



**Mwaro & another v Charo & 5 others (Environment & Land Case 27 of 2018) [2023] KEELC 21604 (KLR) (14 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21604 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 27 OF 2018**

**MAO ODENY, J  
NOVEMBER 14, 2023**

**BETWEEN**

**JOHN CHARO MWARO ..... 1<sup>ST</sup> PLAINTIFF  
DICKSON KAZUNGU YAA (SUING ON BEHALF OF THE ESTATE OF SIMON  
KAFADZI MWARO) ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**EMMANUEL KATANA CHARO ..... 1<sup>ST</sup> DEFENDANT  
DANIEL KASENA CHARO ..... 2<sup>ND</sup> DEFENDANT  
ONESMUS RIZIKI KAHINDI ..... 3<sup>RD</sup> DEFENDANT  
BLANDINA GHAMAGHANA MALIMU ..... 4<sup>TH</sup> DEFENDANT  
STANLEY M.TSUMA ..... 5<sup>TH</sup> DEFENDANT  
MRIMA KITI ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of a notice of motion dated 23<sup>rd</sup> January 2023 by the defendant/applicants seeking the following orders;
  - a. Spent
  - b. That pending the hearing and determination of this application inter parties there be a stay of any other proceedings including executions of any decree of this court in this case.
  - c. That there be a stay of execution of judgment and decree of this court passed on 31<sup>st</sup> August 2021 pending hearing and determination of the appeal to the Court of Appeal against the



ruling delivered on 21<sup>st</sup> December 2022 dismissing the application dated 12<sup>th</sup> November 2021 that sought for orders to set aside the ex parte judgment.

- d. That costs of this application be in the cause.
2. The application is premised on the grounds set out on the face of the application and the supporting affidavit of Onesmus Riziki Kahindi the 3<sup>rd</sup> Defendant who deponed that the court delivered a ruling dismissing their Notice of Motion dated 12<sup>th</sup> November 2021 and being aggrieved by the ruling, they lodged a Notice of Appeal on 22<sup>nd</sup> December 2022 and simultaneously applied for certified typed copies of the proceedings and ruling to enable them file an appeal against the ruling.
3. The Applicant further stated that they had been ordered to vacate the suit property within 45 days from the date of the delivery of the judgment. That they were also ordered to pay to the plaintiff's general damages for trespass in the sum of Kshs. 800,000/-. Mr. Kahindi further stated that the Defendants reside on the suit premises and there being no stay, they are likely to be evicted occasioning them substantial loss.
4. It was the Applicant's case that the matter proceeded ex parte and judgment was passed against the Defendants for failure to enter appearance and defence. The Judgment and decree granted the Plaintiffs the following reliefs:
  - a. A declaration that the sale of the suit property by the 1<sup>st</sup> and 2<sup>nd</sup> defendants to the 3<sup>rd</sup> to 6<sup>th</sup> defendants is null and void.
  - b. An order for vacant possession of the suit property within 45 days of the judgment failure to which an order of the eviction of the defendants from the suit property to issue.
  - c. Payment of the sum of Ksh.800,000/- as general damages for trespass.
  - a. A permanent injunction restraining the defendants from dealing with the suit property plus costs of the suit.
5. In response, the Plaintiffs filed a Replying Affidavit sworn by John Charo Mwaro the 1<sup>st</sup> Plaintiff who stated that judgment was entered against the Defendants on 31<sup>st</sup> August 2021 and following the judgment, the Applicants filed an application dated 12<sup>th</sup> November 2021 seeking to set aside the judgment and decree which application was dismissed by the court on 21<sup>st</sup> December 2022.
6. The Respondent further stated that following the dismissal of the application, the applicants preferred an appeal/intended appeal against the order of the court thus there is no appeal hence the instant application is incompetent.

#### **Defendant/applicants' submissions**

7. Counsel relied on order 12 rule 7 of the *Civil Procedure Rules* and the cases of *Shah-vs- Mbogo and another* [1967] E.A 116, *James Kanyitta Nderitu & Another-Vs-Marios Philotas Gbikas & Another*, Civil Appeal No.6 of 2015 eKLR on court's discretion and factors to be considered in applications for setting aside orders or judgments.
8. Counsel submitted that the Defendants were let down by their Advocate who failed to enter appearance and file defence. Counsel urged the court to allow the application as prayed.



## Plaintiffs' submissions

9. Counsel submitted that the Applicants filed an application for stay of execution dated 12<sup>th</sup> November 2021 which was heard and determined and the same was dismissed with costs to the Plaintiffs.
10. Counsel submitted elaborately on the principles of setting aside judgments and stated that the Applicants have not met the threshold for grant of the orders sought. Counsel urged the court to dismiss the application as the Applicants admitted that they were properly served but they blamed their advocate for not filing a defence.

## Analysis and Determination

11. It should be noted that the Applicants filed an application dated 12<sup>th</sup> November 2021 seeking the same orders for stay of execution which was heard and determined. The current application seeks the same orders of stay of execution of any decree issued by the court pending the hearing and determination of the Appeal.
12. The principles guiding the grant of stay of execution pending appeal are provided for under order 42 rule 6(2) of the *Civil Procedure Rules*:

“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.
13. An Applicant must meet the above threshold before a court can grant stay of execution pending appeal. The Court also has discretionary powers to grant the orders but the same must be applied judiciously. (See *Butt vs. Rent Restriction Tribunal* [1979]).
14. In the case of *Absalom Dova vs. Tarbo Transporters* [2013] eKLR, the Court of Appeal stated that : -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal, which includes the prospects 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...”
15. The court must balance the competing interests of both parties so as not to disadvantage any of the parties but ensure that justice is administered while recognizing the rights of the parties.
16. A party in an application for stay of execution is under an obligation to establish that he/she will suffer substantial loss if the order sought is not granted. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the court observed that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has



been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

17. It is the Applicants’ case that they stand to be evicted in the event that stay of execution is not granted hence they will suffer substantial loss. The Applicants stated that they are willing to provide security to guarantee the due performance of the decree.

18. In the case of *Arun C. Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, the court explained the purpose of security as follows:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

19. This is the Applicants’ second stab on an application for stay of execution but this time it is stay pending appeal against the ruling of this court. The court will only consider the limb that deals with stay pending appeal of the ruling and not stay pending appeal of the Judgment, which had already been heard and determined.

20. The court therefore gives a conditional stay of execution of the ruling pending appeal and orders that the Applicants deposit Kshs 400,000/- which is half the damages awarded into a joint interest earning account of the Plaintiffs’ Advocates and the Defendants’ Advocates within 45days failure to which the stay lapses.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 14<sup>TH</sup> DAY OF NOVEMBER 2023.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

