



**M’CM v HM & another (Environment and Land Appeal E035 of 2022)
[2023] KEELC 20765 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20765 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E035 OF 2022
CK YANO, J
OCTOBER 19, 2023**

BETWEEN

M’CM APPELLANT

AND

HM 1ST RESPONDENT

DKG 2ND RESPONDENT

RULING

1. By a notice of motion dated 16th June 2023, the appellant/applicant is mainly seeking for orders of stay of execution and or further proceedings in Githongo SPM ELC No 4 of 2020 vide a judgment dated 23rd May 2022 pending the hearing and determination of the appeal herein.
2. The application is supported by the affidavits of M’M and DN’C and is based on grounds that:
 - a. The appellant was the plaintiff before the trial court in Githongo SPM ELC No 4 of 2020 and the respondents are her grandchildren.
 - b. The trial court in Githongo ELC No 4 of 2020 delivered its judgment on 23rd May 2022 dismissing the appellant’s case before the trial court.
 - c. The appellant, was disgruntled with the decision of the trial court below and filed an appeal to the court vide memorandum of appeal dated 22nd June 2022 and filed in court on even date.
 - d. On 15th June 2023, the appellant/applicant learned that the respondents had engaged land brokers within the village to sale off the suit land to third parties an action that has necessitated the filing of this application.



- e. The applicant is now apprehensive that the respondents will commence execution proceedings unless further proceedings of the trial court are stayed during the pendency of the appeal.
 - f. It is in the interests of justice that the orders sought are granted to preserve the suit land should the appeal be successful.
 - g. No prejudice will accrue to the respondent's should the orders sought herein be granted.
3. In his affidavit in support of the application the applicant reiterated the above grounds and avers inter alia that he is the original proprietor of the suit land LR No Abothuguchi/Kariene/xxxx which was subdivided by the 1st respondent after being registered as proprietor therein in 2013. That the 1st respondent's said action prompted the applicant herein to file the suit in the lower court which was decided in favour of the 1st respondent. The applicant further avers that he was evicted from the suit land by the respondents in the year 2020 and has since then been living at the home of his son, one DN'C.
 4. The applicant avers that he is an elderly man of over 100 years and suffering from dementia. That the suit land harbors his home where he has raised his children. That unless execution is stayed, the applicant risks suffering substantial loss. The applicant has annexed copies of the decree of the trial court, memorandum of Appeal, the green card and subdivision as well as a medical report and ruling of the trial court dated 29th October, 2021.
 5. DN'KC, the 3rd born son of the applicant and who is not a party to these proceedings, confirmed that the applicant was evicted from the suit land in 2020 and has been living with him on his land LR N. ntima/Igoki/xxxx since 2020.
 6. The respondent only filed a notice of appointment of advocate and therefore the application is not opposed.
 7. The application was canvassed by way of written submissions. In his submissions dated 22nd September, 2023, the applicant cited the provisions of Order 42 Rule 6 of the *Civil Procedure Rules* and relied on the case of *RWW v EKW* [2019] eKLR on the purpose of stay of execution order pending appeal. Learned counsel for the applicant submitted that the court has the discretion to grant or refuse to grant an order of stay, but that the discretion must be exercised judiciously and relied on the case of *Kenya Power & Lighting Company Ltd v Esther Wanjiru Wakabi* [2014] eKLR They also relied on *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, *Equity Bank Ltd v Taiga Adams Company Ltd* [2006] eKLR, *Elena D. Korir v Kenyatta University* [2012] eKLR and *Stanley Kiplagat Rono & another v William Kiprotich Cherus* [2021] eKLR
 8. It is the applicant's submissions that unless the orders of stay are issued, the applicant's appeal will be rendered nugatory. That the appeal is arguable and the applicant is ready to abide by any terms the court may impose.
 9. I have considered the application, the affidavits in support and the submissions by the applicant. The issue for determination is whether the court should grant the orders of stay of execution pending the determination of the appeal herein.



10. The principles upon which stay of execution pending appeal may be allowed are now well settled from the authorities of this court and from the superior courts. Generally, stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules 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 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 of 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 undue 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. Stay of execution pending appeal is a discretionary power bestowed upon this court by the law. The Court of Appeal in the case of Butt v Rent Restrictions Tribunal [1982] KLR 417 gave guidance on how a court should exercise the said discretion and held that;

- “1. The power of the court to grant or refuse an application for a stay of execution is discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle 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.
3. 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.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI Rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order of stay of execution to lapse.”



12. As such for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for the due performance of the decree.
13. In the instant case, the judgment was delivered by the trial court on 23rd May 2022 while the application herein is dated 16th June 2023. That is a period of over one year and one month. In my view, the application has been made after undue delay. The applicant has also not given any explanation in regard to the delay in filing the application. In my considered view, the delay in bringing the application was inordinate and the applicant ought to have given sufficient reason for not filing the application timeously.
14. In the case of *Julius Orare Isaac v Bake N'Bite Co. Ltd* [2016] eKLR it was held that “a delay of 4 months before making the application for stay pending appeal is inordinate delay. No good cause has been shown to justify that delay”
15. As for the applicant having to suffer substantial loss, in the case of *Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga* (1982 – 1988) KAR 107 the Court of Appeal pronounced itself to the effect that-;

“It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdiction for granting stay.”

(see also the case of *Macharia T/a Macharia & Co. Advocates v East African Standard (No 2)* 2002) KLR 63)
16. The applicant has a burden to show the substantial loss he is likely to suffer if no stay is ordered. This is in recognition that both parties have rights, the appellant to his appeal which includes the prospect that the appeal will not be rendered nugatory, and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination (see the case of *Absalom Dora v Turbo Transports* (2013) [eKLR])
17. The applicant has stated that the intended appeal will be rendered nugatory if the stay is not granted and that he is apprehensive that the respondents will commence execution proceedings unless further proceedings of the trial court are stayed during the pendency of the appeal.
18. The applicant has pleaded that he was evicted from the suit land in the year 2020 and has been living on his son’s land. This therefore confirms that there is nothing to stay. In my view, the application has been overtaken by events since the applicant has been evicted and has been out of the suit land since 2020. Moreover, there are no proceedings pending in the subordinate court since judgment has already been delivered in which the applicant’s suit was dismissed. There were no positive orders granted by the trial court which should be stayed.
19. I am of the view that the application was not filed timeously. Further the applicant has not proved what substantial loss he would suffer considering that he has already been evicted from the suit property. Moreover, there were no positive orders issued by the trial court which can be stayed. Even the order for costs was that each party bears its own costs.
20. In the circumstances the application has no merit and is dismissed.



21. Considering the relationship of the parties who are close family members, I order that each party to bear their own costs.

DATED SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF OCTOBER, 2023

C.K YANO

JUDGE

In the presence of;

Court Assistant – V. Kiragu/Lena M

Njindo holding brief for Munene Kirimi for respondent

