



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Githachuri v Gaitho & Gaitho & another; Mbugua (Interested Party) (Environment & Land Case 1 of 2021) [2022] KEELC 3836 (KLR) (26 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3836 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1 OF 2021**

JA MOGENI, J

MAY 26, 2022

**PREVIOUSLY ELC 334 OF 2019
FORMERLY NAIROBI HIGH COURT CIVIL SUIT 2364 OF 1999 (OS)**

BETWEEN

JOSEPHAT THUO GITHACHURI PLAINTIFF

AND

LUCY NJOKI GAITHO & DANIEL KIBUE GAITHO 1ST DEFENDANT

KIMANI KIBUE KANYUA 2ND DEFENDANT

AND

GLADYS NDUTA MBUGUA INTERESTED PARTY

RULING

1. By a Motion on Notice dated 9/02/2022 the Plaintiff/Applicant herein seeks the following orders:
 - a) Spent
 - b) That the Honorable Court be pleased to grant a stay of execution of the ruling delivered on 22/09/21 pending the hearing and determination of this application.
 - c) That the Honorable Court be pleased to grant a stay of execution of the ruling delivered on September 22, 2021 pending the hearing and determination of the intended appeal.
 - d) That costs be provided for.
2. The application was supported by the grounds set out in the application and the supporting affidavit of Josphat Thuo Githachuri who averred that vide a ruling delivered on September 22, 2021 this Court set aside judgment entered on 5/10/2007. The plaintiff/applicant aggrieved by the ruling filed a notice



of appeal. He avers that he will suffer irreparably if the orders sought are not issued and the appeal would be rendered nugatory as he will be forced to have his originating summons dated 9/12/1999 heard afresh. He stated that the respondent will not be prejudiced in any way if the orders sought are granted. He also contended that he filed the application without undue delay.

3. This application is unopposed.

Analysis and Determination

4. In the Supreme Court of Kenya case of *Tullow Oil PLC & 3 others v Permanent Secretary Ministry of Energy and 15 others* [2020] eKLR, the court stated that:

“In other circumstances, depending on the nature, where an application is unopposed, and the court sees merit in it, then it should be granted without much ado”

5. Thus the court has a duty to consider if an application has merits even if it is unopposed.
6. This court has carefully considered the Application, and found two issues for determination. These are:
 - a) Whether stay of execution pending appeal is merited?
 - b) Whether there is an arguable appeal to warrant the issuance of the orders sought?
7. A background of this case is a good starting point. The plaintiff took out an originating summons dated 9/12/1999 against two surviving proprietors (James Gaitho and Kimani Kibui) seeking title to one acre out the suit property under the doctrine of adverse possession. Rawal J (as she then was) heard the suit ex-parte and on 5/10/2007 rendered her judgment and granted the plaintiff the one acre. Gladys Nduta Mbugua who was a widow of one the three proprietors of the suit property the late Mbugua Kibui sought to be enjoined in the suit after obtaining letters of administration on September 30, 2013 and also to have the judgment rendered by Rawal J on 5/10/2007 set aside. My brother Judge Eboso in his ruling dated September 22, 2021 issues orders allowing Gladys Nduta Mbugua to be made a party to the suit in her capacity as the administrator of the estate of George Mbugua Kibue alias George Mbugua Kabue alias Mbugua Kibui. He also set aside the judgment entered on 5/10/2007 in the absence of the estate of George Mbugua Kibue alias George Mbugua Kabue alias Mbugua Kibui thus allowing the administrator to be served with the originating summons and to file a response within 14 days. That is the subject of this instant application.
8. The principles that guide the Court when deciding on application for stay of execution pending appeal are clearly set out 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.
9. 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 discretionary 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.”
10. 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.
11. 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, 1979] KECA 22 (KLR)(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.”
12. The first limb of consideration is whether there was unreasonable delay in filing the application for stay of execution. Ruling was delivered on September 22, 2021, and the applicant filed their notice of motion under certificate of urgency on 9/02/202, this was five months from the date the ruling was delivered. This was inordinate delay in the filing of this instant application.
13. 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, [2007] KEHC 2438 (KLR) 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.”

14. From the cited decision, it is clear that for the Court to grant stay of execution of the Ruling, the Applicant needs to satisfy the Court that he will suffer substantial loss. In the case of *Century Oil Trading Company Ltd v 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.”

15. In Bungoma HC Miscellaneous Application No 42 of 2011 *James Wangalwa and another v Agnes Naliaka Cheseto*, [2012] KEHC 1094 (KLR) 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.”



16. The applicant should not only state that he is likely to suffer substantial loss but he must also prove that he will suffer loss. The applicant says he will suffer irreparably because his originating summons dated 9/12/1999 heard afresh.
17. The Applicant bears the burden of proving that by refusal to grant stay of execution he stands to suffer substantial loss. In this instant application the Applicant save for, mentioning that his Originating Summons will have to be heard afresh does not tender any evidence to show the nature of loss he is likely to suffer should an order of stay be denied.

Whether there is an arguable appeal

18. 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, apart from annexing a copy of the Notice of Appeal dated September 28, 2021 and a letter dated September 28, 2021 in which the Applicant herein is seeking copies of typed proceedings, ruling and order to enable him file an appeal the Applicant has not annexed any certificate of delay to demonstrate that he has not been supplied with copies of typed proceedings and or ruling to enable him pursue his appeal.
19. In the case of *Dickson Miriti Kamonde v Kenya Commercial Bank Ltd* [2006] eKLR, it was held that:

“.....the delay cannot be excused and an indolent party must reckon with consequences of inaction”.
20. In *Gideon Sitelu Konchella v Daima Bank Ltd* [2013] eKLR citing *Mobil Kitale Service station v Mobil Oil(K) Ltd & another* [2004] eKLR, it was held:

“It is the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously. The overriding objectives of the Act and the Rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”
21. From my perusal of the Notice of Appeal on record I am not able to determine what is this exceptionally compelling ground of appeal that can persuade this court that the intended appeal has high chances of success. I find that the Applicant has failed to demonstrate that there exists an arguable appeal with high chances of success nor has he satisfied the pre-requisite conditions set out in Order 42 Rule 6 of the *Civil Procedure Rules, 2010* to warrant grant of stay of execution of decree pending the hearing and determination of the intended appeal.
22. An applicant seeking stay pending appeal is also required to provide security for the due performance of such decree or order as may ultimately be binding on him. The applicant has not offered any security.

Disposal Orders

23. In view of the foregoing, the applicant has not met the conditions precedent set out under Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules* and the application thus lacks merit and is hereby dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED THIS 26TH DAY OF MAY 2022

MOGENI J.

JUDGE



In the presence of

..... for the Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant

..... for the Interested Party

