



**Machiri v Mohamed (Environment & Land Case 335 of 2013)
[2022] KEELC 2376 (KLR) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2376 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 335 OF 2013**

**BN OLAO, J
JUNE 29, 2022**

BETWEEN

ABUBAKAR SALIM MACHIRI PLAINTIFF

AND

MACHIRI Y.S.M MOHAMED DEFENDANT

RULING

- [1] The parties herein are siblings and Abubakar Salim Machiri (the plaintiff) moved to this Court vide a plaint dated December 16, 2013 seeking the main remedy that his brother Machiri Y. S. M. Mohamed (the defendant) holds 10 acres comprised in the land parcel No Bungoma/naitiri/290 (the suit land) in trust for him, a claim the defendant disputed.
- [2] Upon hearing the parties and their witnesses, this court delivered its Judgment on February 4, 2021 and made the following disposal orders: -
- 1: A Declaration that the defendant holds 10 acres out of the land parcel No Bungoma/naitiri/290 in trust for the plaintiff.
 - 2: An order that the trust is determined and the defendant shall, within 30 days from the date of this Judgment, execute all the necessary documents to enable the Land Registrar And Surveyor Bungoma to demarcate and issue a title document in the names of the plaintiff for 10 acres out of the land parcel No Bungoma/naitiri/290.
 - 3: In default, the Deputy Registrar of this court shall execute all such documents on behalf of the defendant.
 - 4: Each party shall bear their own costs.
- [3] The defendant being aggrieved by the said Judgment filed a Notice of Appeal on March 4, 2021.



- [4] I now have before me for determination the defendant's Notice of Motion dated January 28, 2022 and filed on January 31, 2022 and premised under the provisions of Order 22 Rule 22, Order 51 Rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act seeking the following orders: -
1. Spent
 2. That this honourable court do make an order for stay of execution of the Judgment delivered on 4th February 2021 and any other order/decreed made pursuant thereto until this application is heard and determined.
 3. That the costs of this application be in the cause.
- [5] The application is predicated on the grounds set out therein and is also supported by the defendant's affidavit dated January 28, 2022.
- [6] The gravamen of the application is that following the delivery of the Judgment herein on February 4, 2021, the defendant filed a Notice of Appeal on March 4, 2021 and although he applied and paid for certified copies of the proceedings and Judgment on April 12, 2021, he received them on August 4, 2021 but is yet to receive the Certificate of Delay. That this being a land matter, the defendant should be given an opportunity to prosecute his intended appeal. That he has been served with a notice from the County Surveyor Bungoma dated January 25, 2022 notifying him of the intention to visit the suit land on February 9, 2022 for purposes of sub – dividing it. That he has an arguable appeal which will be rendered nugatory if the suit land is subdivided. Annexed to the application are several documents including copies of receipts and correspondences, a letter dated January 25, 2022 from the County Surveyor Bungoma and a Certificate of Delay dated August 12, 2021 and Certifying that the proceedings were supplied to the defendant on July 7, 2021.
- [7] When the application was placed before me for directions on January 31, 2022, I did not certify it as urgent but directed that it be canvassed by way of written submissions. The plaintiff was to file his response and submissions upon the defendant within 14 days of being served with the application and the defendant's submissions.
- [8] The plaintiff filed both a replying affidavit dated February 18, 2022 and grounds of opposition. In the grounds of opposition, the plaintiff described the application as an end to itself and an abuse of the court process.
- [9] In his replying affidavit, the plaintiff describes the application as merely geared towards denying him from enjoying the fruits of the Judgment herein which was obtained after a protracted trial which commenced in 2013. That his Counsel has not been served with any Notice of Appeal which in any event was lodged on March 4, 2021 long after the 14 days and is therefore defective and incompetent. That he will be prejudiced if the orders sought are granted.
- [10] Submissions have been filed both by Mr Etole instructed by the firm of Etole & Company Advocates for the defendant and by Mr Murunga instructed by the firm of J. O. Makali & Company Advocates for the plaintiff.
- [11] I have considered the application, the rival affidavits and the submissions by Counsel.
- [12] The plaintiff has described the application as “an end in itself.” There is merit in that observation as is clear from the Notice of Motion which I have already referred to above and which is self-explanatory. The Notice of Motion does not indicate that the orders of stay of execution are being sought pending the hearing of the intended appeal. Secondly, the Notice of Motion cites the provisions of Order 22 Rule 22, Order 51 Rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act.



The correct provision is Order 42 Rule 6 of the Civil Procedure Rules. However, since the defendant has already filed a Notice of Appeal, it is obvious that what he seeks is an order for stay of execution pending the hearing and determination of the intended appeal. In the circumstances, I shall invoke the provisions of article 159(2)(d) of the Constitution as well as section 19(1) of the Environment and Land Court Act which empowers this Court to determine matters without undue regard to technicalities. I will therefore save the application and determine it on its own merits.

[13] Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provide as follows: -

6(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, 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.”

6(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 ultimately be binding on him has been given by the applicant.”
Emphasis added.

It is clear from the above that a party seeking the grant of an order of stay of execution pending appeal must satisfy the following conditions: -

1. Show sufficient cause.
2. Demonstrate that he will suffer substantial loss unless the order for stay of execution is granted.
3. Approach the court without unreasonable delay.
4. Offer security.

The importance of establishing substantial loss was re – emphasized by Platt Ag J.A (as he then was) in the case of Kenya Shell Ltd v Kibiru & another [1986] KLR 410 where he said: -

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.” Emphasis added

[14] Whether or not to grant the remedy of stay of execution pending appeal is a matter of judicial discretion which, as is often said, must be exercised on sound basis, rationally but not capriciously or whimsically. In so doing, the court must bear in mind the need to balance between the two competing interests of a party who has a Judgment in his favour and another party who is desirous of exercising his right of



appeal. The onus is however on the party seeking a stay to meet the threshold set out in Order 42 Rules 6(1) and (2) of the *Civil Procedure Rules*. The duty of this court while considering an application for stay of execution pending appeal was stated by the Court of Appeal in the case of *Vishram Halai v Thornton & Turpin Ltd(1963) LTD* [1990] KLR 365** as follows: -

“Thus, the superior court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly, the applicant must furnish security. The application must of course be made without unreasonable delay.”Emphasis added.

[15] Substantial loss, as is now clear from the case of *Kenya Shell Ltd v Kibiru (supra)*, is the “cornerstone” of an application for stay pending appeal. In the same case, Gachuhi Ag J.A (as he then was) added as follows: -

“In an application of this nature, the applicant should show what damages it would suffer if the order for stay is not granted.”

[16] I have perused the grounds upon which the Notice of Motion is premised as well as the supporting affidavit and the defendant has not indicated what substantial loss he stands to suffer if this application is not granted. In paragraphs 9 and 10 of his supporting affidavit, the defendant has averred as follows: -

“9: “That I have been served with the Notice from the County Surveyor Office Bungoma dated January 25, 2022notifying me of his intention to visit the suit land on February 9, 2022for purposes of subdividing the same. Annexed and marked “MYSMM 6” is a copy of the said letter.”

10: “That this is a land matter which is very sensitive and I urge and plead with the Honourable (sic) to give me a chance to be heard on appeal.”

[17] No doubt land is a sensitive matter. However, sensitivity of the subject matter is not, in itself, a ground for granting stay of execution. There is no mention of what loss the defendant will suffer if the order sought is not granted or that such loss will be substantial. The only reference to substantial loss is in the defendant’s submission where his Counsel has submitted as follows: -

“We submit on behalf of the applicant a loss of 10 acres of land is a substantial. This case is between two siblings and this honourable court should use it’s discretion to stay execution for the sake of peace between the brothers.”

However, submissions are not evidence. In the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR, the Court of Appeal clarified that as hereunder: -

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties ‘marketing language’ each side endeavouring to convince the court that it’s case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

See also *Nganga & another v Owiti & anothr* [2008] 1 KLR [EP] 749.

[18] Therefore, if there is any evidence by the defendant that a denial of the remedy of stay of execution will result in substantial loss to him, it ought to have been presented to the Court through his supporting



affidavit. That was not done. And it is not enough simply to allege substantial loss. A party seeking such a remedy must go further and avail evidence of such loss and demonstrate that it will be substantial. In *Machira T/a Machira & Co Advocates v East African Standard (no 2)* [2002] KLR 63, the Court stated that: -

“In this kind of application for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay.”

[19] It is clear from the above that the defendant has not satisfied a core requirement for the grant of an order of stay of execution pending appeal which is proof of substantial loss. On that basis alone, this application is for dismissal.

[20] In paragraph 11 of the supporting affidavit, the defendant has averred as follows: -

“ 11 “That my advocates on record have advised me, which advise I verily believe to be true, after the perusal of the court proceedings, that I have an arguable case on appeal.”

The strength or otherwise of an intended appeal is not a consideration when this court is dealing with an application for stay of execution of it's own decision pending appeal to the court of appeal. the arguability of an appeal is only a consideration when the appellate court is interrogating such an application.

[21] The defendant was also required to file this application "without unreasonable delay." The Judgment sought to be stayed was delivered on February 4, 2021 by way of electronic mail. A Certificate of delivery of Judgment via email was extracted on the same day. There is no doubt that the defendant knew about the delivery of the said Judgment on the day on which it was delivered because it was dispatched to his Counsel on the same day. This court has not heard any evidence to the contrary. However, this application was filed on January 21, 2022 almost 12 months later. Of course what is or is not unreasonable delay is a matter to be determined on the peculiar circumstances of each case. It is not an issue to be determined by any mathematical formula. Considering that the Judgment sought to be appealed was delivered on February 4, 2021, a delay of 12 months is not only unreasonable but has also not been explained. The defendant has averred that he applied for certified copies of proceedings and Judgment on April 12, 2021 and according to the Certificate of Delay dated August 12, 2021, the same were supplied to him on July 7, 2021. I do not think that the defendant required certified copies of proceedings and Judgment before mounting this application. And even if the defendant took the view that he required them, no explanation has been proffered for the delay of 6 months from July 7, 2021 to January 31, 2022 when this application was filed. Equity frowns upon the indolent. It appears to me that the defendant went to sleep soon after the Judgment and only moved to this court when he received the letter from the County Surveyor Bungoma dated January 25, 2022 advising him of the impending visit to the suit land on February 9, 2022 for purposes of executing the orders of this Court to demarcate 10 acres out of the suit land to be registered in the names of the plaintiff. That is not the conduct of a litigant who desires this court to exercise it's discretionary power in his favour. The defendant has failed the test of approaching this court "without unreasonable delay ."

[22] Finally, the defendant was required to offer "security" for the performance of any such decree or order that may ultimately be binding on him. The offer for security must come from the defendant himself and is a demonstration of the fact that the application for stay of execution is being pursued in order to advance the cause of justice and is not simply a knee – jerk reaction only intended to delay and scuttle a lawful execution process. Nowhere in his 14 paragraph supporting affidavit nor in the grounds on



the face of the Notice of Motion has the defendant made any offer of security nor confirmed that he is ready and willing to abide by any condition which this Court may impose as a pre – condition for the order of stay of execution. The defendant has therefore failed to satisfy an important requirement of providing security.

- [23] It is clear from all the above that the defendant has not met the threshold for the grant of an order of stay of execution pending appeal.
- [24] The up - shot of all the above is that the Notice of Motion dated January 28, 2022 and filed on January 31, 2022 is devoid of any merit. It is accordingly dismissed.
- [25] The parties are siblings. On the issue of costs, I will, albeit reluctantly this time, take the same route that I did in my Judgment and order that each shall meet their own costs.

BOAZ N. OLAO.

J U D G E

29TH JUNE 2022.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 29TH DAY OF JUNE 2022 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.

BOAZ N. OLAO.

J U D G E

29TH JUNE 2022.

