



Thimbui v Amboseli Court Limited (Environment and Land Appeal 5 of 2023) [2023] KEELC 21944 (KLR) (30 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21944 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 5 OF 2023
MD MWANGI, J
NOVEMBER 30, 2023**

BETWEEN

MESHACK MWANGI THIMBUI PLAINTIFF

AND

AMBOSELI COURT LIMITED DEFENDANT

(An appeal from the Ruling of the Chief Magistrate Hon. H. M. Nyaberi (Mr.) delivered on 16th June, 2022 IN THE CHIEF MAGISTRATE COURT CMELC NO. E211 OF 2021 (MILIMANI))

RULING

(In respect to the Appellant’s application for stay of execution pending appeal)

Background

1. The Application by the Appellant is for a stay of execution of the decree of the subordinate court pending hearing and determination of the appeal brought under the provisions of Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* 2010.
2. The Application is premised on the grounds on the face of it being that the Magistrate’s Court declined to grant the Appellant/Applicant an order of stay of execution of the Decree in CMELC E211 of 2021 exposing him to execution of the said Decree unless stay is granted.
3. The Appellant states that it has issued ‘security’ herein by paying the Respondent a sum of Kshs.300,000/= . The Appellant further avers that it stands to suffer irreparable loss and damage unless the order of stay is granted. Finally, that the Appeal has high chances of success and will be rendered nugatory unless stay of execution is granted.



4. The application is further supported by the Supporting Affidavit of David Njeru Nyaga, the Advocate seized of this matter on behalf of the Appellant/Applicant who reiterates the averments contained in the grounds in support of the application.
5. The Respondent, Meshack Mwangi Thimbui opposed the application vide a Replying Affidavit deponed on the 12th May, 2023. He depones that the application is unmerited, and an abuse of the court process as the Appellant has on numerous occasions sought the similar prayers before courts of competent jurisdiction and the same have been determined.
6. Despite the Magistrate Court granting the Appellant a chance to pay the decretal sum in installments, the Appellant has failed to comply. The Appellant went to slumber. The prayer for stay was denied as the Applicant had not shown any willingness to settle the judgement-debt.
7. After the ruling by the Magistrate's court, the Appellant filed another application for stay after paying a sum of Kshs. 500,000/=. The application was disallowed. The deponent filed yet another application for stay but the court declined to grant the prayers sought on the basis that the application was res judicata.
8. It is after the unsuccessful attempts at the Magistrate's Court that the Appellant has now moved this court for similar orders. The Respondent contends that the assertion by the Appellant that the installments as directed by the Magistrate's court are too high is baseless as no evidence has been adduced in support of the inability to pay.
9. The Respondent prays that the application be dismissed with costs.

Issues for Determination:

10. The appeal in this matter as expressed in the Memorandum of Appeal dated 7th November, 2022, is an appeal from the ruling of the Chief Magistrate's Court delivered on 16th June, 2022. The ruling from the perusal of the subordinate court's file, now before this court was in respect of an application by the Appellant herein seeking to liquidate the decretal amount by monthly instalments of Kshs 150,000/-.
11. The learned magistrate in his ruling found that the Appellant was not acting in good faith but was only out to frustrate the Plaintiff/Respondent from enjoying the fruits of his judgment that was entered way back on 17th November, 2021. He concluded that the Defendant had had sufficient time to settle the Plaintiff's claim. In exercise of his discretion however, he allowed the Appellant to settle the decree amount in three (3) monthly instalments with effect from 30th June, 2022. In default execution was to issue.
12. The sole issue for determination then is whether the Appellant/Applicant has satisfied the grounds for the grant of an order of stay of execution pending appeal.

Analysis and Determination

13. The Court of Appeal in the case of *Visbram Ravjiltalai -vs- Thoraton & Turnip* (Civil Application No. Nai 15 of 1990 [1990] KLR 365 observed that whereas the Court of Appeal's power to grant stay pending appeal is unfettered, the High Court's (and now, Courts of equal status') jurisdiction to do so under Order 41 Rule 6 (now Order



42 Rule 6) is fettered by 3 conditions, namely; establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further, the application must be made without unreasonable delay.

14. Substantial loss however, is the cornerstone of the jurisdiction for granting stay of execution pending appeal.
15. To prove substantial loss as expressed in the case of *James Wangalwa & Another - vs- Agnes Naliaka Cheseto* [2012] eKLR, 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.”
16. The Applicant’s basis of its application in this matter is that the Magistrate’s Court’s refusal to grant it an order of stay of execution exposes it to execution and that consequently, it stands to suffer irreparable loss and damage, unless the order of stay is granted.
17. In the *James Wangalwa case (supra)*, the Court noted and pronounced that execution of a decree is a lawful process and its likelihood or even its implementation cannot therefore amount to substantial loss by itself. The Applicant must establish other factors beyond the likelihood of execution or implementation of the execution process.
18. Going by the above reasoning, the Applicant in this case has surely not established substantial loss. The Applicant has neither demonstrated any sufficient reason to warrant an order of stay of execution.
19. I am not the least persuaded that I should exercise this Court’s discretion in the Applicant’s favour.
20. As eloquently stated by Lord Mansfield in *R -vs- Wilkes*, 1770 (98) EK 327, discretion when applied to Courts of justice means sound discretion guided by the Law. ‘It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, but Legal and regular.’
21. The Appellant has not established the legal basis for the exercise of the court’s discretion to grant an order of stay of execution pending appeal.
22. The upshot is that the Appellant/Applicant’s application lacks merit and is hereby dismissed with costs to the Respondent.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2023.

M. D. MWANGI

JUDGE

In the virtual presence of:

N/A for the Respondent

Mr. Njeru for the Appellant/Applicant

Yvette: Court Assistant

