



**Luka v Riinya & another (Environment and Land Appeal  
E037 of 2022) [2023] KEELC 18301 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18301 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E037 OF 2022**

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

**BETWEEN**

**HELLEN NDUMBA LUKA ..... APPELLANT**

**AND**

**FLORENCE RIINYA ..... 1<sup>ST</sup> RESPONDENT**

**JANET K GUANTAI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant herein moved this court vide an application dated September 1, 2022 brought pursuant to section 1A,1B,3,3A and 63 of the [Civil Procedure Act](#) and order 42 rule 6 (1) (2) and 3 of the [Civil Procedure Rules 2010](#) wherein she seeks for orders that:
  - 1) That this application be certified as urgent and the same be heard on priority basis.
  - 2) That this Honourable court be pleased to order stay of execution of judgement and decree in CMCC No.35 of 2019 pending the hearing and determination of the application.
  - 3) That the honourable court be pleased to order stay of execution of judgement and decree in CMCC No.35 of 2019 pending the hearing and determination of the appeal.
  - 4) That costs for and incidental to the application abide the outcome of the appeal.
2. The application is premised on the grounds that:
  - a) Judgement in the matter was entered on June 23, 2022 and the application is very urgent and need to be heard at the earliest to save the appellant and her family from being evicted.
  - b) The defendant/applicant has already filed an appeal which has very high chances of success and which will be rendered nugatory if the orders sought herein are not issued.



- c) The subject matter is a family trust land and the defendant/applicant seek to be heard on appeal since if execution is done at this stage they will be rendered landless and vagabonds.
  - d) The defendant/applicant stand to suffer substantial loss and irreparable harm if orders for stay of execution are not issued urgently since they shall be evicted from their only home as per the appealed judgement which has ordered forceful eviction.
  - e) The applicants have an arguable and meritorious appeal with a likelihood of success.
  - f) The applicant/appellant has lived on the subject matter as the only home where she has been married for many years.
  - g) The applicant/appellant lives on the suit land with his (sic) children and if evicted they will have no alternative abode.
  - h) That indeed the suit land is the family land where even the applicant's husband is buried and whose buried body the trial court ordered to be exhumed with nowhere to be reburied.
  - i) That unless stay of execution of judgement and the decree in CMCC No.35 of 2019 is ordered the applicant and her family shall suffer substantial loss.
  - j) The respondents shall suffer no prejudice if the application is allowed.
  - k) That it is in the interest of justice that the orders sought be granted.
3. The applicant in her supporting affidavit dated September 1, 2022 has reiterated the above grounds and annexed copies of the judgment and photographs.
  4. In opposing the application, the 2<sup>nd</sup> respondent filed a replying affidavit dated October 17, 2022 wherein she states that she is the donee of the power of attorney of the registered owner of the subject property, Shadrack Mwiti Ithinji. She avers that the application is premised on contorted facts meant to mislead the honourable court.
  5. The 2<sup>nd</sup> respondent avers that the matter has checkered history and that the appellant's husband had sued them in Nkubu PMCS No.93 of 2014 seeking cancellation of their title after chasing them out of the suit land and settling therein. That the suit land was registered jointly in respondents' names and that of their deceased father and thereafter they had his name removed from the register. That the appellant's husband who is also their brother, died in 2018 after withdrawing from the aforementioned suit which was later dismissed for want of prosecution against the other plaintiff Jamlick Muthomi who is also their brother.
  6. The respondents state that the appellant buried her husband in the suit land in full knowledge that it was registered in their names. That owing to the interference by the appellant and their brother, Jamlick Muthomi, they transferred the suit land to Shadrack Mwiti Ithinji who is the current registered owner. That apart from the suit land, their deceased father had another parcel of land where the appellant was initially settled before the husband forcefully settled in the suit land. That the registered owner of the land has a proper title to the land and stay of execution of the decree as sought by the appellant will frustrate their contract of sale of land which required that they give him vacant possession.
  7. The respondents aver that the appellant is hell bent on keeping them in the corridors of justice forever and so as to continue enjoying the suit land to their detriment and to the detriment of the registered owner. That they are also properly advised by their advocates on record that there is no substantive appeal and the application is not properly before the honourable court. That the application has been



unreasonably delayed and the appeal is time barred and no extension of time was sought to lodge the appeal since the judgement was delivered on June 23, 2022.

8. The respondents further avers that the application has been brought in bad faith to frustrate enjoyment of the fruits of the judgement delivered by the honourable court as they have been in court since 2014 when the appellant's husband sued them before they brought the instant suit for eviction that she seeks to appeal and both suits have been determined in their favor hence the application is meant to cause further delay. It is the respondents' contention that the applicant's application is a delaying tactic and should be dismissed with costs.
9. On October 18, 2022 the court directed that the application be canvassed by way of written submissions. The firm of Gikunda Anampiu & Co. Advocates filed submissions for the applicant while the firm of Muchomba Law Advocates filed for the respondent on December 15, 2022.

### **Applicant's Written Submissions**

10. The Applicant submitted that the principles guiding the grant of stay of execution pending appeal are well settled under order 42 rule 6 (2) of the Civil Procedure Rules and that the applicant should satisfy the court that: -
  - i. Substantial loss may result to him unless the order is made.
  - ii. That the application has been made without unreasonable delay and the applicant has given such security as the court orders for the due performance of such decree or orders as may ultimately be binding on him.
11. The applicant's counsel relied on the case of Richard Muthui v Patrick Gituma Ngoma & another [2017] eKLR which quoted the case of Chris Munga N Bichage v Richard Nyagaka Tongi & 2 others eKLR.
12. The Applicant further relied on the case of Richard Muthuri that quoted the case of Mohammed Salim T/A Choice Butchery v Nasserpuria Memon Jamat [2013] eKLR where court upheld the decision of M/S Portreitz Maternity v James Karanga Kabia Civil Appeal No.63 of 1997 and stated that:-

“That right of appeal must be balanced against an equally weighty right that of the plaintiff to enjoy the fruits of the judgement delivered in his favour. There must be a just right....”
13. The applicant submitted that the subject matter in the appeal is a family trust land and that she lives there with her family and has been married there for over 40 years and that her husband was buried on the subject matter.
14. The applicant further submitted that the judgement sought to be executed seeks to forcefully evict the applicant from the family trust land and have the body of her husband exhumed. It is the applicant's submission that she would suffer substantial loss if the stay is not granted.
15. The applicant submitted that she had preferred a counter claim where she raised serious issues with particulars of trust over the suit land and she wished to argue those issues in the appeal to prove that she is legally entitled to the suit land.
16. The applicant further submitted that although the respondents transferred the suit land to a third party, that was done fraudulently and can only be determined on appeal.
17. The applicant states that the respondents replying affidavit is full of admissions that the suit land is a family trust land and particularly at paragraph 6 and 8 and that that confirms that the appeal is not



- frivolous and that the applicant is before the honourable court in order to be given a chance to ventilate those issues and for the respondent to reply for the court to make a final determination.
18. The Applicant submitted that the previous case Nkubu PMCC No.93 of 2014 alluded by the respondents did not involve the parties herein, and that if there was a previous suit as alleged, the same was dismissed for want of prosecution and that then confirmed that the issues involved particularly on trust were not decided on merit since the matter was never heard.
  19. The applicant submitted that it is only in the appeal that these issues can finally be determined and that she has developments on the suit land including her dwelling house where they live with the family. That her husband and father in law's bodies are buried on the suit and the respondents never raised any prior objection to that. That it is in the appeal that the parties will have a chance to ventilate all their issues and a determination is made by the honourable court with finality.
  20. It is the applicant's submission that the appeal has a strong substratum and that the application as merit and has been brought without unreasonable delay.
  21. The applicant further submitted that the judgement and the decree sought to be executed is not a monetary decree hence there is no condition for a deposit before the orders sought are granted as per the law.
  22. The applicant urged the court to find in her favour and grant the orders sought.

### **Respondents' Submission**

23. The respondents submitted that the law governing the stay of execution pending appeal is order 42 rule 6 (1) of the *Civil Procedure Rules*, and that the issues for determination are first whether the applicant will suffer substantial loss if the application is not allowed, secondly, whether the application has been made without unreasonable delay and thirdly, whether the applicant has furnished security.
24. On the first issue the respondents submitted that from the affidavits by both parties, it is not in contention that apart from the suit land, there is another parcel of land in the name of the respondent's father-in-law where the applicant's husband lived before he chased away the respondents from the suit land and settled therein. It is the respondents' contention that the applicant has not controverted this fact and it follows that the applicant will not suffer any loss since she can go back and settle on that other parcel of land. The respondents' pointed out that annexures HNL1 in the applicants supporting affidavit shows that her house is semi-permanent hence easily movable to the vacant parcel. That the nature of the alleged developments can also be easily compensated upon valuation and consequently it is their submission that the applicant will not suffer substantial loss.
25. The respondents further submitted that Shadrack Mwititi, the registered owner of the land is yet to realize his proprietary rights and yet he has a judgement in his favour whereas the applicant who has never at any particular instance been the registered nor a lawful beneficial owner as shown by her evidence and is utilizing the suit land at the detriment of the lawful owner. That as such the registered owner continues to suffer loss without any form of security has to the compensation for the loss suffered.
26. On the second issue the respondents submitted that the judgement appealed against was delivered on June 23, 2022 and the instant application was filed in court on September 5, 2022 and that no explanation for the two and half months delay has been made by the applicant and argued that the delay is inordinate in the circumstances and it can only be inferred that the instant application is a delaying tactic.



27. The respondents relied on the case of *Utalii Transport Company Limited & 3 others v NIC Bank Limited & another* [2014] eKLR where it was held:-

“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 delay 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.”

28. The respondent submitted that taking into consideration the circumstances of the instant case, the court should find that there was inordinate delay in bringing up the instant application bearing in mind that there is a lawful judgement for eviction in place.

29. The respondent pointed out that from the record the memorandum of appeal was filed on July 18, 2022 and the instant application was filed on September 5, 2022 and that five months down the line, the record of appeal is yet to be filed contrary to the statutory period of sixty days. That the intentions of the applicant are clear that the application is delaying tactic and is not keen on expeditiously prosecuting the substantive appeal as illustrated by her failure to file the record of appeal within the statutory period and that allowing the application will aid in her endeavor of clogging the wheels of justice and eventually denying the respondents the fruits of their lawful judgement.

30. On the third issue, the respondents relied on the case of *Paul Kamura Kirunge v John Peter Nganga* [2019] eKLR where the court held as follows in regard to security of costs.

“Having now carefully considered the instant application, the written submissions, the cited authorities and the relevant provisions of law, the Court finds that the said application is merited and it is allowed entirely with a condition that the Appellant to deposit Kshs 500,000/= as security of costs within 30 days from the date hereof. Further, the court directs the parties to prepare the Appeal for hearing expeditiously. For that reason, the court directs the Appellant/Applicant to file Record of Appeal within the next 30 days from the date hereof and then cause the matter to be listed before the judge for directions under section 79 B of the *Civil Procedure Act* within the next 30 days from the date hereof.

It so ordered.”

31. The respondents further relied on the case of *David Kipkosgei Kimeli v Titus Barmasai* (2020) eKLR where the court ordered the applicant to deposit Kshs. 300,000/- as a condition for stay of execution of eviction order pending appeal.

32. The respondents submitted that in the event the court is inclined to allow the application, then it’s only fair and just that the applicant be ordered to furnish security and further prosecute the appeal within a limited period as a prerequisite condition for the purposes of expeditious disposal of the substantive appeal.



## Analysis and Determination

33. I have considered the application, the affidavits and the submissions filed by the parties to buttress their assertions. I have also taken into account the legal authorities proffered by the parties. What calls for determination in this matter is the issue of stay of execution pending appeal.
34. 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 v 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 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.”
35. 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-;
- “(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.”
36. 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.
37. As for the applicant having to suffer substantial loss, in the case of *Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karagu* (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 *Macharia T/A Macharia & co. Advocates v East African Standard* ( No 2) [2002] eKLR 63).”
38. The applicant has a burden to show the substantial loss she is likely to suffer if no stay is ordered. This is in recognition that both parties have rights, the appellant to her 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. (see the case of *Absalom Dora v Turbo Transporters* (2013) eKLR)
39. As F. Gikonyo J stated in *Geoffrey Muriungi & another v John Rukunga M’Imonyo suing as legal representative of the estate of Kinoti Simon Rukunga (deceased)* [2016] eKLR and which wisdom I am persuaded with-;
- “...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: with the jurisprudence in the High Court, or “rendering the appeal nugatory” within the judicial precincts of the court of appeal and that is the loss which is sought to be prevented by an order of stay of execution pending appeal...”
40. The applicant deposed that the appeal will be rendered nugatory if the stay is not granted. She submitted that she is apprehensive that if the orders of stay are not granted, the applicant and her family will be rendered landless and that the applicant’s husband whose body is intended to be exhumed is buried on the suit land which is the only family land they own and that unless stay of execution of judgement and the decree in CMMCC No.35 of 2019 is ordered, the applicant is likely to suffer substantial loss.



41. It has been held by the courts that the applicant bears the legal burden to prove that substantial loss would occur. This is also in recognition that both parties have rights with the applicant having the right to appeal and the respondent having a right to enjoy the fruits of his judgment which must not be restricted or postponed except on a lawful and justifiable cause. The court as such has to balance these competing rights.
42. From the deposition on record it is more probable that the issue at hand calls for status quo pending the hearing of the appeal. Indeed, if the respondents are left to execute the decree the applicant may be evicted and the body of her deceased husband will be exhumed. In my view the applicant must be allowed to exercise her right to be heard at the appellate court expeditiously since the applicant stands to suffer immeasurable loss should the application be dismissed and the decree is executed by the respondents.
43. That being the case and in balancing the rights of the parties herein, the balance tilts in favour of the applicant. The respondents will not suffer prejudice which cannot be compensated by way of costs as in most cases, costs are awarded to the winning party. If at all the respondents wins the appeal, the costs awarded to them will be a reasonable panacea to them for the period they shall have to wait so as to enjoy the fruits of their judgment. This is further bearing in mind that interests are also awardable. In my view, the applicant stands to suffer substantial loss if there is execution here.
44. As to the applicant giving security for due performance of the decree the applicant did not offer any security and submitted that the judgement and the decree sought to be executed is not a monetary decree hence there is no condition for a deposit before the orders sought are granted as per the law and the respondents have argued that security is a prerequisite in an application under Order 42 Rule 6 of the *Civil Procedure Rules*. The respondents prayed for application to be dismissed.
45. I would therefore exercise my discretion in favour of the applicant and allow the application for stay but on condition that the applicant gives security and for the applicant to expedite the appeal by filing the required documents.
46. In the end, the application dated September 1, 2022 is allowed in the following terms;
- a) There shall be stay of execution of the judgment and decree dated June 23, 2022 in Nkubu PMCC No 35 of 2019 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 Kes 100,000/= 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 the application are awarded to the respondents.
47. It is so ordered.

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

**IN THE PRESENCE OF**

Court Assistant – V. Kiragu

No appearance for appellant/applicant

No appearance for respondents

**C.K YANO**

**JUDGE**

