



**Wakwabubi v Kituyi (Environment and Land Appeal E013 of 2023)
[2023] KEELC 22400 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22400 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E013 OF 2023
EC CHERONO, J
DECEMBER 14, 2023**

BETWEEN

MARY NAFULA WAKWABUBI APPELLANT

AND

WILLIAM KILISWA KITUYI RESPONDENT

RULING

1. The Appellant/Applicant, *vide* a Notice of Motion dated 9th August 2023 brought under Certificate of Urgency seeks the following orders;
 1. Spent
 2. That this Honourable Court do issue a temporary order of stay execution of Judgment and Decree delivered by the trial Court on 1st March 2023 and Ruling delivered on 9th August 2023 against the Appellant/Applicant's pending hearing and determination of this application.
 3. That this Honourable Court do issue an order of stay execution of Judgment and Decree delivered by the trial Court on 1st March 2023 and Ruling delivered on 9th August 2023 against the Appellant/Applicant's pending hearing and determination of this Appeal.
 4. The costs of this application be provided for.
2. The application is supported by the affidavit of the Appellant/Applicant sworn on even date and grounds apparent on the face of the said application. The application is further supported by a copy of a judgment and Decree from the trial court, a Memorandum of Appeal and a copy of an application by the Respondent seeking to execute the impugned judgment, all annexed to the supporting affidavit.
3. When the application came up for directions on 20/9/2023, this Honourable Court directed the applicant to serve the said application forthwith and the Respondent granted leave to file and serve his response within 7 days upon service with corresponding leave to the Applicant to file and serve



a supplementary affidavit, if need arise, within 3 days from the date of service thereof. The said application was fixed for inter-parte hearing on 12/10/2023

4. During the next hearing of the said application on 9/11/2023, Mr Shikhu Advocate for the Appellant/Applicant informed the court that they had not received any response to the application from the Respondent despite service of court process. The learned Counsel referred the court to an affidavit of service indicating that the respondent was served with a Hearing Notice on 14/10/2023. Upon perusal of the said affidavit of service sworn by one Daniel Fwamba Muyekho on 15/10/2023, this Honourable court was satisfied that the Respondent was indeed served with the said application and directed the application to proceed for hearing Ex-parte.

Appellant/Applicant's summary of facts

5. In her supporting affidavit, the Appellant Applicant deposed that the trial Court in Bungoma CM-ELC Case No. 30 of 2021 delivered a Judgment and thereafter also issued a Decree against her on 1st March 2023. She stated that immediately thereafter, the Respondent filed an application in the lower Court dated 8th May 2023 seeking to execute the impugned Judgment and Decree by directing the Court Administrator or the Executive Officer to sign the requisite forms of transfer of land in favour of the plaintiff/Respondent. The Appellant/Applicant further deposed that on 9th August 2023, the lower court delivered a ruling allowing the said application with costs. She stated that she is apprehensive that the Respondent may commence the process of execution of the impugned judgment and decree any time unless the stay of execution order is granted.
6. The Appellant/Applicant further stated that she is reasonably apprehensive that the appeal will be rendered nugatory in the event that a stay of execution is not granted and that she will suffer irreparable loss and damage by being condemned to settle an erroneous decree

The respondent's summary of facts;

7. The Respondent failed to file response to the said despite having been duly served

Legal Analysis and Decision

8. I have considered the Notice of Motion application, the supporting affidavit and the annexures thereto as well as the applicable law. It is imperative to note that the said application proceeded ex-parte after this Honourable Court was satisfied that the Respondent had been served but failed to file any response.
9. Order 42 Rule 6 of the [Civil Procedure Rules](#) under which the present application is anchored 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 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.”
10. It is clear from the above provisions of the law that before an application for stay of execution of a decree or an order is made, the applicant must establish the following three conditions;
- i. The application is brought without undue delay;
 - ii. The applicant will suffer substantial loss unless the stay of execution order is granted; and
 - iii. The applicant has given security for the due performance of the decree and/or order as may ultimately be binding on him.
11. A Stay of execution pending appeal is an order seeking to suspend the enjoyment of the fruits of a judgment or order in favour of a party who lost but who now wishes to exercise his undoubted right of appeal to the appellate Court. In deciding whether or not to grant such an application for stay of execution pending appeal, the court must balance the rights of the successful party/decree holder which has crystallized against the undoubted right of the applicant.
12. Based on the guiding principles for the grant of stay of execution pending appeal as set out under Order 42 Rule 6 CPR, I now examine each of the three conditions as follows;

Whether the application has been brought without unreasonable delay?

13. The applicant has deposed in her supporting affidavit that the impugned judgment was delivered by the trial court on 1st March 2023. The applicant took the applicant more than four (4) months to bring the present application. No explanation has been given why the Applicant took that long to file this application for stay pending appeal. There being no explanation given for the delay, a period of four months in my view is unreasonable and inexcusable. The mere fact that the Respondent made an application for execution of the decree *vide* a Notice of Motion dated 8th May, 2023 where a ruling was delivered in his favour on 9th August, 2023 is not an excuse for the applicant to file her application for stay.

Whether the applicable will suffer substantial loss unless the application for stay is granted?

14. In the case of *Geoffrey Muriungi & Another v John Rukunga M'imonyo suing as the legal representative of the estate of Kinoti Simon Rukunga (deceased)* (2016) KLR, Gikono J. (as he then was) held;
- “...the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High court, or rendering the appeal “nugatory” within the judicial precincts of the Court of Appeal; and that is the loss which is sought to be prevented by an order for stay of execution pending appeal...”



15. Again in *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR, the same Gikonyo J while discussing substantial loss as a ground for stay pending appeal expressed himself as follows;

" 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."

16. The applicant at paragraphs 7, 8 and 9 of the supporting affidavit deposed as follow;

" 7. That the Appellant/Applicant is apprehensive that Respondent may commence the process of execution of the decree and the said ruling of the court at any time.

8. That the Appellant/Applicant is reasonably apprehensive that the appeal will be rendered nugatory in the event that a stay of execution is not granted.

9. That further the Appellant/Applicant will suffer irreparable loss and damage by being condemned to settle an erroneous decree."

17. In an application for stay such as before this court, the Appellant/Applicant is required to show that unless the stay order is granted, the execution will create a state of affairs that will irreparably negate the very essential core of the applicant as the successful party in the appeal. The Appellant/Applicant has not shown that the Respondent is likely to dispose of the subject property to third parties beyond the reach of the court thereby rendering the intended appeal nugatory. The apprehension by the Appellant/Applicant that the Respondent may commence the process of execution of the impugned decree and order is not sufficient ground to grant the order for stay. The applicant must establish tangible grounds for substantial loss and not on conjecture.

Whether the Appellant/Applicant has given the court security for the due performance as may be binding on him?

18. It is a statutory requirement for the Applicant to give security or an undertaking to abide by any terms and conditions this Honourable court may give for the due performance of the decree/order as may ultimately be binding on her. The applicant has not given any security or undertaking in her supporting affidavit for the due performance of the decree/order as may be binding on her. Consequently, I find that the applicant has failed to establish the three conditions for the grant of stay pending appeal

19. The upshot of my finding is that the Notice of Motion application dated 9th August, 2023 is devoid of merit and the same is hereby dismissed with costs

Orders accordingly.

READ, DATED DELIVERED AND SIGNED IN THE OPEN COURT/VIRTUALLY AT BUNGOMA THIS 14TH DECEMBER, 2023

HON. E.C CHERONO



ELC JUDGE

In the presence of;

1. Bwonchiri H/B for Shikhu for the Applicant/Appellant
2. Respondent-absent
3. Okwaro C/A

