



**Agape Dayspring Academy v Ndungu (Environment & Land Case 107 of 2021) [2023] KEELC 19258 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19258 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 107 OF 2021**

**JG KEMEI, J  
JULY 28, 2023**

**BETWEEN**

**AGAPE DAYSPRING ACADEMY ..... PLAINTIFF**

**AND**

**SAMMY GODFREY NDUNGU ..... DEFENDANT**

**RULING**

1. The application is dated March 22, 2023 in which the Applicant seeks the following orders:-
  - a. Spent
  - b. That pending the hearing and determination of this application inter parties there be a stay of execution of the Judgment delivered on March 13, 2023 and any further consequential orders.
  - c. That pending the hearing and determination of the intended appeal to the Court of Appeal, there be a stay of execution of the Judgment delivered on March 13, 2023 and any further consequential orders.
  - d. That the costs of this application be provided for.
2. The application is supported by the grounds annexed thereto together with the Supporting Affidavit of the Applicant sworn on March 22, 2023.
3. The Applicant avers that he is aggrieved with the Judgment delivered on March 13, 2023 and that he has filed a Notice of Appeal against the said Judgment. He is apprehensive that the Respondent will execute the Judgment, a scenario that will occasion him irreparable loss. That he has requested for certified copies of proceedings in preparation of filing a Record of Appeal and that in the interest of justice he urged the Court to preserve the subject suit properties so as not to render his appeal nugatory.



4. The application has been opposed by the Respondent vide the Replying Affidavit of Duncan Mbogo Wanjigi sworn on March 24, 2023. The deponent terms the application as unmerited, frivolous and an abuse of the Court process. Further that the Applicant has failed to discharge the onus placed on him with respect to prove of substantial loss. That the Applicant has not offered to deposit the 12 titles being the subject suit properties to serve as security for the due performance of any decree that may be binding on him if he is unsuccessful in the intended appeal. That it is unfair for the Applicant to keep the purchase price in the sum of Kshs 2.1 Million already paid to him by the Respondent and fail to deposit any security towards meeting the due performance of the Court's decree. Moreover that the Applicant has not established any loss or damage as the subject matter of the suit is land which will eventually be available should he succeed in his appeal. That the Applicant does not live on the suit lands and neither has he established that the Plaintiff has any intention to alienate the said properties to his detriment.
5. The Applicant was further castigated for annexing documents that were not produced during the trial. The Court was urged to dismiss the application with costs.
6. The Applicant filed a Further Supplementary Affidavit dated March 31, 2023 in support of the application which Affidavit has been read and considered.
7. Additionally, the Applicant filed a further affidavit on April 27, 2023 in which he averred that the titles of the suit properties were in the custody of his sickly mother who is currently suffering from Dementia and that he does not know the whereabouts of those titles hence his inability to avail them as security in this matter.
8. On March 22, 2023 parties were directed by the Court to file their written submissions. The Applicant's submissions were filed on April 4, 2023 while those of the Respondent were filed on April 14, 2023. The Court has read and considered the submissions and all the highlights made by the parties.
9. The key issue for determination is whether the application is merited.
10. Stay in case of an Appeal is provided under Order 42 rule 6(2 of the [Civil Procedure Rules](#) which states as follows:-

“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.

11. Going by the above provision, it is apparent that an Applicant must establish the following;
- a. The existence of sufficient cause.
  - b. Proof of substantial loss.
  - c. Application must be filed without unreasonable or undue delay.
  - d. Provision of security for the due performance of the decree that may ensue, however the issue of security is within the mandate or discretion of the Judge.
12. 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 his right of appeal is safeguarded and in the event his appeal is successful, is not rendered nugatory. Equally the right to the enjoyment of fruits of the Judgment of the Respondent must be protected.
13. This Court is guided by the decision in the case of *Butt v 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.
  - d. 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.
14. In determining the application for stay therefore, the Court must do a balancing act in the preservation of the rights of both parties pending the conclusion of the appeal. It is never a function of the Court to disadvantage one party while giving no legitimate advantage to the other.
15. The Judgment in this case was rendered on March 13, 2023 while this application was filed on March 22, 2023, a period of 9 days. It is trite that there is no mathematical method of calculating delay. It is for the Court to consider the peculiar circumstances of each case. In this case, the Court finds that 9 days is not inordinate and therefore the application is mounted without any delay.
16. Has the Applicant established substantial loss? The ingredients of substantial loss were well captured in the case of *Machira T/A Machira & Company Advocates v East African Standard* (No 2) 2002 2 KLR as follows:-

“If the Applicant cites as a ground, substantial loss the kind of loss likely to be sustained must be specified, details or particular thereof must be given and the conscience of the Court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such



loss will really ensue and that if it comes to pass, the Applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order before disposal of the Applicant's business (eg appeal or intended appeal).”

The Judge went on to add that: -

“Moreover, a Court will not order a stay upon a mere vague speculation; there must be the clearest ground of necessity disclosed on evidence ..... Another common factor in favour of the Applicant is whether to proceed further or to execute may destroy the subject matter of the action and deprive the appellant or intended appellant of the means of prosecuting the appeal or intended appeal. So, really, stay is normally not granted, save in exceptional circumstances.”

17. Substantial loss may be presented in various forms and in whichever form, it considered as the cornerstone upon which an order of stay of execution is granted. It is what has to be prevented from happening so as not to render an appeal nugatory. It is therefore imperative for an Applicant to establish and demonstrate substantial loss in an application for stay of execution. The Applicant must show the loss he stands to suffer if the order for stay is not granted.
18. In this case, it is not disputed that the Respondents are in possession of the suit properties. It is not also disputed that the titles of the suit properties are registered in the name of the Applicant. Although the Applicant has stated in his Affidavit that he is apprehensive that the Respondent will execute the Judgment he has not placed before the Court the basis of his apprehension neither has he placed before this Court evidence of impending threat of execution by the Respondent. Having said that, the Court is alive to the fact that the mere fact of filing an appeal by itself is not a bar to execution by the Respondent and should execution ensue the appeal will likely be rendered nugatory.
19. That said the Court holds that there is no overwhelming hindrance to the issuance of the orders of stay in this matter for the purpose of holding the rights of both parties even and not to render the appeal nugatory. The Respondent has not given any prejudice that is likely to suffer given that it is in occupation of the suit lands.
20. On the issue of security for the due performance of the decree it is trite that the Court retains the discretion to grant or not to grant an order for security. In this case the Court orders the Applicant to deposit the sum of Kshs 200,000/- in Court as security for costs.
21. Final orders for disposal
  - a. The Application is allowed.
  - b. The Applicant to deposit the sum of Kshs 200,000/- in Court as security for the due performance of the decree of this Court within a period of sixty (60) days, in default the orders shall lapse.
  - c. The Applicant will meet the cost of the application in favour of the Respondent.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 28TH DAY OF JULY, 2023  
VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**



**Delivered online in the presence of:**

Gacoya for Plaintiff/Respondent

Defendant/Applicant – present in person

Court Assistants – Phylis & Lilian

