



**Kango Enterprises Limited & another v Unsworth (Sued as the administrator the Estate of John Fraser Unsworth) & 7 others (Environment & Land Case 41 of 2012 & E11 of 2020 (Consolidated)) [2023] KEELC 18355 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18355 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**ENVIRONMENT & LAND CASE 41 OF 2012 & E11 OF 2020 (CONSOLIDATED)**  
**MAO ODENY, J**  
**JUNE 21, 2023**

**BETWEEN**

**KANGO ENTERPRISES LIMITED ..... PETITIONER**

**AND**

**GAIL UNSWORTH (SUED AS THE ADMINISTRATOR THE ESTATE OF JOHN FRASER UNSWORTH) ..... 1<sup>ST</sup> DEFENDANT**

**FREDRICK KAZUNGU ..... 2<sup>ND</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**THE COMMISSIONER OF LANDS ..... 4<sup>TH</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR ..... 5<sup>TH</sup> DEFENDANT**

**GRACE MGHOI MUSHIMBA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE MORRIS NGOLE MACHACHE) ..... 6<sup>TH</sup> DEFENDANT**

**AS CONSOLIDATED WITH**

**ENVIRONMENT & LAND CASE E11 OF 2020**

**BETWEEN**

**GRACE MGHOI MUSHIMBA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE MORRIS NGOLE MACHACHE) ..... PLAINTIFF**

**AND**

**THE HON ATTORNEY GENERAL ..... 1<sup>ST</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**



**RULING**

1. This ruling is in respect of a Notice of Motion dated 29<sup>th</sup> August 2022 by the 1<sup>st</sup> Defendant in ELC 41 of 2012 seeking the following orders:-
  - a. Spent
  - b. Spent
  - c. That this Honourable Court be pleased to stay the whole judgment delivered by the Malindi Environment and Land Court on 5<sup>th</sup> August 2022 and its decree pending inter-partes hearing and determination of the 1<sup>st</sup> Defendant/Applicant's intended appeal.
  - d. That this Honourable Court be pleased to issue an order of injunction restraining the plaintiff, its principals, agents, servants, employees or any other person from enforcing the judgment dated and delivered on 5<sup>th</sup> August 2022 and its decree; pending inter-partes hearing and determination of the 1<sup>st</sup> Defendant/applicant's intended appeal.
  - e. That the costs of this application be in the cause.
  - f. That this Honourable Court be pleased to issue any other orders ancillary to the above and favorable to the Applicant as it may deem just, fit and expedient to issue.
2. The application was premised on the grounds on the face of the motion and supported by the affidavit of Gail Unsworth dated 30<sup>th</sup> August 2022 where she deponed that upon judgment being delivered, she filed a Notice of Appeal dated 15<sup>th</sup> August 2022 and that the court gave her 45 days to vacate the suit land parcel Chembe/Kibabamshe/327, further deponed that she is at risk of being rendered homeless and her appeal nugatory.
3. The Plaintiff in ELC E11 of 2020, opposed the application and filed grounds of opposition dated 10<sup>th</sup> November 2022 and averred that since the 1<sup>st</sup> Defendant, applicant herein, did not prefer any appeal or review against the consent order dated 24<sup>th</sup> March 2022, she will be prejudiced if the judgment is stayed and that the 1<sup>st</sup> Defendant had not demonstrated any sufficient cause or offered any security for costs to warrant the court to stay the impugned judgment.
4. The application was canvassed by way of written submissions.

**1<sup>st</sup> Defendant's/applicant's Submissions**

5. Counsel identified three issues for determination namely, whether the intended appeal has high chances of success; whether the applicant will suffer substantial loss if the orders sought are not granted; and finally whether the applicant has furnished security for the due performance of the decree.
6. Regarding the first issue, counsel submitted that the intended appeal was arguable as per their draft Memorandum of Appeal and relied on the case of Commissioner of Customs v Ashok Doshi and 2 others [2007] eKLR.
7. On the second issue, counsel relied on the case of Consolidated Marine v Nampijja and Another, Nairobi Civil Appeal No. 93 of 1989; Mukuma v Abuoga [1988] KLR 645 and submitted that the applicant stands to suffer substantial loss considering she has lived on the suit property for a



long period of time and the time issued by the court to vacate the premises will not be enough to remove her personal effects and improvements done on the property. Counsel further submitted that if the Plaintiff executes the impugned judgment, the Applicant will be dispossessed hence the need to preserve the suit property.

8. Counsel further stated that the Applicant will offer a reasonable security and argued that the suit property was nevertheless sufficient security. To counsel, the Plaintiffs ought to have demonstrated their financial ability to pay the decretal amount if the intended appeal succeeds. Counsel relied on the cases of Johnson Mwiruuti Mburu v Samuel Macharia Ngure HCCA 716 OF 2003; and National Industrail Credit Bank Ltd v Aquinas Francis Wasike and another [2006] eKLR.

#### **5<sup>th</sup> Defendant's Submissions**

9. Counsel for the 5<sup>th</sup> Defendant identified two issues for determination namely, whether the Applicant has met the conditions in Order 42 rule 6 of the Civil Procedure Rules, 2010; and whether the application is merited.
10. It was counsel's submission that the Applicant neither demonstrated the nature of the loss she would suffer if the orders sought are not granted, nor offered such security as stipulated under Order 42 rule 6 of the Civil Procedure Rules. Counsel relied on the case of Michael Ntouthi Mitheu v Abraham Kivondo Musau [2021] eKLR. and urged the court to dismiss the application for lack of merit.

#### **Plaintiff's Submissions**

11. Counsel submitted that in an application for stay, the court ought to be concerned with the rights of both parties pending the appeal as it was held in Nduhiu Gitahi v Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100. Counsel added that the conditions to be met were three as captured in the case of Halai and another v Thornton and Turpin [1963] Ltd [1990] eKLR.
12. On the issue as to whether there is sufficient cause to warrant stay orders, counsel cited the case of Francis K. Chabari and another v Mwarania Gaichura Kairubi [2022] eKLR and submitted that the arguability of the applicant's appeal was not a consideration in such applications. That the applicant could not base her application on that argument as it was held in the case of Judson Oriema Okoth and another t/a Okoth and Kiplagat Advocates v National Housing Corporation [2006] eKLR.
13. On substantial loss, counsel relied on the cases of Kenya Shell Limited v Benjamin Karuga Kibiru and another [1986] eKLR; James Munene Ndumbi v Sospeter Murimi Karitu [2015] eKLR. Counsel argued that in determining the issue of substantial loss, a court is to be guided by adequate evidence, not mere assertions as was the case herein. This position, he submitted, was stated in the case of Samvir Trustee Limited v Guardian Bank Limited [2007] eKLR. Further, that the consequences of execution could not be synonymous with substantial loss, as was held in James Wangalwa and Another v Agnes Naliaka Cheseto [2012] eKLR.
14. On sufficient security, counsel cited the cases of Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd and 4 others [2015] eKLR; Gianfranco Manenthi and another v Africa Merchant Assurance Company Ltd [2019] eKLR and submitted that the applicant had failed to provide adequate security and could not rely on the suit property as sufficient security as the same was not registered in the applicant's husband's name. Counsel cited the case of Arun C Sharma v Ashana Raikundalia t/a Raikundalia and Co. Advocates and 2 others [2014] eKLR.
15. Counsel added that the application was overtaken by events as the register had been rectified and Plaintiff acknowledged as the registered proprietor. In the circumstances, court could not issue the



orders sought as it would be in vain. Counsel relied on the cases of Florence Cherugut v Cheptum Murei Annah [2022] eKLR; Leonard Roipa Pasha v Elijah Tende Ole Kula and 5 others [2018] eKLR; and Tambayya Enterprises Limited and 14 others v National Land Commission and 2 others; EACC-Interested Party [2022] eKLR and urged the court to dismiss the application with costs.

### **Analysis And Determination**

16. The issue for determination is whether the Applicant has met the conditions for grant of stay of execution orders as provided for under Order 42 rule 6(1) and (2).
17. Order 42 rule 6(1) and (2) of the Civil Procedure Rules, 2010 provides as follows:-
  - (1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 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. The court’s jurisdiction to grant a stay pending appeal is only fettered by three conditions namely, that a party must establish a sufficient cause, satisfy the court that he/she will suffer substantial loss if the orders are not granted and furnish security for the due performance of such decree or order that may be ultimately binding on him. Further the application must be made without unreasonable delay.
19. On the issue whether the application was filed timeously, the Judgment in this case was delivered on 5<sup>th</sup> August 2022 and the application was filed on 7<sup>th</sup> September 2022 which I find that it was filed without undue delay. On the issue of whether filing amounts to unreasonably delay is determined on a case to case basis as there is no scientific or precise measurement of what amounts to inordinate delay.
20. In the case of Utalii Transport Company Limited & 3 others –v- NIC Bank Limited & another [2014] eKLR the court held that;

“ Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore, inexcusable.



On applying Court's mind on the delay, caution is advised for Courts not to take the word 'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality."

21. Grant of stay of execution orders are discretionary but the discretion must be exercised judiciously. The Court of Appeal case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 provides 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 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'.
22. The Applicant must prove that she will suffer substantial loss as the 45 days granted by the court for her to give vacant possession is not enough for her to remove her belongings hence might be rendered homeless.
23. In the case of *Charles Wahome Gethi vs. Angela Wairimu Gethi* [2008] eKLR, the Court of Appeal held that; -

"... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent executes the decree in this suit against them."
24. In the case of *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR it was held that;

"For the applicant to obtain a stay of execution, it must satisfy the Court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the Court will not consider assertions of substantial loss on the face value but the Court in exercising its discretion would be guided by adequate and proper evidence of substantial loss."
25. I find that the Applicant has not established that she will suffer any substantial loss if the order of stay is not granted.



26. On the issue as to whether the Applicant has established that sufficient cause why an order of stay of execution should be granted, the Applicant has gone ahead to argue on the arguability of the Appeal which is not synonymous with sufficient cause as was held in the case of Judson Oriema Okoth & Another t/a Okoth & Kiplagat Advocates v National Housing Corporation [2006] eKLR where the Court stated that:

“In my view “sufficient cause” is not synonymous with arguable appeal or meritorious appeal. As to whether an appeal is arguable or not is a consideration when such an application is being considered by the Court of Appeal. In my view the reason for not considering merits or demerits of an appeal at this stage is obvious. It would put the trial judge in a bind and may even be embarrassing. In determining this application therefore, I will refrain from considering the chances of the intended appeal.”

27. The Applicant seems to be arguing that the time granted by the court to vacate the suit land was not sufficient for her to remove her belongings therefore needs more time which she could have negotiated with the decree holder. I therefore find that no sufficient cause has been shown to warrant the court to use its discretion in her favour.

28. The Applicant had stated that the suit property being in her husband’s name is sufficient security but the Respondent stated that the court had established that the husband is not the rightful owner of the suit property. It therefore follows that the Applicant cannot offer that which the court has adjudged as belonging to the Plaintiff as security for due performance of the decree.

29. In the case of Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others [2014] eKLR it was held as follows ;

“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...Civil process is quite different because in civil process the Judgment is like a debt hence the 1st applicant become and are Judgment 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 order as may ultimately be binding on the 1st applicant. I presume the security must be one which can serve that purpose.”

30. The Plaintiff deponed in the replying affidavit, that the judgment has already been effected as the register has been rectified by inserting the Plaintiff as the duly registered proprietor. This means that the application is overtaken by events hence there is nothing to stay.

31. I have considered the application, the submissions by counsel and find that the applicant has not met the threshold for grant of orders of stay pending appeal. The application is therefore dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 21<sup>ST</sup> DAY OF JUNE 2023.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave



of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules

