



**Ondika v Swanya Ltd & another (Environment & Land Case  
69 of 2021) [2022] KEELC 2592 (KLR) (18 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2592 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA  
ENVIRONMENT & LAND CASE 69 OF 2021  
JM KAMAU, J  
MAY 18, 2022  
FORMERLY KISII ELC CASE NO. 240 OF 2016**

**BETWEEN**

**RAEL MORAA ONDIKA ..... PLAINTIFF**

**AND**

**SWANYA LTD ..... 1<sup>ST</sup> RESPONDENT**

**ZADOK EAST AFRICA LTD ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1 Following the Judgment delivered in court on February 28, 2022 dismissing the Defendant's Counter-claim with costs and where the Judgment was delivered in favour of the Plaintiff in the following terms:  
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1. That the court dismisses the Defendant's Counter-claim with costs to the Plaintiff.
2. Judgment is hereby granted to the Plaintiff in the following terms: -
  - a. A declaration be and is hereby issued directing that the sale agreement executed between the Plaintiff and the 1<sup>st</sup> Defendant on May 15, 2015 is hereby rescinded, repudiated and/or abandoned owing to material breach on the part of the 1<sup>st</sup> Defendant.
  - b. An order be and is hereby issued directing the Defendants to return the Title Deeds issued to them in respect of the parcel of land known as L.R. Number Gesima Settlement Scheme/1075.



- c. The land Registrar, Nyamira is hereby ordered to rectify the register in respect of the parcel of land number Gesima Settlement Scheme/1075 and revert and/or restore it in the Plaintiff's name in the register and issue a Title to that effect.
  - d. Upon rectification of the register in respect of the parcel L.R. Number Gesima Settlement Scheme/1075 the Plaintiff do refund a sum of Kshs. 1,800,000/= to the 1<sup>st</sup> Defendant being the deposit paid to the Plaintiff less Kshs. 200,000/=, 10% of Kshs. 2,000,000/= so far paid to the purchaser in forfeiture for breach of the agreement of sale dated May 15, 2015.
3. The costs of this suit in addition to the Defendant's Counter claim are awarded to the Plaintiff against the Defendants jointly and severally.

By an Application dated 28<sup>th</sup> March 2022, the Defendants have moved this court for the following orders: -

1. That there be a stay of execution of the Judgment delivered by this Honourable Court on 28/02/2022 that is, rescinding, repudiating, the sale agreement between the 1<sup>st</sup> Applicant herein and the Plaintiff, an order directing the Defendant to return the Title Deed issued to them in respect of L.R. NO. Gesima Settlement Scheme/1075 and all consequential orders arising therefrom pending the Hearing and determination of the intended Appeal by the 1<sup>st</sup> and 2<sup>nd</sup> Applicants against the whole Decision of this Honourable Court.
  2. Costs of the Application.
- 2 The grounds advanced in favour of the Application are that the Defendants' intended Appeal is not frivolous but raises several arguable grounds of Appeal with good chances of success against this Court's Judgment and that should the intended Appeal succeed, it would be rendered nugatory and the Applicants would suffer substantial loss if the stay is not granted.
- 3 On the grounds on the face of the Application and in the Supporting Affidavit of Victor Swanya Ogeto, the 1<sup>st</sup> Defendant's Director, the Applicants plead that there is an eminent risk of execution of the subject of the intended Appeal as the Respondent has already commenced the process of inviting people for viewing and consequently selling the said land.
- 4 The Applicant further says that the Respondent's assets and means are unknown hence the irreparability of the loss to be incurred should execution not be stayed as the Applicants' house/shop would be demolished. The Applicants also stated that any stay granted would not prejudice the Respondent and that the Defendants are ready to abide by whatever terms given by this court. A copy of the Notice of Appeal dated 08/03/2022 with a letter of 09/03/2022 to the Deputy Registrar requesting for certified copy of Judgment and proceedings, a copy of receipt in part payment of the same and a copy of the Judgment of this court are exhibited in the Application. In her Replying Affidavit, the Decree Holder/Respondent swore an Affidavit on April 20, 2022 where she deposes that the Application is devoid of merit, that she is not a woman of straw since she is a farmer and a business woman and she owns a large parcel of land and that what she contracted to sell to the 1<sup>st</sup> Applicant was only a small portion thereof. She also states that no evidence has been tabled to show that she intends to dispose of the land, the subject of Appeal, that the Decree is yet to be extracted and that she has undergone untold suffering by virtue of not utilizing the land for so many years. The Judgment she has waited for for so long should not suffer any further delay and that this court should ensure that she enjoys the fruits of the long awaited for Judgment.



5 Finally, the Respondent depones that the Application is bereft of merit and the same should be dismissed with costs. I allowed both Counsel to orally submit on the merits or otherwise of the Application which oral Submissions I have carefully considered before arriving at a Decision.

6 The issues for determination in an application for stay of execution pending appeal are as provided for under Order 42 rule 6 of the Civil Procedure Rules, 2010 which provides as follows:

.....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 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 of stay 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 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 ultimate/y be binding on him has been given by the applicant.

7 The purpose of stay pending appeal is to preserve the substratum of the case especially in land matters where the character of the suit property may be changed while the appeal is pending. The Applicant must establish that he/or she will suffer substantial loss if the order of stay is not granted.

8 In the case of RWW vs. EKW [2019] eKLR, the court stated the purpose of stay of execution order pending appeal, in the following words:

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

9 The court has the discretion to grant or refuse to grant an order of stay but the discretion must be applied judiciously. In the case of Kenya Power & Lightning Company Ltd Vs Esther Wanjiru Wokabi [2014] eKLR, the court held that:

Order 42 Rule 6(2) lays down the conditions which an applicant must satisfy in order to deserve the orders of stay of execution pending appeal. However, the conditions set out in Order Rule 6 (2) only serve as guidelines which the court can use as beacons in exercising its



unfettered discretion in deciding whether or not to grant stay of execution pending appeal depending on the circumstances of each case.

- 10 It should also be borne in mind that the court has to balance the interests 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 interests of the Respondent who is seeking to enjoy the fruits of his judgement. That is, the Applicant to appeal and that of the successful litigant as was held in the case of *Machira T/a Machira & Co Advocates Vs. East African Standard* (NO 2) [2002] KLR 63 it was held that:

to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

These principles go hand in hand and failure to prove one dislodges the other.

- 11 Warsame, J (as he then was) In *Samvir Trustee Limited v Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997 expressed himself as hereunder:

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..... 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.”

- 12 In Bungoma High Court Misc Application No 42 of 2011 - *James Wangalwa & Another v Agnes Naliaka Cheseto* the court held that:

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. This is what substantial loss would entail.”

- 13 The Judgment of the court delivered on February 28, 2022 was to the effect that the Title Deed issued to the 2<sup>nd</sup> Defendant in respect of L.R. No. Gesima Settlement Scheme/1075 be rectified by the Land Registrar to revert and be registered in the Plaintiff’s name upon which the Plaintiff will refund the



same of Kshs. 1,800,000/= to the 1<sup>st</sup> Defendant. This is what this court has been asked to stay pending the intended appeal. The Application is brought under Order 9 Rules 9 & 10 of the Civil Procedure Rules and Order 42 Rule 6 (2) of the same. The latter sets out the benchmark: -

- 14 The Court's discretion to order stay of execution of its Order or Decree is fettered by the following conditions, namely: -
- i. sufficient cause i.e. that substantial loss would ensue from a refusal to grant stay.
  - ii. the applicant must furnish security.
  - iii. the application must be made without unreasonable delay.
  - iv. the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted.
- 15 From the outset, it is important to set the law straight. It is not a requirement in an Application for stay of execution to interrogate whether the intended appeal has any chances of success or at all. However, no copy of the intended Memorandum of appeal that is said to have high chances of success has been annexed to the Application. This is necessary at least to indicate what prayers are being sought in the appellate court and to demonstrate whether the appeal if successful would be rendered nugatory should the stay of execution not be granted.
- 16 On the issue of the time taken to file the current Application, Judgment having been delivered on February 28, 2022 exactly one month before the Application was made there is no doubt that there was no unreasonable delay in filing the Application. That now leaves us with the Question as to whether substantial loss may result to the Applicant unless the order for stay is granted.
- 17 What is at stake here is the land that belonged to the Plaintiff before the impugned contract and the money that belonged to the 1<sup>st</sup> Defendant. The Decree is a hybrid one being both a monetary and a property Decree.
- 18 I am well guided that for a monetary Decree, money may be refunded if the Decree Holder has the means to do so. But for a non-monetary Decree the court may have to weigh whether the Appeal would be rendered nugatory.
- 19 The Judgment decreed on February 28, 2022 was to have Title to the suit land L.R. NO. Gesima Settlement Scheme/1075 be cancelled and the Register be rectified to read the name of Rael Mora Ondika upon which rectification the Plaintiff do refund to the 1<sup>st</sup> Defendant the sum of Kshs. 1,800,000/=. Should the intended appeal be successful, the Applicants will have had the purchase price paid refunded to them. The Defendants would therefore not suffer substantial loss since the money paid by the 1<sup>st</sup> Defendant will have been recovered.
- 20 The upshot of this is that the monies to be returned to the 1<sup>st</sup> Applicant by the Plaintiff upon rectification of the Register is enough safeguard for both Applicants should they succeed in their intended Appeal. My discretion therefore lies in favour of the Respondent and consequently the Application dated 28<sup>th</sup> March 2022 is dismissed with costs.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 18TH DAY OF MAY 2022.**

**MUGO KAMAU**

**JUDGE**

In the Presence of:



Court Assistant: Sibota

Plaintiff: Mr. Otieno

Defendants: N/A

