



**Canon Automobile Limited v Kwale International Sugar Co Ltd; Attorney General (Plaintiff to the Counterclaim); Canon Automobiles Limited & 5 others (Defendant to the Counterclaim) (Environment & Land Case 126 of 2021) [2023] KEELC 20132 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20132 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 126 OF 2021**

**AE DENA, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**CANON AUTOMOBILE LIMITED ..... PLAINTIFF**

**AND**

**KWALE INTERNATIONAL SUGAR CO LTD ..... DEFENDANT**

**AND**

**ATTORNEY GENERAL ..... PLAINTIFF TO THE COUNTERCLAIM**

**AND**

**CANON AUTOMOBILES LIMITED . DEFENDANT TO THE COUNTERCLAIM**

**SULEIMAN ABDALLA MACHAFU .. DEFENDANT TO THE COUNTERCLAIM**

**HAMISI OMAR NDAR ..... DEFENDANT TO THE COUNTERCLAIM**

**ABDALLA MOHAMMED SARAI ..... DEFENDANT TO THE COUNTERCLAIM**

**HASSAN ALI MKUNGU ..... DEFENDANT TO THE COUNTERCLAIM**

**HAMISI ALI MKUNGU ..... DEFENDANT TO THE COUNTERCLAIM**

**RULING**

1. The notice of motion subject of this ruling is dated November 10, 2022 and brought under Certificate of Urgency. It is premised on Sections 1A, 1B, 3, 3A and 63 of the *Civil Procedure Act*, Cap 21 and Order 42, Rule 6 of the *Civil Procedure Rules 2010*.
2. The Applicant herein prays to Court as follows:



1. Spent
  2. Spent
  3. There be a stay of execution of the ruling and orders of November 3, 2022, particularly the order for cancellation of the Plaintiff's title pending the hearing and determination of the intended appeal.
  4. The costs of this application be in the cause.
3. The application is supported by an affidavit sworn by Jaweed Mohamed. It is the Applicants case that it is the registered owner of land parcel no Kwale/Shirazi Bodo/754 hereinafter referred to as the suit property. That it sued the 1<sup>st</sup> and 2<sup>nd</sup> defendants over its rights on the suit property. A counterclaim was filed by the 2<sup>nd</sup> Defendant seeking to nullify the Applicants title, the same was allowed. The 1<sup>st</sup> defendant moved the court to strike out portions of the Plaintiffs claim and which was also allowed vide the courts ruling delivered on November 3, 2022. The Applicant has appealed against the said ruling vide the notice of appeal dated November 9, 2022 and is apprehensive that unless the orders sought are granted he will suffer irreparable loss.
  4. The applicant states that the suit property is now open and available for alienation and it is bound to suffer irreparable loss and damage unless the stay orders are granted.
  5. In opposing the application, the 1<sup>st</sup> Defendant filed a replying affidavit dated January 24, 2023 sworn by David Kulecho its legal officer. It is averred that the application does not meet the legal test for stay of execution pending appeal as the intended appeal raises no arguable grounds and lacks merit. That the applicant has failed to prove in which material respect the intended appeal risks being rendered nugatory. The court is urged to dismiss the application with costs as the same lacks merit.
  6. The Plaintiff in the counterclaim [Attorney General] opposed the application vide grounds of opposition dated November 10, 2022. The following grounds are raised;
    1. That the application is misconceived, frivolous, vexatious and an abuse of the process of the court.
    2. That the balance of convenience tilts against the grant of the orders sought. This honourable court made its finding after clearly analyzing the evidence presented by all parties and submissions thereto hence there is no convincing reason presented to enable the same court stay its own orders and directions.
    3. That the applicants have not met the threshold for grant of the orders sought.
  7. The application was dispensed by way of written submissions. The Applicant's submissions are filed before court on February 21, 2023 while the 1<sup>st</sup> Defendant/Respondents submissions were filed on March 17, 2023. The office of the Attorney General intimated that it would place reliance on the 1<sup>st</sup> Defendant's submissions. The court has duly considered the submissions by both parties.
  8. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the [Civil Procedure Rules, 2010](#) which provides as follows: -
    - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application."

9. From the above provisions of law, the principles guiding the grant of stay execution pending appeal can be summed up as;

1. The court is satisfied that substantial loss may result in the absence of the orders
2. The application has been made without unreasonable delay; and
3. Such security as the court orders for the due performance of such decree or order has been given by the Applicant See *Antoine Ndiaye v African Virtual University* [2015] eKLR.

10. Firstly, this Court must determine whether not granting the order will occasion substantial loss to the Applicant. Substantial loss was explained in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR, that: -

“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.”

11. The ruling subject of the intended appeal nullified the Applicants title to the suit property. The Applicants lay claim on the suit property and state that nullification of their title has left the land available for alienation. That in the event the orders sought are not granted they are apprehensive of losing the same. The Respondents on the other hand and more specifically the 1<sup>st</sup> Respondent has based its response on the merits of the appeal and not on whether or not the threshold for grant of stay pending appeal has been met. The purpose of stay of execution is to preserve the subject matter in



dispute while balancing the interests of the parties and considering the circumstances of the case. The Court of Appeal in *RWW vs EKW* (2019) eKLR addressed itself on this as hereunder: -

“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. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

12. It has not been demonstrated by the respondents how the applicants might be able to recover their land in the event that the same is alienated before the appeal and in the event that the appeal succeeds. It is my view that the applicant has proved the substantial loss to be suffered.
13. The ruling that is to be appealed against was delivered on November 3, 2022 while the instant application was filed on November 10, 2022. In my view this is within a reasonable period of time. It is this court’s finding that the application has been made without unreasonable delay.
14. The purpose of security was clearly enunciated in *Arun C Sharma vs Ashana Raikundalia t/a Rairundalia & Co Advocates & 2 others* [2014] eKLR, where the court stated: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

15. Security for costs is discretionary depending on the circumstances of each case. One of the principles on which a court exercises its discretion in an application for security for costs as considered in the case of *Keary Development v Tarmac Construction* (1995) 3 All ER 534 cited by F Tuiyot, J in *Ocean View Beach Hotel Ltd v Salim Sultan Mollo & 5 Others* (2012) eKLR was that the court must carry out a balancing exercise. On one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff’s claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.
16. In exercise of my discretion, I find that in the instant suit, the applicant has already suffered the fate of having their titles cancelled and as such the respondents have an upper hand on their claim of the suit property. In my view no injustice will be suffered by the respondents in the event that security for costs is not granted. The court does not wish to stifle the applicant’s chance of pursuing the intended appeal. Consequently, I will not make any orders as to deposit of security.
17. I find and hold that the Applicant has fulfilled the requirements for grant of stay of execution pending appeal as stipulated under order 42 rule 6 of the *Civil Procedure Rules*. Accordingly, I hereby allow the application dated November 10, 2022. Costs shall abide the outcome of the appeal.



It is so ordered.

**DELIVERED AND DATED AT KWALE THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**A.E. DENA**

**JUDGE**

