



**Patani v Patani (Environment and Land Case Civil Suit 135 of 2018)  
[2023] KEELC 22346 (KLR) (13 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22346 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 135 OF 2018**

**JO MBOYA, J  
DECEMBER 13, 2023**

**BETWEEN**

**SHOBHANABEN PANKAJ KUMANR PATANI ..... PLAINTIFF**

**AND**

**PREDEEP HARAKACHAND PATANI ..... DEFENDANT**

**RULING**

1. The Plaintiff/Applicant has approached the Honourable court vide Notice of Motion Application dated the 19<sup>th</sup> October 2023; brought pursuant to inter-alia, the Provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, 2010; and in respect of which same has sought for the following reliefs;
  - i. ....Spent
  - ii. This Honourable court be pleased to stay execution of the Judgment and the orders emanating therefrom by Hon. Justice Oguttu Mboya, Judge; delivered on 31<sup>st</sup> October 2022, in this matter pending the hearing and determination of this Application
  - iii. This Honourable court be pleased to stay execution of the aforementioned Judgment pending the hearing and determination of the Appeal.
  - iv. Cost of the Application be in the cause.
2. The instant Application is predicated upon various grounds that have been enumerated at the foot thereof. Further and in addition, the Application is supported by the affidavit of the Applicant, namely, SHOBHANABEN PANKAJ KUMANR PATANI, sworn on even date.
3. Upon being served with the subject Application, the Defendant/Respondent filed Grounds of opposition dated the 7<sup>th</sup> November 2023; as well as a Replying affidavit sworn on the 20<sup>th</sup> November 2023; and in respect of which, the Defendant/Respondent has contended, inter-alia, that the instance Application has been made and mounted with undue and inordinate delay.



4. Other than the foregoing, the Defendant/Respondent has similarly contended that the Plaintiff/Applicant herein has failed and/or neglected to mount the Appeal before the Court of Appeal either in accordance with the orders of the court issued on the 25<sup>th</sup> May 2023 or at all.
5. Be that as it may, the Application beforehand came up for hearing on the 29<sup>th</sup> November 2023, whereupon the advocates for the respective Parties covenanted to canvass and dispose of the Application by way of oral submissions. Consequently and in this regard, the court allowed the Parties to ventilate the respective positions.

### **Parties' Submissions:**

#### **a. Applicant's Submissions:**

6. The Applicant herein adopted and reiterated the grounds contained at the foot of the Application and furthermore, reiterated the averments contained in the body of the supporting affidavit. Besides, Learned counsel for the Applicant proceeded to and highlighted three [3] salient and pertinent issues for due consideration by the Honourable court.
7. Firstly, Learned counsel for the Applicant has submitted that pursuant to the orders of this court, which were made on the 23<sup>rd</sup> May 2023, the Applicant proceeded to and filed the requisite Notice of Appeal. Furthermore, Learned counsel contended that the Notice of Appeal was thereafter served upon the counsel for the Respondent herein.
8. To the extent that a Notice of Appeal was duly filed and served, Learned counsel for the Applicant has thus contended that the Applicant herein has thus shown/ exhibited her desire to pursue and/or ventilate her grievances before the Court of Appeal.
9. Secondly, Learned counsel for the Applicant has submitted that by dint of the Judgment issued by this court, the Applicant herein was ordered and/or directed to execute the requisite Transfer instrument pertaining to her portion/share in respect of the suit property within 120 days from the date of the Judgment.
10. Additionally, Learned counsel has contended that there was a rider to the order to the effect that in default by the Applicant to execute the requisite Transfer instrument, the Deputy Registrar of the Environment and Land Court, [the Court], was mandated to do so for and on behalf of the Applicant.
11. Nevertheless, Learned counsel has contended that the time which was granted by the Honourable Court has since lapsed and hence there is a likelihood of the Respondent commencing the process of procuring the execution of the transfer instrument by the Deputy Registrar, in lieu of the Applicant.
12. In this respect, Learned counsel for the Applicant has therefore contended that if the orders of stay of execution of the Decree are not granted, then the Respondent herein would proceed and cause the transfer instrument to be executed and that the execution of the Transfer Instrument and the attendant transfer of the share of the suit property in question, shall occasion irreparable prejudice/loss to the Applicant.
13. Thirdly, Learned counsel for the Applicant has submitted that the instant Application has been made and mounted without unreasonable delay or at all. In any event, Learned counsel for the Applicant has added that the Application has been made timeously and with due promptitude.
14. Consequently and in view of the foregoing submissions, Learned counsel for the Applicant has therefore implored the Honourable court to find and hold that the Applicant has established and demonstrated the requisite grounds to warrant the grant of the orders sought.



### **b. Respondent's Submissions:**

15. Learned counsel for the Respondent adopted and relied upon the contents of the Grounds of opposition, as well as the Replying affidavit filed by and on behalf of the Respondent herein.
16. Further and in addition, Learned counsel for the Respondent has submitted that the instant Application by and on behalf of the Applicant has been made in vacuum and thus same is incompetent and incapable of being granted.
17. In particular, Learned counsel for the Respondent has submitted that the Applicant herein has failed to comply with and/or abide by the orders of the Honourable court which were issued on the 23<sup>rd</sup> May 2023, inter-alia, the filing and service of the Notice of Appeal, as well as the Record of Appeal, within the set timeline.
18. Secondly, Learned counsel for the Respondent has also submitted that having failed to comply with the terms and tenor of the orders issued by this Honourable court on the 23<sup>rd</sup> May 2023, it is therefore deemed that the Notice of Appeal, [if any], that was filed by the Applicant herein stands withdrawn by dint of Rule 83 of the Court of Appeal Rules 2010.
19. Thirdly, Learned counsel for the Respondent has submitted that the Applicant herein has failed to establish and demonstrate the requisite conditions to warrant the grant of an order of stay of execution pending the hearing and determination of (sic) the intended Appeal.
20. In any event, Learned counsel for the Respondent has submitted that the Applicant herein has not met the conditions stipulated and envisaged vide the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, 2010.
21. Fourthly, Learned counsel for the Respondent has submitted that the decree of the Honourable court which is sought to be stayed was issued on the 31<sup>st</sup> October 2022; and yet the current Application was not filed up to and including the 19<sup>th</sup> October 2023. For coherence, Learned counsel for the Respondent has submitted that the instant application has been made with undue and inordinate delay.
22. Lastly, Learned counsel for the Respondent has submitted that the Applicant herein has been and remains in contempt of the lawful Judgment of the Honourable court and hence insofar as the Applicant is in contempt of the court orders; same cannot now approach the court and seek to partake of and/or benefit from the Equitable Jurisdiction of the court.
23. Based on the foregoing, Learned counsel for the Respondent has therefore impressed upon the Honourable court to find and hold that the Application beforehand is devoid bereft of merits; and hence same ought to be dismissed with costs.

### **Issues for Determination:**

24. Having reviewed and appraised the Application beforehand, as well as the Responses thereto; and upon taking into consideration the oral submissions ventilated on behalf of the respective Parties, the following issues do emerge and thus consideration by the Honourable Court;
  - i. Whether the Application has been filed and/or lodged timeously and with due promptitude; or otherwise.
  - ii. Whether the Applicant has established and demonstrated that Substantial loss, is likely to arise, unless the orders sought are granted.



- iii. Whether the Applicant is entitled to the Reliefs sought.

### **Analysis And Determination**

#### **Issue Number 1 Whether the Application has been filed and/or lodged timeously and with Due promptitude; or otherwise.**

25. Before venturing to address the issue herein mentioned, it is important to observe and underscore that the subject matter was heard and disposed of vide the Judgment of the Honourable Court rendered on the 31<sup>st</sup> October 2022.
26. Consequently and in this regard, if the Applicant was aggrieved and dissatisfied, then same was obliged to proceed and file the requisite Notice of Appeal, albeit within the statutory duration, namely, 14 days from the date of the delivery of the Judgment sought to be appealed against.
27. Nevertheless, in respect of the instant matter, the Applicant herein did not file and/or lodge the requisite Notice of Appeal within the set timeline. However, vide the Application dated the 9<sup>th</sup> May 2023; the Applicant herein sought for extension of time within which to file and serve the requisite Notice of Appeal.
28. Moreover, it is also important to point out that the Application under reference, namely, [the application dated the 9<sup>th</sup> May 2023], came up for hearing on the 25<sup>th</sup> May 2023, whereupon same was heard and disposed of. For clarity, the Application was allowed and the Applicant was granted liberty to file and serve the Notice of Appeal within 7 days from the date of the ruling.
29. First forward, the Applicant has now approach the Honourable court with an Application and in respect of which same is now seeking the grant of an order of stay of execution, pending the hearing and determination of (sic) the Intended appeal.
30. To the extent that the Application beforehand seeks stay of execution pending the hearing and determination of the Intended Appeal, it is imperative to observe and underscore that such an application ought to be filed and or mounted without unreasonable and inordinate delay.
31. Consequently and in the premises, it is therefore important for this Honourable court to interrogate the instant Application; and to discern/ decipher whether same has indeed been filed without undue delay and if not, to ascertain whether the delay, [if any], has been duly accounted for or otherwise explained.
32. To start with, there is no gainsaying that by the time the instant Application was being filed, namely, on the 19<sup>th</sup> October 2023, there was a lapse of time amounting to more than 12 months, from the date when the Judgment was rendered and/or delivered.
33. To my mind, the duration of (sic) 12 months, which had lapsed prior to and before the filing of the instant Application, cannot by any chance, be said to be a short duration.
34. To the contrary, it is evident and apparent that the 12 months period, which lapsed before the filing of the current Application represents an inordinate and unreasonable lapse of time; and hence, it behooved the Applicant herein to account for and/or explain the reason for the named delay.
35. Be that as it may, it is not lost on this Honourable court that the Applicant herein has neither alluded to nor endeavored to explain the reasons as to why the instant Application was not filed timeously and with due promptitude. [See the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, 2010]



36. It is my humble view that the Applicant herein owed the Honourable court a duty to avail and/or supply some scintilla/ iota of explanation. However, the Applicant herein has neither deemed it fit nor expedient to avail any such explanation.
37. At any rate, it is worth recalling that when the application came up for hearing, Learned counsel for the Applicant contended that the Application beforehand has been made punctually and without undue [unreasonable] delay or at all.
38. According to Learned counsel for the Applicant, the lapse of (sic) 12 months between the time when the Judgment was rendered to when the instant Application was filed does not [sic] constitutes unreasonable delay.
39. Further and in addition, it was the position of Learned counsel that such a delay is negligible and thus the contention that the Application was filed without unreasonable delay.
40. Despite the contention by and on behalf of Learned counsel for the Applicant, there is no gainsaying that the duration of time between the delivery of the Judgment in question and the lodgment of the current Application, represents unreasonable and inordinate delay.
41. Owing to the foregoing, it was thus mandatory, [if not peremptory], upon the Applicant to account for the delay by making an averment in her Supporting affidavit, which is not the case.
42. Consequently, the question that does arise and which the Honourable court must now endeavor to address; is whether the Application beforehand, has been mounted with unreasonable and inordinate delay and if so, to discern/ decipher whether the delay has been explained.
43. However, it is surprising that despite the lapse of (sic) 12 months from the date when Judgment was rendered to date, the Applicant has not found it appropriate to account for the delay.
44. Suffice it to point out that every litigant, [the Plaintiff/Applicant herein not excepted], who is desirous to partake of and/or benefit from the Equitable discretion of the Honourable court must avail to the court, plausible and cogent evidence as to why the impugned application, was not filed timeously and/ or within the statutory timeline.
45. Having failed to move the court timeously and having failed to account for the delay in the filing of the instant Application, it can thus be taken that the delay to move with expedition and to file the Application timeously, is something to be glossed over, countenanced and or swept beneath the carpet.
46. Quiet clearly, it was incumbent upon the Applicant to move the Honourable court expeditiously, but which the Applicant failed to do. Consequently and in this regard, it suffices to state and underscore that the subject Application has been made and mounted with unreasonable and inordinate delay, which in any event, has neither been accounted for nor explained.
47. To the extent that the Applicant herein has failed to account for and or explain the reasons at the foot of the delay, the obvious inference to be drawn from such failure is to the effect that the delay was informed by want of diligence, negligence, gross inaction and/or blatant disregard of the timelines and Rules of Procedure.
48. As pertains to the significance of accounting for the delay and/or explaining the reasons why the act in question was not timeously made; it is important to re-state and reiterate the holding in the case



of Njoroge v Kimani (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling), where the court held thus;

“ 12. In order to exercise its discretion whether or not to grant condonation, the court must be apprised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant’s prospects of success. Condonation cannot be had for the mere asking. An applicant is required to make out a case entitling him to the court’s indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.

13. Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the court may take a dim view, absent a proper and satisfactory explanation for the further delays.”

49. In my humble , albeit considered view, whoever seeks to partake of or benefit from the Equitable discretion of the Honourable court, must move with due diligence and dispatch; and where such diligence is not exhibited, the failure must be accounted for and/ or suitably explained.

50. Other than the foregoing, it is also imperative to underscore that where a delay is unreasonable and thus inordinate, such a delay gives rise to latches, which effectively negates the exercise of discretion.

51. In short, it is my finding and holding that the current Application,[ by and at the instance of the Applicant], is defeated by the Doctrine of Latches.

**Issue Number 2 Whether the Applicant has established and demonstrated that Substantial loss, is likely to arise, unless the orders sought are granted.**

52. Other than the requirement that an Application for stay of execution pending Appeal ought to be mounted without unreasonable and/or undue delay, it is also important to recall that prior to and before an order of stay of Execution can issue and/or be granted, the Applicant must demonstrate that substantial loss would accrue and/or arise.

53. Put differently, it has been held times without number that substantial loss is the cornerstone to the grant of an order of stay of execution pending the hearing and determination of an appeal. Consequently, any Applicant desirous to partake of such an order, must therefore espouse and/or provide evidence of substantial loss.

54. Without belaboring the point, it is appropriate to take cognizance of the dictum of the Court of Appeal in the case of Kenya Shell Limited versus Benjamin Karuga Kibiru & another [1986] eKLR, where the court held and observe as hereunder;

It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. 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 corner stone 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.

55. Furthermore, the place and significance of Substantial loss in an Application for stay of execution pending appeal was also re-visited and highlighted by the Supreme Court of Kenya in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, where the court underscored, inter-alia, the necessity to demonstrate that the loss that is likely to accrue, [unless the orders sought are granted], is of such a magnitude to negate and/or defeat the Appeal.
56. Having taken cognizance of the basic principles that underpin the grant of an order of stay of execution pending an appeal, it is now appropriate to revert back to the subject matter and to discern whether the Applicant herein has duly met and/or satisfied the requisite threshold.
57. Firstly, it is important to underscore that it was incumbent upon the Applicant to implead and/or depone to the evidence of substantial loss that is likely to accrue, if the order of stay are not granted. For good measure, such evidence ought to be adverted to and deponed in the Supporting affidavit. Instructively, such loss, if any, cannot be left for inference by the Court.
58. Additionally, after such evidence is adverted to and deponed in the affidavit, then thereafter the Applicant is under obligation to espouse/ amplify the evidence and highlight, how the execution that is complained of, [if at all], is likely to impact upon the Applicant, in such a way as to occasion substantial loss.
59. Be that as it may, it is not lost on this Honourable court that the Applicant beforehand has neither adverted to nor impleaded substantial loss, either in the body of the Application or in the supporting affidavit. Consequently and in this regard, it becomes difficult to discern the foundation upon which the Applicant can contend that same is disposed to suffer substantial loss, yet such a loss, has neither been adverted to nor impleaded.
60. Secondly, it is also important to highlight that the Learned counsel for the Applicant merely stated that if the orders of stay are not granted, then there is a likelihood that the Transfer which was decreed by the court, would be executed and/or undertaken.
61. Other than making the foregoing submissions, Learned counsel for the Applicant did not venture forward to address how the imminent transfer would prejudice and/or affect the Applicant or at all.
62. Perhaps in the mind of Learned counsel for the Applicant, it is incumbent upon the Honourable Court to take up the short submissions and endeavor to enlarge same by making and/or drawing inferences, inter-alia, as to the implications that may ensue from such a transfer.
63. Nevertheless, I beg to point out that it is not the duty and/or business of the Honourable court to help any litigant to establish and/or demonstrate critical ingredients, which must be established, before a court of law becomes seized of the requisite facts to underpin exercise of discretion.
64. Put differently, it was incumbent upon the Applicant and his able Legal counsel to expressly advert to evidence of substantial loss, [ in the conventional manner], and thereafter endeavor to explain how such loss would occur.
65. To the extent that the Applicant herein did not advert to, implead and/or establish evidence of substantial loss, [neither, in the Supporting Affidavit or otherwise], the bottom line is that the cornerstone upon which an Application for stay of execution is premised, has neither been alluded to nor proven.



66. Further and in any event, it is also worthy to underscore that execution of court decrees and/or orders, [in whatever manner prescribed by the court], cannot by itself constitute substantial loss.
67. For coherence, an Applicant must therefore venture beyond the mere statement that execution is imminent; and thus show how that [sic], imminent execution will impact on him/her, to warrant the plea of substantial Loss.
68. In a nutshell, I am afraid that the Applicant beforehand has not satisfied the court on the question of substantial loss, which is paramount and critical, in an application for stay of execution pending appeal.

### **Issue Number 3 Whether the Applicant is entitled to the reliefs sought.**

69. Other than the issues which have been highlighted and addressed in the preceding paragraphs, it is also worthy to consider the overall conduct of the Applicant herein, as pertains to the entire matter before the Honourable court.
70. Firstly, it is important to recall that the Judgment under reference was delivered on the 31<sup>st</sup> October 2022; and hence, if the Applicant herein was truly aggrieved and dissatisfied, then same was obliged to file/lodge the Notice of Appeal within the statutory 14 days period.
71. Nevertheless, it is worth to recall that the Applicant herein did not file and/or lodge the Notice of Appeal either within the statutory timeline or at all. In any event, the Applicant waited until the 9<sup>th</sup> May 2023, to revert to court and seek for extension of time to file and serve the Notice of Appeal.
72. Secondly, it is also not lost on this Honourable court that despite procuring and obtaining Leave to file and serve the Notice of Appeal, the Applicant has not ventured forward to file the Record of appeal within the timelines that were stipulated vide the order of the court made on the 25<sup>th</sup> May 2023.
73. For brevity, it suffices to reproduce the terms of the Consent order made on the 25<sup>th</sup> May 2023.
74. Same are reproduced as hereunder;
  - i. The Plaintiff be and is hereby granted leave to file and serve a notice of appeal and the same to be filed and served within 7 days from the date hereof.
  - ii. Thereafter, the Plaintiff shall proceed to file and serve the requisite record of appeal to the court of appeal within the statutory 60 days in terms of the Court of Appeal Rules 2010.  
[ sic, now repealed by dint of the Court of Appeal Rules, 2022]
75. Arising from the foregoing, it is common ground that the Plaintiff/Applicant herein ought to have filed the Record of appeal within 60 days from the date of filing the Notice of appeal. However, in the course of his submissions, Learned counsel for the Applicant admitted that the Record of appeal has not been filed to date.
76. In my humble view, the terms of the consent order are binding on both Parties and hence the lapse of the timeline that was agreed upon for the filing of the Record of appeal, thus denotes that the window which the Applicant had, has since extinguished and/or lapsed.
77. Consequently, the question that then arises is whether the stay of execution sought is in respect of any appeal or otherwise. To my mind, until and unless the consent order entered into and adopted on the 25<sup>th</sup> May 2023; is varied and/or superseded, the Applicant herein is deemed to have no appeal and thus cannot partake of an order of stay, either in the manner sought, or otherwise.



78. Similarly and in short, I come to the conclusion that the Applicant herein is neither entitled to nor deserving of the orders of stay of execution pending (sic) appeal or at all.

**Final Disposition:**

79. Arising from the foregoing discussion,[ details in terms of the foregoing paragraphs], it is evident that the Applicant herein has failed to establish and/or prove the requisite ingredients envisaged by the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, 2010.

80. Consequently and in the premises, I find and hold that the Application dated the 19<sup>th</sup> October 2023; is devoid and bereft of merits. In this regard, same be and is hereby Dismissed with costs to the Respondent.

81. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF DECEMBER, 2023.**

**OGUTTU MBOYA**

**JUDGE.**

**In the presence of:**

Benson – court assistant

Mr. Ochieng h/b for Mr. Oyatta for the Plaintiff/Applicant

Mr. A Rebelo for the Defendant/Respondent

