



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 1111 OF 2013**

**TABITHA WANJIRU.....PLAINTIFF/RESPONDENT**

**-VERSUS -**

**JOSEPH THEURI WAIGWA.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**SAMWUEL MUCHEMI WANDIA.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**SIMON GITAHI WAHOME.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**RULING**

1. This is a ruling in respect to a Notice of Motion dated 28<sup>th</sup> December, 2021 in which the Defendants/Applicants seeks stay of execution pending appeal.
2. The Applicants contends that judgment against them was delivered on 14<sup>th</sup> December, 2021. Being dissatisfied with the said judgment, they have preferred an appeal against the said judgment to the Court of Appeal. They therefore pray that there be stay of execution of the said judgment as they pursue their appeal.
3. The application is opposed by the Respondent through a replying affidavit sworn on **24<sup>th</sup> January, 2022**. The Respondent contends that the Application has not met the threshold for grant of stay pending appeal. The Respondent states that the court had already rendered judgment and found that the Applicants had trespassed onto the suit property and further that the structures which they were directed to demolish and or remove were built in total contravention to the existing court order restraining them from undertaking further activities in the suit property pending the hearing and determination of the suit.
4. Counsel for the parties were allowed to make oral submissions on **7<sup>th</sup> February 2022**. **Ms. Maina** advocate submitted on behalf of the Applicants while **Mr. Nderitu** advocate appeared for the Respondent. Counsel for the Applicants relied on the supporting affidavit and the further affidavit sworn by the 3<sup>rd</sup> applicant **Simon Gitahi Wahome** on **28<sup>th</sup> December 2021** and **2<sup>nd</sup> February 2022** respectively. **Mr. Nderitu** relied on the Respondent's replying affidavit sworn on **24<sup>th</sup> January 2022** and also referred to the list of authorities filed **4<sup>th</sup> February 2022**.
5. I have considered the application, oral submissions made by the counsel for the parties, the affidavits filed and authorities that were filed by the Respondent. The only issue for determination is whether the Applicants have met the threshold for grant of stay pending appeal.
6. The issue of whether to grant stay pending appeal is a matter of discretion. This discretion is fettered by four conditions. First, an applicant must demonstrate that there is just cause to grant stay. Second, the Applicant has to demonstrate that he or she will suffer substantial loss should stay not be granted. Third, there has to be security provided for the due performance of the decree as may ultimately be binding upon the Applicant. Fourth, the application has to be brought without unreasonable delay.
7. The principles are further outlined under **Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules**, which provides:

**(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 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.

8. A stay of execution under **order 42 of the Civil Procedure Rules** is an interim order to suspend the rights of one party who is aggrieved with the judgment of the trial; court or tribunal and wishes to exercise his or her right of appeal. Its main objective is to protect the substratum of the suit by delaying the execution process like attachment until the determination of the appeal. Being a discretionally remedy the applicant must demonstrate that he or she has approached the court of equity with clean hands as succinctly stated in the case of *Jajbhay v Cassim 1939 AD 537-551* the court held on this maxim that: **“All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice.”**

9. The general principle of law is that the successful litigant in possession of a valid court judgement is entitled to the fruits of judgement unless there exist exceptional circumstances to deny him or her that right.

10. In considering an application for stay of execution I am guided by the case of *Butt vs Rent Restriction Tribunal Civil App No. NAI 6 of 1979 (Madan, Miller and Porter JJA)* where the following guidelines were given:

**“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.**

**The general principal 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. 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. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”**

11. The first limb of consideration is whether the application was filed without unreasonable delay. Judgment was delivered on **14<sup>th</sup> December, 2021** and the Applicants filed their notice of motion under certificate of urgency on **28<sup>th</sup> December, 2021**. There was no delay in the filing of this instant application.

12. In the case of *Kenya Women Microfinance Ltd v Martha Wangari Kamau [2020] eKLR* the Court cited the case of *Samvir Trustee Limited v Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997* which held that;

**“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss... Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”**

13. From the cited decision, it is clear that for the Court to grant stay of execution, the Applicants needs to satisfy the Court that they will suffer substantial loss. In the case of *Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007* the court stated: -

**“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue.**

**The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”**

14. In **Bungoma HC Miscellaneous Application No 42 of 2011 James Wangalwa and another Vs. Agnes Naliaka Cheseto** the court further discussed what substantial loss entails:

**“The application 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. This is what substantial loss would entail.”**

15. The Applicants should not only state that they are likely to suffer substantial loss but must also prove that they will suffer loss. The Applicants bears the burden of proving that by refusal to grant stay of execution they stand to suffer substantial loss

16. The mere filing of a Notice of Appeal does not automatically warrant the issuance of orders of stay of execution of the decree. In the present situation, the Applicants have annexed a notice and draft memorandum of appeal which they intend to file.

17. The Applicants contends that the Court directed them to remove the structures on Parcel of Land Known as **Plot No. 41 and subsequently allocated Plot No. C42** within a period of 30 days from the date of judgment and the Respondent was at liberty to remove them and recover the costs from the Appellant should they fail to comply. The Applicants further stated that according to them, the Judge erred in holding that they had trespassed onto the Respondent’s land even after finding that the parcels in issue were two distinct parcels. They submitted that they have a justifiable cause to prefer an appeal to have that issue determined.

18. Back to the issue on whether the Applicants will suffer substantial loss if stay of execution is not granted, the Applicants submitted that if the Respondent is allowed to execute the judgement then the appeal will be rendered nugatory. I note that if the Respondent were to execute the decree, it will indeed render the appeal nugatory as they would have been removed from the suit property. This is a case for grant of stay of execution pending appeal.

19. The Applicants have offered security for costs and even deposed that they are willing to comply with whatever terms of security that the court would direct. The Respondent is not averse to this.

20. I therefore find that the application dated 28<sup>th</sup> December 2021 is merited. The same is allowed as follows: -

**i. An order staying the execution of the Judgment and Decree delivered on 14<sup>th</sup> December 2021 be and is hereby granted pending the hearing and determination of the Appeal on condition that the Applicants do deposit Ksh 500,000/- as security in a joint interest earning account of both advocates within 30 days from today.**

**ii. Costs of this application to abide the outcome of the Appeal.**

21. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15<sup>TH</sup> DAY OF MARCH, 2022**

**E. K. WABWOTO**

**JUDGE**

**In the Presence of: -**

**Mr. Nderitu for the Respondent.**

**Ms. Maina for the Applicants.**

**Court Assistant: Caroline Nafuna**