amoke vs Collins Omondi Omollo](#) (2021) eKLR. The Applicant submits that she has furnished the Respondent with security in form of a title deed for the land known as Mwingi/Kiomo/1169, showing that she is ready and willing to see the prosecute this appeal to its finality. Counsel for the Applicant submitted that the Applicant is living in absolute poverty and urged the Court not to punish her by directing her to deposit the decretal sum on court as they relied on the holding in the case of [Arun C Sharma vs Ashana Raikundalia T/A Rairundalia & Co Advocates & 2 others](#) (2014) eKLR.

The Respondent's Submissions

9. Counsel for the Respondent submitted on the conditions necessary for the grant of stay of execution according to Order 42 Rule 6 of the [Civil Procedure Rules](#) (2010). Relying on the holding in the case of [Kenya Shell Limited vs Benjamin Karuga Kibiru & Another](#) (1986) eKLR, they submitted on the need to balance between the nugatory aspect and the position that a successful litigant should not be kept from the fruits of his judgment.



10. Counsel also submitted that the Applicant has not demonstrated that should the decretal amount be paid; the Respondent would be unable to return the amount in the event that her appeal succeeds. It is their Submission that the offer to deposit security in the form of an immovable property is unknown in law and further that this offer should have been proposed in a supplementary affidavit as new facts cannot be introduced through submissions.
11. The Respondent concluded their submissions by stating that should the Court grant the stay of execution, then the Court should also order that the decretal sum be deposited in Court as a condition for grant of the stay of execution in order to serve justice to all concerned parties.

Analysis and Determination

12. After due consideration of the application herein and submissions made by Counsel for the parties, the Court is of the view that the issue that arises for determination is whether the Court should grant the Appellant stay of execution of the Judgment and Decree of Hon MK Mwangi Chief Magistrate at Mwingi in MC ELC Case No 16 of 2019 delivered on December 21, 2022.
13. Order 42 Rule 6(2) of the *Civil Procedure Rules* (2010) provides that:

“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.
- (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.”

14. The purpose of stay orders is to preserve the subject matter of the appeal so as to not render it nugatory. In the famous case of *Butt vs. Rent Restriction Tribunal* [1979]eKLR, the Court of Appeal set out considerations for determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, 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 the appeal court reverse the judge’s discretion. Thirdly, 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. Finally, 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. As to what substantial loss is, it was observed in *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR, that:

“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.”

16. The Applicant states that she stands to suffer substantial loss since she claims ownership of the suit land by way of inheritance. She claims that the judgement of the trial court issued permanent injunction to her not to interfere with the said land. The Court further ordered payment of the decretal sum of which the Applicant claims is a colossal sum of Ksh 478,600 for damage on the suit property. The Applicant states that she is living in abject poverty and may not be able to raise the decretal sum. The Respondent on the other hand submitted that there is need to balance stay with the element that a successful litigant should not be deprived of the fruits of a judgment issued in their favour.
17. The Respondent has cited the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR, where the Hancox JA was of the view that:

“As I said I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”
18. In this case the Court is of the view that it must balance the rights of the Appellant to pursue the appeal and to seek to protect the substratum of the suit, while at the same time consider the interests of the Respondent who has a judgment in her favour and would like to see an end to this litigation. In balancing these two interests the court is persuaded to grant the order of stay of execution on condition that the Appellant deposit part of the decretal sum with the Court, pending the expeditious hearing and determination of the main appeal.
19. The security envisaged under Order 42 Rule 6 (b) is for ensuring due performance of such decree or order as may ultimately be binding on the Applicant in case she does not succeed on the appeal. In this case the judgement was for a permanent injunction restraining trespass on the suit land. Such security is not meant to be punitive as was discussed in *Arun C Sharma vs Ashana Raikundalia t/a Raikundalia & Co Advocates & 2 others* [2014] eKLR, cited by counsel for the Appellant, where the court stated that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor....”
20. On the question of delay, it is noted that this Application was made without unreasonable delay, since judgement was delivered on the December 21, 2022 while the Application for stay of execution was filed on February 9, 2023, not too long after the Judgment.
21. From the foregoing the final orders of the court are that the application dated February 9, 2023 is allowed as follows;
 1. Stay of execution of the Judgment and Decree delivered in Mwingi CMELC NO 16 OF 2019: Sabina Samuel Mulyungi vs Lydia Mwalale Mati be and is hereby granted on condition that the Appellant deposit in court security in the sum of Kshs 230,000/= within 30 days from the date of this ruling in default of which the order herein will automatically lapse.



2. The Appellant to prosecute this appeal within six months from the date hereof in default of which the orders herein will automatically lapse.
3. Costs of the application to be borne by the Applicant.

DELIVERED, DATED AND SIGNED AT KITUI THIS 18TH DAY OF MAY 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE - KITUI

Ruling read in open court and virtually in the presence of-

Musyoki Court Assistant

M/s Muvindie for the Applicant

Muigai for the Respondent

