



REPUBLIC OF KENYA



KENYA LAW
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**Ndungu & 2 others v Chege & another (Environment & Land Case
28 of 2019) [2023] KEELC 18005 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18005 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 28 OF 2019**

**JG KEMEI, J
JUNE 15, 2023**

BETWEEN

**JOSEPH NGIGI NDUNGU 1ST PLAINTIFF
ANDREW MWANGI WACHINJI 2ND PLAINTIFF
ANTONY MWANGI KARIUKI 3RD PLAINTIFF**

AND

**JACK BONIFACE CHEGE 1ST DEFENDANT
KAHUTHU ANTHONY MAGERIA T/A KAHUTHU & KAHUTHU COMPANY
ADVOCATES 2ND DEFENDANT**

RULING

1. Judgment in this case was delivered on 29/9/2022 in the following terms:-
 - a. The Plaintiffs' suit therefore partially succeeds.
 - b. The agreement of sale dated the 8/9/2014 stands terminated.
 - c. The 1st Defendant is ordered to refund the Plaintiffs the sum of Kshs. 2.0 Million within a period of 30 days in default the same shall be recoverable summarily. The said sums shall attract interest at Courts rates from the date of this Judgment till payment is made in full.
 - d. The costs of the suit shall be borne by the Plaintiffs in favour of the Defendants.
2. The Applicants vide the Notice of Motion dated 11/10/2022 brought under Sections 1A, 1B, 3A, 80, 98 & 99 of the *Civil Procedure Act* Order 45 rule 1 and Order 51 rule 1 of the *Civil Procedure Rules*. The Applicants seek the following orders:-
 - a. Spent.



- b. Spent.
 - c. That this Honourable Court be pleased to grant stay of execution of its Judgment and decree dated the 29th of September 2022 pending the hearing and determination of this application.
 - d. That this Honourable Court be pleased to grant stay of execution of its Judgment and decree dated the 29th of September 2022 pending the hearing and determination of the intended Appeal.
 - e. That the costs of this application be provided for.
3. The application is premised on the following grounds:-
- a. That this Honourable Court delivered its Judgment on the 29th of September 2022 where it ordered inter alia a refund of Kshs. 2.0 Million to the Plaintiffs.
 - b. That the Plaintiffs/Applicants intend to appeal against the decision of this Honourable Court.
 - c. That the Plaintiffs/Applicants have filed their Notice of Appeal in preparation to filing their substantive appeal.
 - d. That it is prudent that there be stay of execution of the Judgment and the decree pending the hearing and determination of the intended appeal.
 - e. That if the decree of this Honourable Court is settled within the set timelines the intended appeal will be rendered nugatory.
 - f. That it is in the interest of justice that the prayers sought herein be granted.
4. The application is supported by the affidavit of Joseph Ngigi Ndungu the 1st Applicant. He states that Judgment was entered in favour of the 1st Defendant on 29/9/2022. The Plaintiff was granted 30 days to refund the sum of Kshs. 2.0 Million to the Defendant. That the agreement of sale having been terminated it would be fit and just if the Judgment and the decree of this Court is stayed to enable them pursue an appeal. That they have filed a Notice of Appeal dated 7/10/2022 and unless the orders of stay are granted the notice of appeal will be rendered nugatory. That they are ready to abide with the conditions of this Court and that the Respondents will not suffer any prejudice if the orders sought are granted. Inter alia, that it is in the interest of justice that the application be allowed.
5. The application is opposed by the Respondents vide the Replying Affidavit sworn on 7/11/2022 by Anthony Kahuthu on his behalf and that of the 2nd Respondent. He was emphatic that the application lacks merit, its only intention being to delay the conclusion of the suit, in addition, that it is an abuse of the Court. That there is nothing capable of being stayed in the Judgment, the suit having been partially allowed. The Applicants failed to exhibit the decree of the Court arising from the Judgment. In addition, save for filing of the Notice of Appeal the Applicants have taken no steps towards the prosecution of the appeal. That the agreement had been terminated on account of the Applicant's breach. That even if the Plaintiff feels aggrieved by the Judgment there is no action that the Respondents can do or refrain from doing that will affect any intended appeal. If the Plaintiffs are not ready to receive the sum of Kshs. 2.0 Million from the 1st Defendant /Respondent the same can be deposited in Court after offsetting the cost. The Respondents urge the Court to dismiss the application.
6. The application was argued orally by the parties on 17/4/2023 with each party reiterating the contents of the affidavit evidence on record for which I find no necessity to repeat.



Analysis and determination

7. The key issue is whether the application is merited.
8. The legal provisions for stay of execution are anchored in Order 42 rule 6 of the Civil Procedure Rules that;
 - “ 6. Stay in case of appeal [Order 42, rule 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 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.”
9. It is trite that for an Applicant to succeed in an Application of this nature, one must establish three conditions namely; establishment of substantial loss upon timely filing of the Application and the furnishing of security.
10. This Court is guided by the decision in the case of *Butt vs. Rent Restriction Tribunal* (1982) KLR 417 where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal namely; -
 - a. 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.
 - b. The general principal 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.
 - c. 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.
11. 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.
12. In this case the Plaintiffs case was dismissed. The Applicants have argued that if the amount of Kshs 2.0 Million is paid to them the appeal will be rendered nugatory.



13. In the case of *Milcab Jeruto vs Fina Bank Ltd* [2013] eKLR the Court held that an order for stay cannot be granted where a negative order had been issued. Under Section 2 of the *Civil Procedure Act*, the definition of a decree holder alludes to an order that was capable of being executed.

14. In the case of *Catherine Njeri Maranga vs. Serah Chege & another* [2017] eKLR the Court in refusing to grant orders of stay cited *Kenya Commercial Bank Limited vs. Tamarind Meadows Limited & 7 Others* [2016] eKLR, where the Court of Appeal stated:

“16. In *Kanwal Sarjit Singh Dhimažl v. Kesbavji Juvraj Shah* 2008 eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior Court made on 18h December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior Court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences vs. Oranga & Others* [1976] KLR 63 at page 66 paragraph C).”

15. Further the same reasoning was applied in the case of *Raymond M Omboga vs. Austine Pyan Maranga Kisii HCCA No. 15 of 2010*, that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:

“The Order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the Respondent which is capable of execution, there can be no stay of execution of such an order. The Applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the Applicant has lost. The refusal simply means that the Applicant stays in the situation he was in before coming to Court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise ...”

16. In the case of *Exclusive Estates Limited vs Kenya Posts & Telecommunications Corporation & Anor* (2005) 1 EA the dismissal orders were for all intents and purposes negative orders incapable of forming a basis for orders of stay of execution. The order that struck out the suit was negative and not capable of execution. I find myself in agreement with the decisions of the superior Courts cited above. The Court finds that the judgement having been a dismissal, there is nothing to stay.

17. Consequently, I find the Applicant has not established substantial loss. It is not necessary to go into the other limbs of granting stay orders.

18. The application is unmerited. It is dismissed with costs in favour of the Respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 15TH DAY OF JUNE, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;



Aronda HB Wachira Maina for 1st, 2nd and 3rd Plaintiffs

Ms. Kinyua HB for Kahuthu for 1st Defendant

Njenga HB Ms. Njoroge for 2nd Defendant

Court Assistants – Kevin & Lilian

