



**Rocca v Delta Connections Limited (Environment & Land Case
205 of 2020) [2025] KEELC 1250 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1250 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 205 OF 2020**

**YM ANGIMA, J
MARCH 13, 2025**

BETWEEN

PAOLO ROCCA PLAINTIFF

AND

DELTA CONNECTIONS LIMITED DEFENDANT

RULING

A. Introduction

1. By a judgement dated 21.02.2023 the court entered judgment for the plaintiff in the following terms upon a full hearing;
 - a. The defendant to refund to the plaintiff Kshs 108,940,000/= being the partial payment received for the purchase of 10 acres within Land Parcel LR 463/III/MN with interest at court's rate from 9th November 2020 the date this suit was filed till the judgement date 21st February 2023.
 - b. The plaintiff is awarded costs of the suit.
2. Being aggrieved by the judgment, the defendant filed a notice of appeal dated 22.02.2023, which intimated their intention to lodge an appeal against the whole judgment to the Court of Appeal.

B. Defendant's Application

3. Vide a notice of motion dated 21.8.2024 expressed to be brought under Sections 1A, 1B, 3, 3A of the *Civil Procedure Act*, Order 42 Rule 6 (1) and (2) and Order 51 of the Civil Procedure Rules, Article 159 of *the Constitution* of Kenya and all enabling provisions of the law, the defendant sought a stay of execution of the judgment delivered on 21.02.2023 and the decree issued on 04.12.2023 pending the lodging, hearing and determination of their intended appeal. The application was based upon the



grounds set on the face of the motion and the contents of the supporting affidavit sworn by Moses Waweru Ndung'u 21.08.2024 and the annexures thereto.

4. The defendant contended that unless the stay sought was granted it stood to suffer substantial loss since some parcels of land belonging to Moses Waweru Ndung'u and Jasper Odour Omondi who were not parties to the suit were on the verge of being sold. It was contended that in the absence of a stay the properties of persons not parties to the suit stood to be sold which will cause irreparable loss and damage to innocent parties. The defendant was also apprehensive that unless the stay sought was granted its intended appeal shall be rendered nugatory.

C. Plaintiff's Response

5. The plaintiff filed a replying affidavit sworn on 16.09.2024 and a further affidavit on 17.09.2024 in opposition to the application. It was deposed that the plaintiff had already extracted the decree issued on 04.12.2023 and was in the process of executing it. It was contended that the inclusion of Moses Waweru Ndung'u and Jasper Odour Omondi in the advertisement dated 07.08.2024 was an error and had since been corrected by an amended advertisement on 14.08.2024. It was argued that the defendant was guilty of non-disclosure of material facts for failing to inform the court that it was aware of the amended advertisement. It was argued that the defendant had not satisfied the requirements for granting a stay and the court was urged to dismiss the application.

D. Directions on Submissions

6. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The defendant filed submissions dated 18.10.2024 while the plaintiff's submissions were dated 06.02.2025.

E. Issues for Determination

7. The court has perused the application dated 21.08.2024, the responses thereto and the material on record. The court is of the view that the following key issues arise for determination herein:
 - a. Whether the defendant has made out a case for the grant of a stay pending appeal
 - b. Who shall bear the costs of the applications

F. Analysis and Determination

Whether the defendant has made out a case for the grant of a stay pending appeal

8. There is no doubt from the material on record that the defendant's application was grounded on Order 42 Rule 6 (1) and (2) of the Rules which provide that;
 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 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.
9. The Court of Appeal set out the factors to be considered in an application for stay of execution pending appeal in the *Butt v Rent Restriction Tribunal* [1982] KLR 417, as follows:
1. The power of the court to grant or refuse an application for a stay of execution is a 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 of the case and unique requirements. 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 for stay of execution to lapse.
10. The plaintiff has admitted that there was an error in the 7th August 2024 publication in the Daily Nation which advertised LR No. 313 Takaungu & LR No. 314 Takaungu registered in the name of Moses Waweru Ndung’u and Jasper Odour Omondi for sale by public auction on 26.8.2024 for satisfaction of the money decree. The plaintiff acknowledged the error in the advertisement and caused an amendment on 14.8.2024 in the Daily Nation which identified Kilifi/Mtwapa/1574 and Mainland North/Section III/4760 registered in the name of Delta Connections Limited for sale by public auction. The court has perused the amended advertisement and noted that there was a clarification that the advertisement of 7.8.2024 had been withdrawn.
11. The court is not satisfied that the defendant was not aware of the advert of 14.8.2024 which amended the one of 7.8.2024 before making the instant application on 21.8.2024. Further, the defendant has not demonstrated the substantial loss that it stands to suffer if the stay is not granted. In the case of *Kenya Shell Limited v Benjamin Karuga Kibiru and Ruth Wairimu Karuga* [1986] eKLR it was held;
- “If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”
12. There is no allegation or demonstration that the plaintiff would be unable to pay back the decretal sum in the event of the defendant’s appeal being successful. The court finds that the defendant has failed



to show that if the decretal sum is paid to the respondent, the plaintiff would not be in a position to reimburse the same should its intended appeal be successful.

Who shall bear the costs of the application

13. Although the costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [19671 EA. The court finds no good reason to depart from the general rule. As a result, the plaintiff shall be awarded the costs of the application.

G. Conclusion and Disposal Order

14. The upshot of the foregoing is that the court finds and holds that the defendant has failed to satisfy the requirements set out in Order 42 Rule 6 of the Rules. As a consequence, the court makes the following orders for the disposal of the application.
- a. The defendant’s notice of motion dated 21.8.2024 be and is hereby dismissed in its entirety.
 - b. The plaintiff is hereby awarded the costs of the application.

RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 13TH DAY OF MARCH 2025.

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Y. M. ANGIMA

JUDGE

In the presence of:

Mr. Wangila for the plaintiff

Mr. Waweru for the defendants

Court assistant Gillian

