



Mbutti & another v Njeri & 2 others (Environment & Land Case 42 of 2020) [2022] KEELC 3016 (KLR) (10 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3016 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 42 OF 2020**

**JA MOGENI, J
MAY 10, 2022**

BETWEEN

MOSES KAMAU MBUTTI 1ST APPLICANT

DAVID KURIA MBUTTI 2ND APPLICANT

AND

FELISTA NJERI 1ST DEFENDANT

NELLIUS WANGUI 2ND DEFENDANT

JANE GACU 3RD DEFENDANT

RULING

1. The Notice of Motion before the Court is dated 15/04/2022, brought to the Court pursuant to Order 42 Rule 6 of the *Civil Procedure Rules* and sections 1A, 1B, and 3A of the *Civil Procedure Act*, 2010 and all other enabling provisions of the law. The Applicant prays for the following orders:-
 - a. Spent.
 - b. The Court be pleased to extend stay of execution of the judgment delivered herein on 3/03/2022 pending the hearing and determination of this application;
 - c. The Court be pleased to extend stay of execution herein set to lapse on 3/03/2022 by another 60 days or such time their application of stay of execution will have been heard and determined by the Court of Appeal; and
 - d. That the costs of this application be cost in the cause.
2. The 1st and 2nd prayers are spent and the only remaining prayers for determination are prayer number 3 and 4 of the Notice of Motion.



3. The Application is premised on the ground on the face of the Application and the Applicant's main ground is that it intends to appeal against the Courts judgment herein dated 03/03/2022, and for which the Applicant has caused an application for leave to appeal dated 09/03/2022, that the intended appeal raises cogent points of law and that the orders of stay sought are the only way to balance the competing interests intents pending the hearing of the intended appeal. The application is further supported by an affidavit of Felista Njeri who is the 1st defendant/applicant and who has authority of her co-defendants to swear the affidavit herein and has attached several annexures thereto being FN1 – FN4.
4. The Application is opposed.
5. The background of the matter is that the Court delivered its judgment on 03/03/2022, for the plaintiff and gave an eviction order against the defendants and awarded nominal damages for trespass to the plaintiff including the costs of the suit. Further the court ultimately granted leave for enforcement through a decree of this Court.
6. The Applicant being aggrieved by said judgment proceeded to file Notice of Appeal dated 09/03/2022. The Court of Appeal certified the application as urgent and directed the Applicant to file and serve written submissions and relevant documents within three days from 22/03/2022 and serve and the respondent was also granted leave of three days from the date of service to file their response.
7. The applicant has now come to this court and filed a Notice of Motion dated 22/04/2022 which is opposed.
8. The Counsels appeared before Court on 4/05/2022 for highlighting on their respective submissions in relation to the Notice of Motion dated 22/04/2022.
9. The Application is supported by the grounds set on its face as well as on the sworn affidavit of Felista Njeri the Applicant herein, dated the 22/04/2022.
10. The said Application was opposed vide the Respondent's Replying Affidavit dated the 28/04/2022 in which the Respondent sought for its dismissal with costs for being fatally defective, inept and an abuse of the Court process because the Applicant had neither met the requisite conditions for stay of the decree pending the hearing and determination of an Appeal nor had she demonstrated in what manner he would suffer substantial loss and/or irreparable damage.
11. The Application was disposed of by way of written submission wherein the Applicant's submission was to the effect that she and other family members reside on the suit property and they will be prejudiced if the stay is not extended.
12. That unless a stay of execution was granted, the Applicant was apprehensive that her and her family, would suffer substantial loss of their livelihood and the substratum of the Appeal would be affected thus rendering it nugatory. That it was thus imperative to preserve the subject matter of the Appeal to await its determination. That the application was filed without undue delay.
13. In response to the Applicant's submission and in opposition of the Application herein, the Respondent's submission was to the effect that the Applicant had not discharged the onus placed on him by virtue of the provisions of Order 42 Rule 6 of the Civil Procedure Rules which are concerned with the stay of execution.
14. That the Applicant had not established that she was likely to suffer any irreparable damage/loss as the subject matter was land which was an immovable asset and would be available to any party who would eventually succeed in the Appeal.



Determination

15. I have considered the Applicant's Application for stay of execution of the decree of 3/03/2022 pending the hearing and determination of the intended Appeal. I have also considered the authorities, as well as the reasons given for and against the said application.
16. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:-
 - (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 1st 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 1st Applicant.
17. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to which:-
 - i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered.
 - ii. The application is brought without undue delay and
 - iii. 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.
18. The purpose of stay of execution is to preserve the substratum of the case. In the case of *Consolidated Marine. vs. Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi), the Court held that:-

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
19. What is the status quo on the suit property? The Applicant contends that they would suffer substantial loss if stay is not granted, because she and her family were in and have been in occupation of the said parcel of land for the last 40 years.



20. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma vs Abuoga* (1988) KLR 645 where their Lordships stated that;
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
21. I find that indeed in the case of *Charles Wabome Gethi vs. Angela Wairimu Gethi* [2008] eKLR, the Court of Appeal held -
- “ ... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”
22. 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. In other words the Court should not only consider the interest of the Applicant but has also to consider, in all fairness, the interest of the Respondent who has been denied the fruits of his Judgment.
23. In dealing with issue of substantial loss, I am alive to the fact that the applicant ought to establish that the execution will create a state of affairs that will irreparably affect or negate the very essential core of applicant as a successful party in the appeal. The applicant has the burden to prove that by refusal to grant stay of execution it stands to suffer substantial loss. In the instant application no such evidence has been produced; as the applicant has not discharged their duty to prove the nature of loss that they are likely to suffer should an order of stay be denied. In short I find that the Applicant has failed to avail evidence to support its alleged claim of irreparable loss, should the application for stay of execution be denied.
24. It was stated by Kuloba, J in *Machira T/A Machira & Co Advocates* (supra)
- “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 judgment 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”.
25. In an application of this nature, the Applicant should show the damages she would suffer if the order for stay is not granted since by granting stay would mean that the status quo should remain as it were before the judgment and that would be denying a successful litigant of the fruits of his judgment which should not be done if the Applicant has not given to the Court sufficient cause to enable it to exercise its discretion in granting the order of stay see (see *Kenya Shell Ltd vs. Kibiru & Another* [1986] KLR 410;)



26. On the second condition, I find that it was not in dispute that the impugned judgment was delivered on the 03/03/2022 respectively, wherein the applicants had applied for stay of execution in this court which application had been granted for a period of 30 days on 03/03/2022 the applicants sought to have the stay extended for 60 days and this was also granted. The applicants lodged their appeal on 9/03/2022 I find that the said application is brought without undue delay.
27. On the last condition as to provision of security, I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. The Applicant has In the case of *Aron C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co.* Advocates the court held that:
- “The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”
28. Under the provisions of Order 42 rule 6 (1) (2) of the Civil Procedure Rules, a party seeking a stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. In the instant matter, the applicant was required to provide the actual security for consideration by the Court as to its sufficiency. In the case of *Equity Bank Ltd -vs- Taiga Adams Company Ltd*[2006] eKLR it was held that:-
- “of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought ...let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...” which principle was also emphasized in *Carter & Sons Ltd -vs- Deposit Protection Fund Board & 3 Others*.
29. In the instant matter, no security has been offered, nor proposal on how to settle the Respondent’s claim nor single coin has been paid since the delivery of the judgment. There is no commitment exhibited by the applicant and as such I find that the applicant has not provided nor demonstrated sufficient cause and has been applying delaying tactics to destroy the Respondent prompt disposal of this matter. The discretionary relief of stay of execution pending appeal is designated for the benefit of both parties so that none of the parties would be worse off by virtue of an order of the Court, that none is disadvantaged but to ensure substantive justice is administered fairly and justly to all parties.
30. This arises out of the Court’s realisation that both parties have rights which the Court is bound by law to safeguard; the respondent’s right to appeal which includes the prospect that the appeal will not be rendered nugatory or on the other hand the decree which includes the Respondent’s enjoyment of the fruits of the judgement which includes all full benefits under the decree. Given the facts of the case I am persuaded that the Respondent should be left to enjoy the fruits of its judgement.
31. The Applicant has been silent on the issue of security in this matter. The offer for a security should come from the applicant, it should not be inferred or implied or left for the Court to make an order for security for due performance as that would amount to stepping into the arena of dispute. I find in this



matter the applicant has to satisfy the critical tenets under which stay of execution can be granted. The Court, is of the view that the Applicant has failed to sufficiently satisfy the required pre-conditions to allow the Court to exercise its discretion in this matter; hence it is of the view that the application is not merited.

32. The grant of stay remains a discretionary order that must also take into account the fact that the Court ought not to make a practice of denying a successful litigant the fruits of their judgment.
33. The Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how discretion should be exercised as follows:
 1. “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.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
 3. 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.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

The upshot is that the Applicant's application dated 22/04/2022 is without merits and is dismissed with costs to the Respondent.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 10TH DAY OF MAY, 2022.

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MOGENI J

JUDGE

In presence of

Mr. Gikaria for Defendant/Applicant

Mr. Nyakundi for the Plaintiff/Respondent

Mr. Vincent Owuor.....Court Assistant

