



REPUBLIC OF KENYA



KENYA LAW
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**Nyabali v Humphrey (Environment and Land Appeal
E055 of 2023) [2023] KEELC 19224 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19224 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E055 OF 2023**

**MD MWANGI, J
JULY 31, 2023**

BETWEEN

PETER KIBISU NYABALI APPELLANT

AND

MARGARET WAMAITHA HUMPHREY RESPONDENT

*(In respect of the Appellant's Notice of Motion application dated 12th June 2023
brought under the provisions of order 42 rule 6 of the Civil Procedure Rules
seeking stay of execution pending hearing and determination of the Appeal)*

RULING

Background.

1. The application before me for determination is the Notice of Motion dated June 12, 2023 filed by the Appellant seeking for an order of stay of execution pending the hearing and determination of his appeal. The application is supported by the affidavit of the Appellant/Applicant and the grounds on the face of it. The main ground is that the Appellant risks eviction and or execution by the Respondent for the sum of Kshs 1,780,000/- decreed by the Business Premises Rent Tribunal (BPRT) before the determination of the appeal. That, according to the Appellant would render her appeal nugatory. The Appellant believes that his appeal has a high likelihood of success.

Reply by the Respondent.

2. The Respondent opposes the Appellant's application by way of the grounds of opposition dated June 26, 2023. The Respondent termed the application by the Appellant hopeless, incompetent and devoid of any merits. The Respondent opines that the application does not meet the threshold under Order 42 rule 6 of the *Civil Procedure Rules*.



3. The Respondent states that though it has not commenced the execution process, 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 as claimed by the Appellant/Applicant. Execution is a lawful process.
4. The Respondent further states that she has the financial ability to refund the decretal amount should the Appellant's appeal succeed in this court.
5. The Respondent's ground 7, made without prejudice to the foregoing, proffers that the Appellant should be directed to deposit a sum of Kshs2,140,000/- into a joint interest earning account in the names of the Advocates for the parties within 21 days.

Court's Directions.

6. The court's directions were that the application be canvassed by way of written submissions. Both parties complied and I have had the opportunity to read the submissions filed.

Issues for determination.

7. The sole issue for determination in my opinion is whether the Appellant's application meets the threshold for the grant of an order of stay pending appeal.

Analysis and determination.

8. Order 42 rule 6 of the *Civil Procedure Rules* provides that an application for stay of execution pending appeal shall not be granted 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. The Appellant submits that one of the grounds of appeal by the Applicant is that the trial court erred by ordering the Appellant to pay rent arrears in the sum of Kshs 1,780,000/- when there was evidence that he has been paying rent to one of the beneficiaries of the estate of the deceased. Further that the monthly rent payable is Kshs 30,000/- not Kshs 60,000/- as alleged by the Respondent. The Appellant therefore submits that the decretal amount is a colossal amount and unless a stay of execution is ordered he stands to suffer substantial loss since he risks losing his property in case of execution when he should not since he has been paying rent to the right parties.
10. The Appellant made reference to the decision in *Kenya Shell Ltd -vs- Kibiru & another* (1986) KLR 410 which, as he puts it, calls upon the court considering an application for stay, to address its collective mind to the question whether to refuse it (stay) would render the appeal nugatory.
11. The Applicant further submits that the application was filed without unreasonable delay.
12. The Appellant expresses his willingness to deposit half of the decretal amount in an interest earning account in the names of the Advocates for both parties in 45 days as security.
13. The Appellant made further reference to the Court of Appeal decision in *Butt -Vs- Rent Restriction Tribunal* (1982) KLR 417 which held that the court in exercising its discretion whether to grant or refuse an application for stay should consider the special circumstances of each case and its unique requirements.



14. The Respondent in her submissions made reference to a number of authorities. She referred to the case of *Machira T/A Machira & Co. Advocates -vs- E.A. standard (No. 2)* (2002) KLR 63 where it was held that the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts which is to do justice in accordance with the law and to prevent abuse of the process of court.
15. The Respondent further made reference to *Elena Dondoladova Kerir -vs- Kenyatta University* (2014) eKLR where Justice Nzioki wa Makau cite the Court of Appeal decision in *Halal & Another -vs- Thernton & Turnip Ltd.* In the said case, the Court of Appeal stated that:

“The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- sufficient cause, substantial loss would ensue from a refusal to grant stay. The applicant must furnish security; The application must be made without unreasonable delay.”
16. The Respondent’s submissions was that substantial loss has not been established. She made reference to various decided cases defining what substantial loss is.
17. On the offer by the Appellant/Applicant to deposit a security, the Respondent submitted that the security must be one which shall achieve due performance of the decree which might ultimately be binding on the Applicant; not any security (*Mwaura Karuga t/a Limit Enterprises -Vs- KBC Ltd & 4 others* (2015) eKLR).
18. The Respondent submitted that in the event the court is persuaded to allow the application, it should order the Appellant/Applicant to deposit a sum of Kshs 2,140,000.00/- into an interest earning bank account in the names of the Advocates for the Appellant and the Respondent in the next 21 days.
19. I agree with the holding in the case of *Machira T/a Machira & Co. Advocates -vs- E.A. Standard No. 2* (2022) eKLR as regards the business of the court to do justice and to prevent abuse of the process.
20. The Decree appealed from by the Appellant/Applicant herein is a money decree. While this court is inclined to grant an order of stay of execution pending appeal in order to give an opportunity to the Appellant to prosecute his appeal without the risk of execution and or eviction, the court agrees with the Respondent that the Appellant must provide a reasonable security.
21. The court in the case of *Gianfranco Manenthi & another -Vs- Amaco Ltd* (2019) eKLR, cited by the Respondent observed that:

“Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the Appellant fails to succeed on appeal there could be no return to status quo on the part of the Plaintiff to initiate execution proceedings where the judgment involves a money decree; the court would order for the release of the deposited decretal amount to the Respondent in the appeal. Thus the objective of the legal provisions on security was never intended to fetter the right of the appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for the due performance of decree is not a matter of willingness by the Applicant but for the court to determine.”



22. Considering the circumstances of this case, this court allows the Appellants application for a stay of execution pending appeal but on condition that the sum of Kshs 1,200,000/- is deposited by the Appellant in a joint interest earning bank account in the names of the Advocates for the Appellant and the Advocates for the Respondent in the next 30 days from the date of this ruling. Further the Appellant shall file the record of appeal in the next 45 days from the date hereof.
23. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Mwau for the Appellant/Applicant

Mr. Kipkurui for the Respondent

Court Assistant – Yvette.

