



REPUBLIC OF KENYA



**Amolo & another v Oluwaso & 2 others (Environment and Land Appeal
16 of 2021) [2023] KEELC 18049 (KLR) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18049 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAAYA
ENVIRONMENT AND LAND APPEAL 16 OF 2021**

**AY KOROSS, J
JUNE 19, 2023**

BETWEEN

JUMA PAUL AMOLO 1ST APPELLANT

FREDRICK ONYANGO 2ND APPELLANT

AND

LUCIA ACHIENG OLUWASO 1ST RESPONDENT

ANDREW ODHIAMBO OLWASO 2ND RESPONDENT

DOMINIC OUMA AMOLO 3RD RESPONDENT

RULING

Respondent's Case

1. By the provisions of articles 50 and 159 of the [Constitution](#), sections 1A and 3A of the [Civil Procedure Act](#) and orders 42 rule 2 and 51 rules 1 and 4 of the [Civil Procedure Rules](#), the respondents' notice of motion dated February 2, 2023 prayed for the following orders:
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of the application to extend time within which to file the notice of appeal in the court of appeal an order do issue staying the judgment and consequential decree arising out of the judgment of this court delivered on October 6, 2022.
 - d. That pending the hearing and determination of the appeal in the court of appeal, an order do issue staying the judgment and consequential decree arising out of the judgment delivered on October 6, 2022 by this court.



- e. That the costs of and incidental to this application do abide the outcome of the appeal.
2. The application is premised on the grounds enumerated on the face of the motion and on the annexed affidavit of their counsel Christine Musando sworn on February 2, 2023.
3. In summary, they mis-diarised the judgment of this court hence did not attend court on the scheduled date of October 6, 2022. Consequently, the respondents did not file a notice of appeal in good time. They withdrew an application for leave to appeal out of time that had been lodged in the Court of Appeal. From the memorandum of appeal, it was evident they had an arguable appeal.
4. If imminent execution was not stayed, the substratum of the intended appeal would dissipate and the entire exercise rendered nugatory and a mere academic exercise. The respondents would suffer substantial loss if execution was not stayed.

Appellants' Case

5. In opposition, the 2nd appellant, Fredrick Onyango, filed a replying affidavit sworn on April 6, 2023. In summary, the appeal did not have chances of success and was incapable of being rendered nugatory. Leave to appeal out of time had not been heard and determined. The respondents could be compensated by damages. The motion had been made in bad faith, lacked merit and an abuse of court process. The same should be dismissed with costs.

Respondents' Submissions

6. Their counsel, M/s Nyambengi, filed written submissions dated March 13, 2023. Counsel relied on the averments made in the supporting affidavit and submitted the principles for stay pending appeal were well settled in the Court of Appeal decision of *Butt v Rent Restriction Tribunal* [1979] eKLR that was cited with approval in *HE v SM* [2020] eKLR.
7. Counsel submitted the applicable provision of law was order 42 rule 6 (2) of the *Civil Procedure Rules*. In support of her position, counsel relied on the case of *RWW v EKW* [2019] eKLR which held: -

‘The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.’
8. Counsel submitted the motion should be allowed so that the respondents’ right to be heard was not vitiated. Further, the respondents had an arguable appeal and to this end, counsel relied on the case of *Kenya Tea Growers Association v another v Kenya Planters & Agricultural Workers Union* civil application Nai number 72 of 2001 where the court held:-

‘He (the applicant) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the courts should pronounce its decision.’

Appellants' Submissions

9. Their counsel, Mr Nyanga, filed submissions dated April 21, 2023. Counsel identified one issue for determination; whether the respondents had demonstrated the orders for stay of execution pending appeal were merited.
10. Counsel submitted there were certain conditions that needed to be satisfied in order for a stay of execution to be awarded; (a) claimant needed to prove substantial loss would result, (b) the application



had been made without unreasonable delay, and, (c) satisfy any order as to security. Counsel submitted the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR had defined substantial loss as: -

‘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.’

11. It was counsel’s submission the respondents would not suffer substantial loss, the appellants would be denied the fruits of their judgment, security had not been proposed and the motion was frivolous and intended to forestall the wheels of justice. The motion was incompetent and an abuse of court process.

Analysis And Determination

12. Having carefully considered the motion, affidavits and rival submissions, I shall be guided by the authorities and provisions of law that have been well articulated by counsels. The issues that fall for determination are:-
 - a. Whether the motion was competent.
 - b. If the answer to (a) is in the affirmative, whether the respondents had met the threshold to warrant grant of stay pending appeal.
 - c. What orders should this court issue.

A. Whether The Motion Was Competent.

13. Grant of stay of execution finds its basis in order 42 rule 6 (1) and (2) of the *Civil Procedure Rules* which states that:-
 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.’ Emphasis added.
14. A reading of this provision of law demonstrates the existence of an appeal from the decision of this court was a jurisdictional prerequisite for the court to entertain the motion for stay. An appeal comes into existence by lodging a notice of appeal in writing within 14 days from the date of the decision. A copy thereof is usually lodged with the registrar of the superior court. See rule 75 (a) and (b) of the *Court of Appeal Rules*.
15. However, in the event of delay, an appeal can come into existence upon issuance of an order for extension of time to appeal against the decision of the superior court to the Court of Appeal. See rule 4 of the *Court of Appeal Rules*.
16. The respondents did not file an appeal within the prerequisite timelines. Consequently, they sought leave from the Court of Appeal *vide* their application in Kisumu civil application No E013 of 2023



dated January 31, 2023. That application is yet to be heard and determined and as it is, there is no appeal against the decision of this court.

17. In the case of *Wilfrida Armodah Itolondo v Attorney General & 9 others* [2021] eKLR, the apex court in paragraph 39 of its ruling held: -

‘Therefore, in the absence of a substantive appeal on record, we are unable to grant the orders of stay of execution of the order on costs in civil appeal No 120 as sought.’

18. I have not been persuaded to depart from the decision of the Supreme Court and consequently, this court finds and holds that it has no jurisdiction to entertain the motion. I need not say more. Consequently, I hereby strike out the notice of motion dated February 2, 2023. Because costs follow the event, I award costs to the appellants.

DELIVERED AND DATED AT SIAYA THIS 19TH DAY OF JUNE 2023.

HON. A. Y. KOROSS

JUDGE

Ruling delivered in the Presence of:

M/s Ochieng for the appellants

M/s Nyambengi for the respondents

Court assistant: Ishmael Orwa

