



Justus Munyinyi Macharia t/a Gusii Proprietary v Dakianga Distributors Limited (Environment & Land Case 29 of 2015) [2023] KEELC 21531 (KLR) (16 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21531 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 29 OF 2015**

M SILA, J

NOVEMBER 16, 2023

BETWEEN

JUSTUS MUNYINYI MACHARIA T/A GUSII PROPRIETARY PLAINTIFF

AND

DAKIANGA DISTRIBUTORS LIMITED DEFENDANT

RULING

(Application for stay pending appeal; whether this court has jurisdiction to give an order of stay pending appeal or whether court is functus officio; Order 42 Rule 6 giving this court mandate to hear an application for stay pending appeal arising out of its decisions; principles to be applied; security for the due performance of the decree; applicant's director offering her property as security; need for such security to conform to the law regarding dispositions thus need for such offer to be backed up by spousal consent; security acceptable but subject to provision of spousal consent)

1. The application before me is that dated 26 May 2023 filed by the defendant. It is an application seeking orders of stay of execution of the judgment delivered on 20 April 2023 pending hearing of an intended appeal to the Court of Appeal. The application is opposed.
2. To put matters into context, the plaintiff/respondent sued the defendant/applicant through a plaint filed on 20 June 2012. In the plaint, the respondent pleaded to be the legal representative of one Abigael Wanjiru Mbiri (deceased), who, before her demise, was tenant of the applicant in the property Kisii Municipality/Block 3/107. It is averred that the applicant purchased the property sometimes in the year 2004, and on 11 January 2005, issued a notice to the tenant to vacate the premises. This notice was challenged before the Business Premises Rent Tribunal (BPRT), Case No. 2 of 2005. The BPRT upheld the notice but the tenant lodged an appeal before the High Court, being Kisii HCCA No. 950 of 2005. It was pleaded that while the appeal was pending, and despite an existing stay order, the applicant evicted the respondent from the premises, and threw away all his movable goods and equipment but retained the permanent fixtures and heavy equipment. He pleaded that he obtained



an order to be reinstated back to the premises but the applicant secretly gave the premises to other third parties. He claimed to have suffered loss as a result. In the suit he claimed special damages of Kshs. 9, 929, 765/=, aggravated damages, costs and interest. The applicant filed defence and resisted the respondent's case culminating in a judgment delivered on 20 April 2023. In the judgment, the court (Onyango J) held for the respondent, and awarded her a sum of Kshs. 8,282, 817/= in special damages; Kshs. 2,000,000/= in aggravated damages; interest and costs. I have seen that the applicant filed a Notice of Appeal on 27 April 2023 and this application was subsequently filed. I already mentioned that it is one for stay pending appeal to the Court of Appeal.

3. The supporting affidavit is sworn by Lydia Nkirote Manene, a director of the applicant. She has deposed that the applicant is aggrieved by the judgment and intends to appeal. She states that the judgment sum is colossal and will bring the business of the applicant to a halt if the same is executed. She adds that the respondent is a person of unknown means and may not be able to refund the money if paid. She points out that he is merely a beneficiary of the estate of the late Abigael Wanjiru Mbiriri (deceased). On security, she has stated that she is ready to deposit a title deed to one of the properties that she owns, that is Kisii/Keroka Township/42, which she states is valued at Kshs. 20,000,000/= and had previously been charged to a bank. She has annexed a copy of the title deed and a valuation report for this property.
4. The respondent filed a replying affidavit to oppose the motion. He believes that he is entitled to the fruits of the judgment and argues that nothing has been placed before this court to demonstrate the veracity or arguability (sic) of the appeal. He also avers that this court is functus officio and that such application is better heard by the Court of Appeal. On the security, he avers that he has no trust in the security being offered. He avers that the company should deposit the full decretal sum in court or in an interest earning account.
5. I invited counsel to file written submissions towards the application and I have seen the submissions of Mr. Bosire Gichana, learned counsel for the applicant, and M/s Muchangi Nduati & Co, for the respondent. I have taken these into account before arriving at my decision. In particular, learned counsel for the respondent inter alia argued that such application is governed by the provisions of Rule 5 (2) (b) of the Court of Appeal Rules and referred me to some authorities on the interpretation of this rule. He also raised issue that the Notice of Appeal was not lodged in accordance with Rule 77 of the Court of Appeal Rules which requires a Notice of Appeal to be lodged within 14 days of the decision. He urged that the Notice of Appeal was lodged on 22 May 2023 which was out of time. Finally, he submitted that if the court is not persuaded by the above, it ought to order that the decretal sum be deposited in court.
6. I have considered all the above.
7. Let me start with the Notice of Appeal. It is correct that Notices of Appeal to the Court of Appeal are supposed to be lodged within 14 days of the decision. Counsel claims that in our case, the Notice of Appeal was lodged on 22 May 2023. That cannot be correct. I have perused the Notice of Appeal and it is clear to me that it was lodged on 27 April 2023. That is the date that the said Notice of Appeal was paid for. It is the date of payment of the Notice of Appeal that should be considered to be the date that the Notice of Appeal is lodged and Deputy Registrars need to take note of that. In our case, the Notice of Appeal was indeed paid for on 27 April 2023. For reasons I cannot fathom, the Deputy Registrar noted the date of 2 May 2023 as the date that the notice was lodged. This clearly, is erroneous. Whatever the case, even 2 May 2023 would still be within the 14 days of judgment, given that the judgment was delivered on 20 April 2023. There is no date of 22 May 2023 as claimed by counsel for the respondent. Thus my finding is that the Notice of Appeal was lodged within time.



8. The next issue I will deal with is the claim by the respondent that such application cannot be heard by this Court but by the Court of Appeal and the reference to Rule 5 (2) (b) of the Court of Appeal Rules as the applicable law. This position of the respondent is completely incorrect. It is wrong to insinuate that this court cannot hear an application for stay pending appeal from its own decision and it is wrong to claim that this court considers Rule 5(2)(b) of the Court of Appeal Rules and the principles therein. The applicable law for stay of execution pending appeal applications before this court is actually Order 42 Rule 6, of the Civil Procedure Rules, 2010, which provides as follows :-

6. Stay in case of appeal [Order 42, rule 6.]

- (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 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.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

9. From the foregoing, it will be seen from a reading of Order 6 Rule 1 that this court has the jurisdiction to hear an application for stay pending an appeal arising from its own decision. There is no need of belabouring that point as this is obvious from the plain reading of the text. For applications of stay before this court, it is the above provision that applies, not Rule 5 (2) (b) of the Court of Appeal Rules. Rule 5 (2) (b) and the principles therein are applicable to the Court of Appeal and not this court.

10. For this court, the principles that apply are those set out in Order 6 Rule 2. These are: -

- (i) Whether the application has been made without unreasonable delay;



- (ii) Whether the applicant stands to suffer substantial loss if the order for stay is not made;
 - (iii) Whether there is provision of security as the court may order for the due performance of the decree.
11. I will stand guided by the above principles.
 12. On delay, there was no delay given the circumstances of this case.
 13. On substantial loss, I am persuaded that if the decree is executed and the applicant succeeds on appeal, she may suffer substantial loss. The amount payable is indeed colossal and it has been stated that if paid, it will cripple the operations of the applicant. It has also been pointed out that the respondent is a person of unknown means, thus if the money is paid out, it may never be recovered in case the appeal succeeds.
 14. That only leaves the issue of security. The applicant has offered as security one of the properties of her director. I have seen that the property is valued at Kshs. 20,000,000/=. Nothing has been brought forth by the respondent to contend that this property does not exist or is not of the value indicated in the valuation report. It has indeed been used as security before and had been charged to a bank. I see nothing wrong with this offer of security. However, the making of this property as security needs to conform to the law regarding dispositions. What the director of the applicant is doing can be equated to her offering herself as guarantor, and the property mentioned as security, and it can be liable to be sold if there is default in payment of the decree. It is now the law that one cannot dispose of property without the consent of the spouse. Before I can allow the suit property to be security, I think the guarantor needs to file a consent from the spouse (if she is married) or swear an affidavit to the effect that she is unmarried if that is the position. If the above is complied with, I will accept the said property as security, but if not, then the same will be rejected. I will give further directions upon delivery of this ruling regarding the above.
 15. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 16 DAY OF NOVEMBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

In the presence of: -

Ms. Nyaenya for the applicant

