



REPUBLIC OF KENYA



Waweru & another v Maombi Water Services Limited (Environment & Land Case 337 of 2013) [2023] KEELC 21127 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21127 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 337 OF 2013
A OMBWAYO, J
OCTOBER 31, 2023**

BETWEEN

JOHN KIGAA WAWERU 1ST PLAINTIFF

SHADRACK NJUGUNA NJIHA 2ND PLAINTIFF

AND

MAOMBI WATER SERVICES LIMITED DEFENDANT

RULING

1. The Defendant/Applicant filed the instant application dated 15th September, 2023 seeking the following orders:
 1. Spent.
 2. Spent.
 3. That pending the hearing and determination of the Applicant's intended appeal, this Honourable court be pleased to grant a stay of execution of the judgment issued on 17th July, 2023 together with all consequential orders thereof.
 4. That cost of this application be provided for.
2. The Application was based on grounds set out and supported by the Affidavit of Johnson Njuguna Ngaruiya the Director of the Defendant company herein sworn on 15th September, 2023.
3. It was stated that the Plaintiffs filed the instant suit against the Defendant and the court rendered its decision on 17th July, 2023 in favour of the Plaintiff. That being dissatisfied with the said judgment, the Defendant/Applicant filed a notice of appeal at the Court of Appeal challenging the said decision.
4. That the Plaintiff is likely to execute the said judgment and subject to such execution the Defendant/Applicant is likely to suffer irreparable loss as the sum involved is high. He stated that if the said



judgment is executed, the intended appeal will be rendered nugatory. He added that the Defendant/Applicant is ready and willing to comply with any reasonable conditions as ordered by this court.

5. It was further stated that the intended appeal has merit with high chances of success thus the need to stay execution.
6. In conclusion, the Applicant stated that no prejudice will be suffered by the Plaintiff if the application is allowed.

Response

7. The 1st Plaintiff/Respondent filed his Replying Affidavit dated 28th September, 2023 on 29th September, 2023. He deposed that the Defendant/Applicant is not likely to suffer any irreparable loss if the application is disallowed. He further stated that no huge amount is involved and that the appeal would not be rendered nugatory if the orders sought are not granted.
8. It was his contention that the Defendant/Applicant had not offered any security for the enforcement of the decree.
9. In conclusion he deposed that the application lacked merit and ought to be dismissed.

Submissions

10. The Defendant/Applicant filed its submissions dated 28th September, 2023 on 3rd October, 2023. It gave a background of the application and submitted on the principles before granting stay of execution pending appeal. The Defendant/Applicant relied on Order 42 rule 6(2) of the [Civil Procedure Rules](#) as well as the overriding objective provided for in sections 1A and 1B of the [Civil Procedure Act](#).
11. It also relied on the judicial authorities of [Antoine Ndiaye V African Virtual University](#) [2015] eKLR and [RWW V EKW](#) [2019] eKLR and submitted that the instant application met the criteria for grant of stay of execution pending appeal.
12. The Defendant/Applicant urged the court to grant the same as prayed.

Analysis and Determination

13. This court has carefully read the application, replying affidavit in opposition as well as the submissions and the main issue for determination is whether the order for stay of execution pending appeal should issue.
14. This court is alive to the fact that the principles governing the grant of an order for stay of execution pending appeal are now settled. The relevant law governing such an application is provided for under Order 42 Rule 6 1(2) of the [Civil Procedure Rules](#) which states as follows: -
 - (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.”



15. In the case of *Halal & Another v Thornton & Turpin* [1963] Ltd [1990] eKLR the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag. JA) held that:

...thus the superior court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must of course, be made without unreasonable delay.”
16. In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in the case of *Hassan Guyo Wakalo v Straman EA Ltd* (2013) as follows:

“In addition, the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory.

These two principles go hand in hand and failure to prove one dislodges the other.”
17. The grant of an order for stay of execution pending appeal is discretionary in nature whose purpose is to preserve the subject matter of the appeal.
18. This court should endeavor to strike a balance between the interests of both the successful party in litigation so as not to unnecessarily bar him from enjoying the fruits of the judgment and that of the Appellant whose appeal may succeed and be rendered nugatory if stay of execution is not granted.
19. In this case, judgment was delivered on 17th July, 2023 and the Applicant filed a Notice of Appeal on 28th July, 2023 as well as the instant application on 19th September, 2023. In regard to the issue of delay, the time from which judgment was delivered and the time this application was brought before this court translates to about two (2) months. I find that the period does not amount to inordinate delay.
20. On the issue of substantial loss, the Defendant/Applicant submitted that it stands to suffer substantial loss if the Plaintiff proceeds with execution as the sum involved is huge. It is not in dispute that the Defendant/Applicant has been in occupation of the suit property. I find that the Defendant/Applicant could be removed if eviction proceeded in line with order (c) of the impugned judgment and therefore suffer substantial loss if stay is not granted.
21. Although the Defendant/Applicant has not expressed whether it is ready to offer security of costs, I find that it can be directed by the court to do so. This court shall therefore exercise its discretion regarding the security of costs to be offered by the Defendant/Applicant and direct that it does so within the time to be stipulated in this ruling if it intends to proceed with the Appeal.
22. In the upshot, the application is allowed and a stay of execution of the decree of this court issued on 23rd August, 2023 is granted on the following conditions:
 - a) The Defendant/Applicant is hereby ordered to deposit in a fixed joint interest earning account in the names of both counsel for the parties the taxed costs of the suit within 30 days of the issuance of a certificate of taxed costs.
 - b) The Defendant/Applicant shall compile, file and serve a record of appeal within 60 days and move the court appropriately towards the finalization of the appeal within 180 days from the date of this ruling.
23. Finally, failure by the Appellant to abide by any of the above stated two conditions within the fixed time lines will lead to an automatic lapse of the stay of execution herein irrespective of whether or not one condition shall have been met earlier than the failure of the latter. It is so ordered.



**RULING DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS
31ST DAY OF OCTOBER 2023.**

A.O.OMBWAYO

JUDGE

