



**Henry v Kithinji (Environment and Land Appeal E024 of 2022)
[2023] KEELC 18118 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18118 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E024 OF 2022**

**CK YANO, J
JUNE 21, 2023**

BETWEEN

CONSTANT GAKURU HENRY APPLICANT

AND

KENNETH KINOTI KITHINJI RESPONDENT

RULING

1. The applicant herein moved this court vide an application dated May 25, 2022 seeking for orders;
 1. That this application be certified as urgent, service be dispensed with and it be heard ex-parte in the first instance.
 2. That the Honourable Court be pleased to issue an interim order of stay of execution of the judgement and/or decree delivered on April 28, 2022 by Hon J IRURA (PM) in Nkubu ELC No E012 of 2020 pending the hearing and determination of this application.
 3. That this Honourable Court be pleased to issue an interim order of stay of execution of the judgement and/or decree delivered on April 28, 2022 by Hon J IRURA (PM) in Nkubu ELC No E012 of 2020 pending the hearing and determination of this appeal.
 4. That the costs of the application be provided for.
2. The application is premised on the following grounds:
 - i. THAT the applicant is in imminent danger of losing the proprietorship of his parcel of land Abogeta/u-chure/3329 in execution of the judgement delivered on April 28, 2022 by Hon J IRURA (PM) in Nkubu ELC No E012 of 2020 on or around May 28, 2022 when the 30 days of stay of execution of the impugned judgement will expire.



- ii. This appeal shall be rendered nugatory if the orders sought herein are not granted as the respondent may transfer, obtain the title deed in his name and thereby sell the suit property in execution of the decree.
 - iii. The respondent is a person of straw and may not be in a position to make good any loss or damage suffered if the decree herein is enforced, he sells the suit property and the appeal ultimately succeeds.
 - iv. The applicant will suffer substantial loss if the application is not certified urgent and a temporary order for stay of execution of the judgement and decree is issued.
 - v. The appeal is meritorious with a high probability of success.
 - vi. That the application has been brought without undue delay.
 - vii. That the applicant is ready and willing to offer security for the due performance of the decree.
 - viii. It is in the best interests of justice for this Honourable Court to grant the orders sought.
3. The application is supported by the affidavit of Constant Gakuru Henry, The Applicant sworn on May 25, 2022. The Applicant avers that he knows of personal knowledge that judgment was delivered on April 28, 2022. That a stay of execution was issued for 30 days during delivery of the said judgement and the same was to expire on or around May 28, 2022.
 4. The applicant avers that upon reading the contents of the judgement and being aggrieved and dissatisfied with the said decision of the Honourable court, he thereby instructed his advocates on record to appeal against the courts finding and he has annexed copies of the letter requesting of typed and certified copies of the proceedings and judgement and memorandum of appeal marked 'CGH-01 (a) & b'.
 5. The applicant states that having read the contents of the impugned judgement he verily believes that the appeal is meritorious with a high probability of success. That there has been no delay in filing the application as his advocates on record obtained a copy of the judgement on May 13, 2022 as the court file was with the trial magistrate at Kigumo Law Courts where she was transferred to in January 2022.
 6. The applicant further states that he has been advised by his advocate on record that if the order for stay of execution of the judgement is not granted the substratum of the appeal shall be rendered nugatory as the respondent may ultimately proceed to transfer, obtain the title deed in his name and thereby sell the suit property in execution of the decree.
 7. The Applicant avers that he verily believes that the respondent being a person of straw may not be in a position to make good any loss or damage suffered if the decree is enforced and he sells the suit property and the appeal ultimately succeeds. That he is willing and capable of furnishing such security as the honourable court may order for the due performance of the decree pending the hearing and determination of the appeal.
 8. The Applicant further avers that he has been advised by his advocate on record that the honourable Court has the inherent power to grant the orders sought herein so as to enable the ends of justice to be met. That the grant of the orders sought herein will not occasion any prejudice to the respondent whereas he stands to suffer great prejudice if he is not allowed to ventilate his appeal herein.
 9. The respondent filed his replying affidavit on July 18, 2022 wherein he states that the application herein is fatally defective, inept and an abuse of court process.



10. The respondent avers that the judgement in the lower court was delivered in his favour and he deserves to enjoy the fruits of the said judgement and that the applicant has not shown how he will suffer any prejudice if the judgement herein is executed as he did not intend to sell the suit property as he ultimately intended to develop it.
11. The respondent states that he has been in occupation and use of the suit land since he purchased it from the applicant in the year 2019. That the applicant, apart from mere allegations, has not shown how he might suffer any irreparable damages or/loss as the subject matter is land which is immovable and will be available to the successful party in the appeal. That in any event the applicant has not offered any security for due performance of the decree in the lower court.
12. The respondent further states that the application and the appeal are frivolous, vexatious and an abuse of the court and only aimed to frustrate him having legally bought the land. That the appeal itself has minimal chances of success and he urged the honorable court to dismiss the application with costs.
13. The court directed that the application be canvassed through written submissions and the applicant filed his submission on November 21, 2022 and the respondent filed his on January 23, 2023.

Applicant's Submissions.

14. The Applicant submitted that the law concerning stay of execution pending appeal is found in order 42 Rule 6 (2) of the Civil Procedure Rules which stipulate three conditions for granting the same as follows:
 - i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
 - ii. The application is brought without undue delay; and
 - iii. 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.
15. The Applicant submitted that the main issue for determination arising from the instant application is whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of the impugned decree pending appeal.
16. On the first condition the applicant submitted that the purpose of stay of execution is to preserve the substratum of the case. The applicant relied on the case of [*NM V EMN \(2019\) eKLR*](#).
17. The applicant submitted that in his grounds and affidavit in support of the application he contends that he will suffer substantial loss if stay is not granted because the respondent may not be in a position to make good any loss or damage suffered if the decree is enforced and he sells the suit property and the appeal ultimately succeeds.
18. The applicant submitted that what amounts to substantial loss was expressed by the Court of Appeal in the case of *Rhoda Mukuma v John Abuoga (1988) eKLR* where their lordships stated that:

' The discretion under rule 5 (2) (b) is at large, but as was pointed out in the Kenya shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory. Therefore, it is necessary to preserve the status quo.'



19. The applicant submitted that he has demonstrated that the execution of the decree herein will create a state of affairs that will irreparably affect him should he succeed in the appeal and that the substratum of the appeal is likely to change if the stay is not granted.
20. On the second condition the applicant submits that the impugned judgement was delivered on the April 28, 2022 and the present application was filed on the May 25, 2022 which was after a period of about 27 days and urged the court to find that the application has been brought without undue delay.
21. The applicant further submits that on the last condition as to provision of security, he has pledged his readiness or willingness to offer such security as the court may order for the due performance of the decree pending the hearing and determination of the appeal.
22. The applicant urged the court to note that the decree herein is not a money decree but for transfer of the suit property to the respondent.
23. The applicant relied in the case of [*Arun C Sharma v Ashana Raikundalia T/A Rairandalia & Co Advocates & Co Advocates & 2 others \(2014\) eKLR*](#) in which the court held that:

‘The purpose of the security needed under order 42 is to guarantee the due performance of such decree or orders as may ultimately be binding on the Applicant. It is not to punish the judgement debtor. Civil process is quite different because in Civil process the judgement is like a debt hence the Applicants become and are judgement debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or orders as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.’

24. The applicant’s counsel urged the court to impose reasonable security for costs against the applicant.
25. The applicant further submitted that the grant of stay by the court is a discretionary order and relied in the Court of Appeal decision in [*Butt vs Rent Restriction Tribunal \(1979\) eKLR*](#) that gave guidance on how the discretion should be exercised as follows:

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.'

26. The applicant urged the court to allow the application dated May 25, 2022 as prayed.

Respondent's Submissions

27. Counsel for the respondent submitted that from the onset it is their humble submission that the applicant has not shown how he will suffer prejudice and or met any condition for grant of stay orders as provided for under order 42 rule 6 (2) of the *Civil Procedure Rules*. That it is not in dispute that the Respondent is in occupation and user of the suit land since 2019 when he bought the same from the Applicant.
28. The respondent submitted that he has no intentions of disposing the land as he intends to develop it and further in the event he is successful in the appeal and the subject matter being immovable property the same will be available to the successful party in the appeal.
29. The respondent further stated that he has not been able to enjoy full proprietary rights since he purchased the suit land and he should be allowed to enjoy the fruits of his judgement and that in any event the applicant who is relatively elderly has not even offered any security for due performance of the decree in the lower court.
30. The respondent submitted that the applicant is malicious and only intends to frustrate the respondent having legally purchased the suit land and urged the court to dismiss the application dated May 25, 2022 with costs to the respondent.

Analysis And Determination

31. I have considered the application and the submissions filed by the parties to buttress their assertions. What calls for determination in this matter is the issue of stay of execution pending the hearing and determination of the appeal.
32. Stay of execution pending appeal is a discretionary power bestowed upon this court by the law. The Court of Appeal in the case of Butt –vs- Rent Restriction Tribunal [1982] KLR 417 gave guidance on how a court should exercise the said 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.'

33. The principles upon which stay of execution pending appeal can be allowed are now well settled from the authorities from this court and from the superior courts. Generally, stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules. Sub-rule 1 gives the court discretionary powers to stay execution and provides 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 undue 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.'

34. As such, for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.

35. As for the applicants having to suffer substantial loss, in the case of *Kenya Shell Limited -vs- Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988)KAR 1018* the Court of Appeal pronounced itself to the effect that:

' It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.'

(See also the case of *Machira T/A Machira & Co Advocates -vs- East African Standard (No 2) (2002) eKLR 63*)



36. The applicant has the burden to show the substantial loss he is are likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Appellant to his Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.
37. In *Geoffery Muriungi & another v John Rukunga M'imonyo suing as Legal representative of the estate of Kinoti Simon Rukunga (Deceased)* [2016] eKLR it was held as follows:
- ' The undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as 'reducing the successful appellant into a pious explorer in the judicial process'. The said state of affairs is what is referred to as 'substantial loss' within the jurisprudence in the High Court, or 'rendering the appeal nugatory' within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal.'
38. The applicant submitted that he will suffer substantial loss if stay is not granted because the respondent may not be in a position to make good any loss or damage suffered if the decree is enforced and he sells the suit property and the appeal ultimately succeeds.
39. As already stated, Order 42 Rule 6 lays out the Law on stay of execution pending appeal, by giving court the discretion to order stay for sufficient cause. Sub-rule 2 outlines the mandatory conditions that have to be met for the court to grant stay pending appeal. The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant.
40. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under Order 42 Rule 6. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicant unless stay of execution is granted; and thirdly 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.
41. From the record, the impugned judgement was delivered on the April 28, 2022 and the present application was filed on the May 25, 2022 which was after a period of about 27 days. In my opinion, the application was made timeously.
42. Regarding the issue of substantial loss occurring to the Applicant, the court has already referred the consideration to be made in the case of Kenya Shell Limited –vs- Benjamin Karuga Kigibu & Ruth Wairimu (Supra).
43. In this case, the Applicant he is likely to suffer substantial loss if no stay is granted as he is in imminent danger of losing the proprietorship of parcel of land ABOGETA/U-CHURE/3329 in execution of the judgement delivered by the subordinate court. .
44. The Court notes that on the issue of security, the Applicant submitted that that he is willing and capable of furnishing such security as the honourable court may order for the due performance of the decree pending the hearing and determination of the appeal. The issue of security is one of the pre requisite condition for stay to be granted. As the Applicant has demonstrated his willingness to provide security, I would therefore exercise my discretion in favour of the applicant and allow the application dated May 25, 2022 on condition that the applicant gives security.



45. In the result, the application is allowed in the following terms:

- a. There shall be stay of execution of the judgment and decree dated April 28, 2022 in Nkubu PMC ELC Case NO E 012 of 2022 pending the hearing and determination of this appeal.
- b. The stay is granted in (a) above on condition that the applicant shall deposit the sum of Kshs 150,000/- in court as security within thirty (30) days from the date hereof, in default, the conditional stay of execution shall automatically lapse.
- c. Costs of this application are awarded to the respondent.

46. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF JUNE, 2023

In the presence of:

Court Assistant – V. Kiragu

Muriira for respondent

Muthomi for appellant

C. K. YANO,

JUDGE.

