



**Msechu v Kamau (Environment & Land Case 46 of 2021)  
[2023] KEELC 19140 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19140 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 46 OF 2021**

**AE DENA, J  
JULY 27, 2023**

**BETWEEN**

**AGNETA MASHA MSECHU ..... PLAINTIFF**

**AND**

**NAOMI WANJIRU KAMAU ..... DEFENDANT**

**RULING**

1. The Plaintiff/Applicant vide a Notice of Motion dated 22/2/2023 seeks the following orders;
  1. Spent
  2. That this honourable court be pleased to issue a temporary stay of execution of the judgement dated 8/2/2023 pending the hearing and determination of this application.
  3. That this honourable court be pleased to issue a stay of execution pending the hearing and determination of this preferred appeal.
  4. Spent
  5. That the costs of this application be provided for.
2. The application is supported by the annexed affidavit of Agneta Masha Msechu sworn on the 22/2/23. The Applicant avers that she filed the instant suit for recovery of suit parcels Kwale/Galu Kinondo/1258 and 1259 for herself. That vide a judgement dated 8/2/2023 this court dismissed the said case with costs. That being aggrieved by the said decision she has appealed against the same. The applicant seeks that the subject matter of the suit be preserved pending the hearing and determination of the appeal hence the application herein. According to the Applicant, unless the orders sought are granted, she is bound to suffer great prejudice and irreparable damage given that she resides on the land parcels subject of the suit. The court is urged to allow the application as prayed.



3. The Applicant filed a further affidavit on 2/5/2023 with leave of the court where is averred that the right to appeal is the applicants inalienable right. That she should not be castigated for exercising the said right. That there was no order sought for cancellation of the applicant's title and the court is faulted for issuing such orders and which was termed an ambush. It is further stated that the appellate court has powers to order new evidence to be taken even on appeal. That it is not clear whether it is the applicants title or the entries made to transfer the land to her name that is subject of cancellation or who keeps custody of the title after the cancellation.
4. In opposing the application, the Defendant/Respondent filed a replying affidavit on 21/3/2023. It is averred that the application as filed is a gross abuse of the court process as the applicant has not met the requisite legal threshold for grant of the orders sought. It is stated that the intended appeal is frivolous and has no chances of success. It is further stated that the applicant will not suffer any prejudice and that the court cannot issue stay orders based on speculative events as claimed by the applicant. The court is urged to dismiss the application.

### **Applicants Submissions**

5. The application was canvassed by way of written submissions. The applicant filed submissions on 2/5/2023. Citing the provisions of order 42 rule 6 of the Civil Procedure Rules on requirements for grant of stay of execution pending appeal it is submitted that in the event the prayers sought in the application are not granted, the substratum of the case which is the title deed to the same will be destroyed leaving the applicant without a remedy. On unreasonable delay it is submitted that the application was filed 14 days after judgement and the issue of delay cannot arise.
6. On security it is submitted that the decree appealed from is not a money decree. That the land in issue serves as security and as such no extra security is required. The applicant states that the power of the court to grant stay of execution pending appeal is discretionary. Reliance is placed on Eldoret CA No 69 of 2020 *Catherine Matei Chena versus Pradeep Harish Hindocha* where the court of appeal allowed a stay of appeal without any conditions pending the hearing of the said appeal.

### **Respondents Submissions**

7. The Respondent's submissions were filed on 26/4/2023. It is submitted that the Applicant's application is unmerited and ought to be struck out. The Respondent states that the applicant has not met the conditions set out under order 42 rule 6 on stay of execution pending appeal. That the purpose of stay is to preserve the substratum of the subject matter. That the court must however balance the interests of all parties involved as was stated in [\*Nicholus Stephen Okaka & another versus Alfred Waga Wesonga\* \[2022\] eKLR.](#)
8. It is submitted that the Applicant has failed to prove that substantial loss may result unless stay of execution is granted. That the Defendant has never expressed any intention to execute. It is admitted the application was filed timeously. On security for costs, it is submitted that the provisions of order 42 rule 6 are couched in mandatory terms and for grant of stay of execution pending appeal a party ought to furnish security.
9. Submissions were also made on the merits of the appeal but I will not dwell on this point. My view is that this cannot be a consideration for the court to entertain as it is its own judgement that is being impugned. The point can only be raised when the application is being made at the Court of Appeal level.
10. The respondent sought that the application be dismissed for failure to meet the required threshold.



## Determination

11. The main issue for determination is whether the Applicant has demonstrated that the orders of stay of execution pending appeal are merited. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides:

No order for stay of execution shall be made under subrule (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.
12. It has been stated in various case law that substantial loss is the main criteria to be considered in application for grant of orders of stay of execution pending appeal. In the case of [Cosmas Cherono & 2 others v Veronicah Cherono](#) [2022] eKLR the court citing the dictum in cited the case of [Samvir Trustee Limited v Guardian Bank Limited](#) [2007] eKLR where it was stated as follows; -

It is my humble view that for the applicant to obtain a stay of execution, it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss.”

13. In the case of [Sammy Some Kosgei v Grace Jejel Boit](#) [2013] eKLR the court rendered itself as follows as relates to the issue of proving the existence of substantial loss:

The more critical issues herein are whether the applicant stands to suffer substantial loss if the order of stay is not granted and the question of security. In my view I think that if an applicant cannot demonstrate substantial loss, then the application ought to automatically fail and there would be no point in considering the question of security. It is the question of substantial loss which is the epicenter in an application for stay of execution pending appeal.

I therefore need first to interrogate if the applicant really will suffer substantial loss if stay is not granted. But even in this interrogation, I must be alive to the tenet that a successful party is entitled to the fruit of his judgment and there must be demonstrated good reason why he ought not to consume the fruit of his judgment, at least just yet. In [Machira t/a Machira & Co v East African Standard No.2](#) (2002) 2 KLR 63, It was stated as follows” It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do. If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars 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 award or decree or order , before disposal of the applicant's business (e.g appeal or intended appeal)” (at P 67).”



14. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR the meaning of substantial loss was espoused in the following dictum; -

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. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

15. I will therefore proceed guided by the case law above to interrogate if the applicant has demonstrated substantial loss will be suffered if the orders for stay of execution are not granted. The applicant states at paragraph 8 of her supporting affidavit herein as follows; -

‘THAT unless the orders sought are issued, I will suffer great prejudice and irreparable damage noting that I live on the subject matter property and have no other place to go.’

16. While not having a place to go could be a factor to be considered and which would show that the execution will create a state of affairs that will irreparably affect the applicant, the applicant just glosses over it. No further explanation is given on why she would have no other place to go. Would it be for example she is an orphan; she has no income for alternative accommodation just to hazard some guesses. It behooved the applicant to satisfy this court that she would suffer irreparable substantial loss and I don’t know how a court would be convinced by a plain statement that the applicant has nowhere to go without any evidence supporting this or a compelling explanation. I find further support in *Charles Wabome Getbi vs. Angela Wairimu Getbi* (2008) eKLR the Court of Appeal held that; -

‘.....It is not enough for the applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The applicants must go further and show the substantial loss that the applicants stand to suffer if the respondent execute the decree in the suit against them’.

17. Assuming I’m wrong on the above, I took time to review the rest of the depositions in the supporting affidavit and it is stated the judgement was not clear to whom the certificates of lease would be released to once the rectification is done and the applicant would like this to be clarified on appeal. Clearly this does not support the requirement on substantial loss. It is a ground of appeal. That the applicant would like another lawyer to represent her in the appeal process, which also is not a consideration for grant of stay of execution including the deposition that it is in the interest of justice that the application is allowed. It is also contended that the appeal has good chances including a motion to get additional evidence which according to the applicant if allowed will tilt the judgement of the court. In other words, I understand the applicant to be saying that she has an arguable appeal with good chances of success. I have already stated elsewhere in this ruling why I will not consider any such proposition for the reason that a court should not cast a doubt on its own judgement. This should be the preserve of the appellate court on application for orders of stay of execution pending appeal to that court.
18. Based on the foregoing it is my finding that the applicant has failed to establish substantial loss that they are likely to suffer unless the stay order is granted. Since the applicant has not met the threshold for the grant of orders of stay of execution, the court cannot exercise its discretion as desired by the applicant.



19. In view of the finding above I do not find it necessary to decide on the issue of security. However, on the timeliness of the application I make a finding that the applicants have shown that they filed the Notice of Appeal within the 14 days prescribed, and that the instant application was filed without delay,
20. The upshot of the foregoing is that the Notice of Motion dated 22/2/2023 is dismissed with costs to the respondent.

Orders accordingly.

**DELIVERED AND DATED AT KWALE THIS 27<sup>TH</sup> DAY OF JULY, 2023**

**A.E. DENA**

**JUDGE**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms Oseke holding brief for Mr. Muchiri for Plaintiff/Applicant

Ms Mwawasi for the Defendant/Respondent

Mr. Daniel Disii - Court Assistant.

