



Lucas Mwangangi Munga & 10 Others v Lawrence Nyamawi & 5 Others (Environment and Land Case Civil Suit 32 of 2014) [2022] KEELC 3771 (KLR) (11 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3771 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE CIVIL SUIT 32 OF 2014**

**MAO ODENY, J
MAY 11, 2022**

BETWEEN

LUCAS MWANGANGI MUNGA & 10 OTHERS PLAINTIFF

AND

LAWRENCE NYAMAWI & 5 OTHERS DEFENDANT

RULING

1. This ruling is in respect of a notice of motion dated November 3, 2021 seeking the following orders: -
 1. Spent
 2. That the honourable court be pleased to order a stay of execution of the judgment and decree of this court issued on the August 31, 2021 pending hearing and determination of this application.
 3. That the honourable court be pleased to order a stay of execution of the judgment and decree of this court issued on the August 31, 2021 pending hearing and determination of Malindi Civil Appeal E014 of 2021 Lucas Mwangandi & others vs Lawrence Nyamawi & Others.
 4. That all other consequential orders and proceedings be stayed pending the appeal in prayer 3.
 5. That the costs of this application be provided for.

Counsel agreed to canvas the application vide written submissions which were duly filed.

Plaintiff/applicants' case

2. The application was anchored on the supporting affidavit of Lucas Mwangandi Munga sworn on the November 3, 2021 where he deponed that judgment was entered in favour of the defendants who have taken out a notice to show cause for issuance of a warrant of arrest and committal to civil jail together



with his co-plaintiffs. That he is dissatisfied with the judgment and decree of the court and has since instructed his advocate to file a notice of appeal and also requested for certified copies of proceedings.

3. The applicant further deponed that he has filed an appeal vide Malindi Civil Appeal E014 of 2021 and that he currently resides on the suit property together with his family and they do not have alternative land.

He also stated that they are senior citizens and risk being committed to civil jail hence will suffer substantial loss. He urged the court to grant the orders as prayed so as not to render the appeal nugatory.

Defendant/respondents' case

4. The defendant filed a replying affidavit dated November 6, 2021 in response to the plaintiffs' application where he deponed that the plaintiffs have not satisfied the conditions for the grant of an order of stay of execution of judgment and decree pending appeal. Further that the application has not been brought within reasonable time in view of the fact that the judgment was delivered on October 2, 2020.
5. He also deponed that the execution that has been set in motion is for payment of the taxed costs which was served on the plaintiffs way back on March 26, 2021 but did not immediately apply for stay of execution. Further the plaintiffs have not offered any security on the due performance of the decree in respect of the taxed costs.

Plaintiffs' submissions.

6. Counsel relied on the order 42 rule 6 of the [Civil Procedure Rules](#) and the case of [Peter Samoei vs Isaac K Ruto \[2012\] eKLR](#) and submitted that an applicant in an application for stay of execution must show that he/she would suffer substantial loss if stay of execution is not granted, that the application for stay has been brought promptly and where there is a delay there are reasons to explain the delay, security for the due performance of the decree binding on the applicants. The applicants must also show that they have an arguable appeal which will be rendered nugatory if the order of stay is not granted.
7. Counsel submitted that the applicants will suffer substantial loss as they are in occupation of the suit land and that the court granted an injunction against them hence that is a positive order as opposed to the defendant's submission that there was a negative order.

On whether there has been unreasonable delay, counsel submitted that they filed this application when the defendants threatened to execute the notice to show cause. That the judgment was delivered on October 2, 2020 but the decree was extracted on the August 31, 2021 and the computation of time therefore begins to run from the time the decree was extracted. Counsel submitted that a delay of two months is not unreasonable.

8. On the issue of security for the due performance of the decree, counsel submitted that it is not a requirement for the applicants to offer any monetary security and relied on the case of [Alex Simiyu & Others vs Francis Simiyu ELC Appeal No 17 of 2018](#) where the court held that the issue of security did not arise as the applicants did not hold title. Counsel further cited the case of [Gitabi & Another vs Warugongo \(1986\)KLR 621](#) where the court held that security in any given case should be less disadvantageous to the party providing it, that the court must consider special circumstances.

Defendants' submissions.

9. Counsel submitted that the plaintiffs have not satisfied the conditions set out under order 42 rule 6 (2) hence stay of execution orders should not be granted.



Mr Shujaa submitted that the declarations made in favour of the defendants even if enforced before the appeal is heard cannot change or affect the substratum of the appeal given that the suit properties are registered in favour of the defendants' predecessors in title.

10. On the issue of substantial loss, the defendants submitted that the plaintiffs have not demonstrated that the execution will irreparably affect the substratum of the appeal and render the appeal nugatory.

Counsel relied on the case of *Stanley Kiplagat Rono & Another vs William Kiprotich Cherus ELC Case No 373 of 2016* and submitted that an applicant must establish factors which show that the execution of the decree will result into an irreparable effect on the substratum of the appeal.

11. On the issue as to whether the application was filed timeously, counsel submitted that the application was filed 11 months after delivery of judgment which was delivered on October 2, 2020 while the application was filed on November 4, 2021.

It was counsel's submission that no explanation has been given why the application was not filed within time. Further that the applicant has not offered any security for the due performance of the decree as per order 42 rule 6 (2) of the Civil Procedure Rules. Counsel urged the court to dismiss the application with costs.

Analysis and determination.

12. In an application for stay of execution pending appeal, an applicant must satisfy the provisions of order 42 rule 6 of the Civil Procedure Rules. The applicant must have filed the application without undue delay, must establish that he or she will suffer substantial loss and that he or she is ready and willing to abide by such security for the due performance of the decree as may be set by the court to be binding on the applicant.

In the case of *Carter & Sons Ltd -vs- Deposit Protection Fund Board & 2 Others Civil Appeal No 291 of 1997* at page 4 the Court of Appeal held that:

'the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay, the applicant must establish a sufficient cause secondly the court must be satisfied that the substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security and the application must, of course, be made without unreasonable delay.'

13. The applicant stated that they will suffer substantial loss if the respondents go ahead with the notice to show cause why they should not be committed to civil jail in satisfaction of the taxed costs. The applicants have not shown what substantial loss they will suffer if the orders are not granted.
14. The applicant filed the application 11 months after the judgment was delivered on October 2, 2020 and has not explained the delay in filing the application. This delay cannot be wished away. The applicant stated that they only filed this application after they were served with a notice to show cause why they should not be committed to civil jail after taxation of costs. The plaintiffs were all along aware of the judgment and if they had made up their mind to file an appeal, then they should have filed this application timeously. I find that the filing of this application is an afterthought, delay in the filing is not explained and therefore it does not meet the threshold for grant of stay of execution.
15. I notice that the applicants filed a notice of appeal on October 8, 2020, why did they not follow it up with an application for stay of execution?



The purpose of stay of execution is to preserve the subject matter as was held in the case of *RWW vs EKW [2019] eKLR*, where the court stated as follows;

'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.'

16. In this case the plaintiffs state that they are in occupation and the reason why they want a stay of execution is that a notice to show cause should be stayed pending the hearing and determination of the appeal. There is no order changing the substratum of the case.

The court has discretion to order for stay of execution if an applicant meets the conditions set out in order 42 rule 6 but such discretion must be exercised judiciously without causing any prejudice to any of the parties as was held in the Court of Appeal case of *Butt v Rent Restriction Tribunal [1982] KLR 417*.

17. I have considered the application, the submissions by counsel and find that the application lacks merit and is therefore dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF MAY, 2022.

MA ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

