



Masidza (Suing as the widow and personal representative of the late Clement Festus Masidza (Deceased)) v Wafula & 4 others (Environment & Land Case 46 of 2018) [2022] KEELC 2836 (KLR) (28 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2836 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 46 OF 2018**

**BN OLAO, J
JUNE 28, 2022**

BETWEEN

**LEAH EGEHIZA MASIDZA APPLICANT
SUING AS THE WIDOW AND PERSONAL REPRESENTATIVE OF THE LATE
CLEMENT FESTUS MASIDZA (DECEASED)**

AND

**ALICE NANJALA WAFULA 1ST RESPONDENT
BEATRICE NANJALA KHAOYA 2ND RESPONDENT
PATRICK NANDASABA KAMULANDA 3RD RESPONDENT
LAND REGISTRAR - BUNGOMA COUNTY 4TH RESPONDENT
HON ATTORNEY GENERAL 5TH RESPONDENT**

RULING

1. Leah Egehiza Masidza (the Applicant herein) moved to this Court vide her plaint dated 6th August 2018 and filed on 10th August 2018 seeking against Alice Nanjala Wafula, Beatrice Nanjala Khaoya and Patrick Nandasaba Kamulanda (the 1st, 2nd and 3rd Respondents respectively) the main order that the titles for land parcels number East Bukusu/south Kanduyi/12919, 12920 and 12921 be cancelled and revert to the title number EAST Bukusu/south Kanduyi/8026 and revert into the name of her late husband Clement Festus Masidza. She alleged fraud on the part of the Respondents in the creation of the land parcels number East Bukusu/south Kanduyi/12919, 12920 and 12921.
2. The Respondents denied the averments of fraud levelled against them and sought the dismissal of the Applicant's suit.



3. The 1st Respondent also filed a Counter – Claim seeking a declaration that her late husband Protus Wafula Masinde had legally bought the suit land from the Applicant’s late husband.
4. The Land Registrar Bungoma County and the Attorney General who were sued as the 4th and 5th defendants did not participate in the proceedings.
5. Upon hearing all the parties, this Court delivered a Judgment on 20th September 2021 dismissing the Applicant’s suit with costs to the Respondents. The 1st Respondent’s Counter – Claim was dismissed with no orders as to costs.
6. A Decree followed and the 2nd and 3rd Respondents filed their Bill of Costs dated 29th December 2021.
7. Meanwhile, aggrieved with the Judgment, the Applicant lodged a Notice of Appeal on 1st October 2021 manifesting her intention to appeal the said Judgment.
8. By a Notice of Motion dated 31st January 2022 and filed on the same date, the Applicant seeks the following orders: -
 - (a) Spent
 - (b) Spent
 - (c) That the taxation of the 2nd and 3rd Respondents’ Bill of Costs dated 29th December 2021 be stayed pending hearing and determination of Kisumu Court Of Appeal Civil APPEAL No 222 of 2021.
 - (d) Costs.
9. The application is founded upon Order 42 Rule 6 of the Civil Procedure Rules and is premised on the grounds set out therein and supported by the Applicant’s affidavit.
10. The gist of the application is that being aggrieved by the Judgment herein, the Applicant has filed at the Court Of Appeal Kisumu, Civil Appeal No 222 of 2021. That notwithstanding the filing of that appeal, the 2nd and 3rd Respondents have filed their Bill of Costs. Among the issues being challenged in the appeal is the said Bill of Costs. If the taxation of the Bill of Costs is allowed to proceed, she will suffer irreparable loss and the appeal will be rendered academic. That the Applicant is ready and willing to abide by any order for security as this Court may order and the application has been filed without undue delay.
11. Annexed to the Notice of Motion are the following documents: -
 1. Decree issued on 1st October 2021.
 2. Memorandum of Appeal in Kisumu Court of Appeal Civil Appeal No 222 of 2021.
 3. 2nd and 3rd Respondents’ Bill of Costs.
 4. Deputy Registrar’s directions on taxation of the Bill of Costs.
12. The application is opposed and Beatrice Nanjala Khaoya the 2nd Respondent has, with the authority of the 3rd Respondent filed a replying affidavit dated 24th February 2022 in which it is averred, inter alia, that their Bill of Costs has not even been taxed and there is nothing to stay. That this application is therefore premature, purely speculative and an abuse of the process of the Court. That no substantial loss will be suffered by the Applicant and the 2nd and 3rd Respondents are capable of refunding any costs paid to the Applicant should the appeal be successful.



13. Further, the 2nd and 3rd Respondents argue that no prejudice will be occasioned to the Applicant if the taxation proceeds. That litigation must come to an end and this application is an abuse of the due process of the Court and must be dismissed.
14. When the application was placed before me on 1st February 2022, I did not certify it as urgent but directed that it be canvassed by way of written submissions.
15. Those submissions were subsequently filed both by Mr Bwonchiri instructed by the firm of Omundi Bwonchiri & Company Advocates for the Applicant and by Mr Makokha instructed by the firm of Makokha Wattanga & Luyali Associates for the 2nd and 3rd Respondents.
16. I have considered the application, the annexures thereto, the rival affidavits and the submissions by Counsel.
17. Order 42 Rule 6 of the Civil Procedure Rules upon which this application is premised states that: -

6(1): “No appeal or second appeal shall operate as a stay of execution of proceeding 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.”

6(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.
- (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 mine.

18. It is therefore 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 unless the order for stay of execution is granted, he will suffer substantial loss.
 3. Approach the Court without unreasonable delay.
 4. Offer security.

See also *Vishram Ravji Halai v Thornton & Turpin* [1963] 1990 KLR 365.

19. The importance of demonstrating substantial loss was re – emphasized by Platt Ag JA (as he then was) in the case of *Kenya Shell Ltd v Benjamin 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 where 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 mine.

20. Whether or not to grant an order for stay of execution pending appeal is a matter of judicial discretion. And, as is often said, such discretion must be exercised in the interest of justice and on sound basis, rationally but not whimsically or capriciously.
21. Has the Applicant met the threshold for the grant of orders under Order 42 Rule 6 of the Civil Procedure Rules? The Applicant is required to meet all the conditions set out in the law, not only some of them. Since she has already filed an appeal at the COURT OF APPEAL, I am satisfied that the Applicant has shown sufficient cause. On the issue of security, the Applicant has deponed that she is ready and willing to offer security for the due performance of any decree that may be binding on her.
22. However, “substantial loss ”is the “cornerstone” of such an application. In answer to the issue of substantial loss, this is what the Applicant has stated in paragraph 7 of her supporting affidavit: -

” 7: That if the said Bill is allowed to go on for taxation as scheduled and thereafter execution levied against me. I stand to suffer irreparable loss and harm having challenged the award on costs and further the same will render my appeal academic.”
23. It is clear from the above that all which the Applicant herein seeks is to forestall the taxation process. The record shows that when the taxation of the Bill of Costs came up before the Deputy Registrar on 2nd February 2022, the Court on its own motion stayed the taxation pending the determination of this application. The Deputy Registrar was not moved by any of the parties to do so. That was not necessary because the taxation of the Bill of Costs could not prejudice the Applicant in any way. This application could still be canvassed after the Bill of Costs is taxed.
24. Having said so, it is clear from the Applicant’s own affidavit as cited above, that she has not demonstrated what “substantial loss” or, to use her own words, “irreparable loss” she will suffer if her application is not allowed. It is not enough simply to allege “substantial loss” or “irreparable loss.” The Applicant was required to demonstrate the nature of loss that she will suffer and that it will be “substantial.” In the case of *Kenya Shell Ltd v Benjamin Kibiru (supra)* Gachuhi Ag J.A went on to add that:-

“It is not sufficient by merely stating that the sum of Kshs. 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before Judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of his Judgment.”
25. Other than alleging that she will suffer “irreparable loss,” the Applicant has not shown what loss she will suffer or that it will be substantial. In any event, the Bill of Costs is yet to be taxed because the Deputy Registrar, suo moto stayed the taxation on 2nd February 2022 pending the determination of this application. In the circumstances the Applicant’s allegation that she will suffer “irreparable loss ”remains merely speculative and is not based on any facts. Therefore, at this stage, it is not clear what amount will be allowed by the taxing master and whether it will be a huge or small amount. And even assuming that it will be huge amount, no evidence has been placed before this Court to suggest that the 2nd and 3rd Respondents are too impecunious as to be unable to refund it should the appeal succeed.



26. The Applicant has failed to satisfy the condition of demonstrating substantial loss which is the cornerstone of such an application.
27. Finally, the Applicant was supposed to approach the Court without undue delay. The Judgment sought to be stayed was delivered on 20th September 2021 and the Notice of Appeal was lodged on 1st October 2021. This application was filed on 31st January 2022 some 4 months later. The law has not defined what is undue delay and this has to be determined on the peculiar circumstances of each case. In the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* 2018 eKLR, J. Mohamed Ja stated thus: -

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court’s flow of discretionary flavor. There has to be valid and clear reasons upon which discretion can be favourably exercisable.”

28. The Judgment having been delivered on 20th September 2021, there is no explanation, reasonable or otherwise, as to why it took the Applicant upto 31st January 2022 to file this application. Indeed, all that she has stated in paragraph 9 of her supporting affidavit is: -

“9: That this application is filed without undue delay.”

I consider a delay of 4 months to be unreasonable in the circumstances of this case.

29. It is also not lost to this Court that the Applicant only filed this application after the 2nd and 3rd Respondents had filed their Bill of Costs on 4th January 2022. Having not offered any explanation for the delay in approaching the Court, I can only conclude that this application is a belated attempt to delay the 2nd and 3rd Respondents’ enjoyment of the fruits of their Judgment as prompted by their move to execute the decree herein. Clearly therefore, this application has not been made in good faith nor in the pursuit of justice.
30. Finally, even if the costs herein had already been taxed, it is trite that there cannot be stay of taxed costs. In *Francis Kabaa v Nancy Wambui & Jane Wanjiru* CA Civil Application No 298 of 1996, the Court of Appeal held that: -

“In any case even if that were so, the Appellant if he succeeds in his appeal would be refunded this costs. Further more, we do not think that stay can be granted in respect of costs.”Emphasis added.

A fortiori, therefore, there can be no justification for this Court to grant a stay of execution in respect of a Bill of Costs which has not even been taxed.

31. The up – shot of all the above is that the Notice of Motion dated 31st January 2022 is devoid of merit. It is accordingly dismissed with costs to the 2nd and 3rd Respondents.

BOAZ N. OLAO.

J U D G E

28TH JUNE 2022.

Ruling dated, signed and delivered at Bungoma on this 28th day of June 2022 by way of electronic mail in keeping with the COVID – 1 pandemic guidelines and as was advised to the parties on 9th March 2022.



BOAZ N. OLAO.
J U D G E
28TH JUNE 2022.

