



Laly v Magnate Ventured Limited (Environment and Land Case Civil Suit 682 of 2014) [2022] KEELC 2247 (KLR) (23 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2247 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 682 OF 2014**

**JA MOGENI, J
JUNE 23, 2022**

BETWEEN

SUKHDEV SINGH LALY APPLICANT

AND

MAGNATE VENTURED LIMITED RESPONDENT

RULING

1. On 23/05/2022 this Court delivered judgment in favour of the plaintiff for general damages for the sum of Kshs. 5,000,000 together with interest and costs of the suit.
2. The applicant/defendant being aggrieved by the said judgment filed a notice of motion dated 26/05/2022 seeking to move this court for orders of stay of execution of the judgment pending the hearing and determination of the defendant's intended appeal.
3. It was the applicant/defendant's prayer that the plaintiff/respondent be restrained from executing the judgment pending appeal. The applicant/defendant averred that unless restrained, the plaintiff/respondent would levy execution against the defendant occasioning the defendant loss and harm.
4. The applicant/defendant has further stated that they are ready to furnish security for the decretal sum by way of bank guarantee or deposit the judgment amount in court or in a joint interest earning account with names of both counsels or any reasonable and justifiable security as the Honourable Court may deem fit and justifiable in the circumstances pending the hearing and determination of the appeal.
5. The respondent/plaintiff opposed the Application and filed Grounds of Opposition dated 9/06/2022 under Order 51 Rule 14(1) which permits filing of either or a combination of both documents and stated as follows:-



- i. That the instant Application is fatally defective since the Court lacks jurisdiction and is *Functus Officio* to issue the order being sought considering the fact that the case had been finally determined leaving no case on which the current Application can be predicated upon.
 - ii. That the Judgment of the Court delivered on 23/05/2022 was sound, clear, unambiguous, unbiased, good in law and fully clothed in the need for natural justice
 - iii. That no reasonable grounds have been adduced to justify the orders of stay of execution sought and in fact a similar oral Application was made on 23.05.2022 and the court dismissed the same
 - iv. That the Defendant has not demonstrated that it has an arguable case on appeal with a high probability and overwhelming chances of success.
 - v. That *Ex-facie* the Application is frivolous, vexatious without merit and an abuse of the court process.
 - vi. That no prejudice or injustice will be occasioned to the Defendant if the orders are not granted.
6. The application was canvassed by way of written submissions. The defendant/applicant filed its written submissions dated 16/06/2022. The plaintiff/respondent had not filed any submissions by the time of writing this ruling despite the court having given directions for the parties to file their submissions. In the Court of Appeal case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR the court observed that it matters not that parties file their submissions since these are but marketing gimmicks and do not in any way affect the decisions of the court.

ANALYSIS AND DETERMINATION

7. The solitary issue in the present Application is Whether an Order for Stay of Execution can issue against the decree and the judgment dated 23/05/2022.
8. Order 42 Rule 6(1) of the *Civil Procedure Rules*, 2010 empowers the court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. Order 42 Rule 6(2) sets out the grounds to be considered and provides as follows: -
- (2) 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; 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.

Whether an Order for stay of execution can issue against the decree and judgment dated 23/05/2022

9. The purpose and objective of the order for stay of execution is to preserve the substratum of the appeal in order to ensure that the appeal is not defeated. 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”.
10. From the provisions in Order 42 Rule (2) of the *Civil Procedure Rules*, there are three conditions for granting an Order for Stay pending Appeal which include:



- 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.
11. The first ground to be established is whether substantial loss may result to the Applicant unless stay of execution is granted. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma v 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.”
12. The onus is on the applicant to show the damages they would suffer if the order for stay of execution sought is not granted for the reason that; by granting such stay, it would mean that the status quo should remain as it were before the judgment and that would be denying a successful litigant the fruits of his judgment, which should not be done unless the applicant has given sufficient cause to the court to enable it to exercise its discretion in granting the orders sought. Besides, it not merely sufficient to state that substantial loss may occasion on the applicant. (See *New Stanley Hotel Ltd v Arcade Tobacconist* (1980) KLR 757).
13. The applicant has stated that he will incur loss and that he has already paid the County Government annual licensing fees of Kesh 198,000. It is not clear how this translates to substantial loss in relation to the suit property where the court found that the applicant is a trespasser. The court cannot sanction continued trespass because this will be tantamount to denying the decree holder their right of enjoyment of the fruit of the judgment. The fact that a party is in occupation and such occupation has been found to be illegal does not mean that is a ground to claim that there will be substantial loss suffered. A party must go a step further and establish the loss that they will suffer.
14. In the case of *Machira t/a Machira & Co. Advocates vs. East African Standard* (No 2)(2002) KLR 63, it was held as follows;
- “In this kind of applications 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...”
15. In *Peter Rugu Gikanga & another v Weston Gitonga & 10 others* [2014] eKLR, the learned Judge Enyara Emukule reiterated as follows;
- “It is clear from the Replying Affidavit of the Peter Rugu Gikanga, that some of the Defendants/Applicants have moved out of the suit land in obedience to the order of court. The majority do not live on the land, but are said to have structures thereon. Only the 3rd and 10th Defendants/Applicants persist on living on the land, allegedly because they have no alternative land. This, with respect, is no ground for granting a stay of execution. In *Charles Wahome Geth V Angela Wairimu Gethi* (Court of Appeal Civil Application No. NAI 302 of 2007 UR 205/2007), 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. "

16. Beyond the applicant's plea that he will be forced to pull down the billboard which is erected on the plaintiff's land and therefore continuing occupying the disputed portion of land, the Applicant has not demonstrated what tangible loss he stands to suffer if the order of stay is not granted. It is therefore my finding that the applicant has failed to demonstrate the loss which it calls substantial loss.
17. On the issue on the application being made without delay I find that the application was filed timeously. It is on record that the judgment was delivered on 23/05/2022 and the applicant filed an application for stay of execution on 26/05/2022 two days after the delivery of judgment so there was no inordinate delay.
18. The last condition is that of security. In an application under Order 42 Rule 6 of the Civil Procedure Rules, the central issue that the Court must determine is that of substantial loss. Platt Ag. J.A (as he then was) addressed that issue in Kenya Shell Ltd v Kibiru 1986 K.L.R 410 at page 416 as follows:-

“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 a stay. That is what has to be prevented”.
19. On his part, Gachuhi Ag. J.A addressed that issue as follows in the same case:-

“It is not sufficient by merely stating that the sum of Ksh. 20,380/- 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”
20. That is the route that Courts have taken in applications of such. Guided by the above principles, I shall now examine if the applicant has established that he will suffer substantial loss which, in my view, must be such loss that if he were to succeed on appeal, the very substratum on which his claim was founded would have been defeated if not wholly but at least to a substantial degree. In other words, the basis upon which the litigation was mounted would have been lost. In both paragraphs 9 & 10 of the supporting affidavit, the applicant has stated as follows on the issue of substantial loss:-

“That the defendant is reasonably apprehensive that if the decretal amount is paid to the plaintiff, the plaintiff would be in no position whatsoever to refund the same if the appeal is successful thus rendering the substratum of the appeal nugatory and causing irreparable loss and damage to the defendant.”
21. No attempt is made to illustrate what substantial loss in relation to the suit property he will suffer except stating that he has paid licensing fees of Ksh 198,000 to the county. The applicant is more concerned with the fact that the plaintiff may not refund the monies he will have been paid in the event the appeal was successful and not showing the loss it will suffer. Although that averment does not provide this Court with any “sufficient cause” upon which stay may be granted as provided under Order 42 Rule 6(1) of the Civil Procedure Rules, I also note the plaintiff/respondent has not responded



on the aspect of ability to refund the amount in event the appeal succeeds. Order 42 Rule 6(1) of the Civil Procedure Rules reads 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 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” (emphasis added)

22. In Butt v Rent Restriction Tribunal 1982 K.L.R 417 Madan J.A (as he then was) described the Court’s jurisdiction in such applications as follows:-

“It is in the discretion of the Court to grant or refuse a stay but what has to be judged in every case is whether or not there are particular circumstances in the case to make an order staying execution”

23. In the judgment delivered, the first order was a declaration. This order cannot be stayed. It just declared the right of the plaintiff. The Declaration order is directing that the defendant desists from its action of trespass on the suit property belonging to the plaintiff and in my view, this is not an order capable of being stayed.

24. The last limb to be proved is on the deposit of security for costs for the due performance as the court may direct. This is where the second and third orders comes in. The applicant has not provided any security for the due performance of the decree. Nevertheless, at paragraph 11 of the Supporting Affidavit, the applicant deposed that they are ready, willing and able to abide by such conditions and terms as the Court may order for the granting of the order sought. Further that they will deposit the judgment amount or any sum thereof in court or a joint interest earning bank accounts in joint names of both counsels or any other condition that may be imposed by the court. Often, the security offered by the applicant is the decretal sum. This scenario in this Judgment is that there is no value has been attached on either the property nor the proceeds derived therefrom.

25. In the case of Aron C. Sharma v 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.”

26. Even though the requirement on the amount of security to be deposited ought to be balanced against the interests of both the Applicants and the Respondent, the said amount should be adequate and not be disadvantageous to the party depositing the security as was properly held in Rosengerens Ltd v Safe Deposit Centre Ltd 919840M 3Aller 198.



27. There is judgment for the plaintiff for trespass by the defendant on his land and for the sum of Ksh 5,000,000. There needs to be security for the performance of this decree if it has to be stayed pending appeal. The applicant cannot say that the plaintiff/respondent may not be able to pay back the money incase he is successful on appeal. It has already been adjudged that the applicant herein is a trespasser on the plaintiff/respondent's land. The applicant has to offer security unequivocally. He needs to demonstrate that if he loses the appeal, he is able to pay the money.
28. Given the foregoing, I will give a conditional grant of stay of execution pending appeal, if the applicant through his counsel, will confirm the availability of the sum of KShs. 5 million to counsel for the plaintiff/respondent, within 30 days from the date hereof, in which case, such money to be deposited in a joint interest earning account in the joint names of counsel for the applicant and counsel for the plaintiff/respondent. If this money is so deposited, there will be no pulling down of the billboard until this appeal is heard. However, if the money is not made available and not deposited as directed above, the applicant will have to pursue his appeal without the benefit of an order of stay of execution, and the plaintiff/respondent will be at liberty to fully execute the decree herein. If the applicant abides by the order of deposit of security as ordered above, the costs of this application will be costs in the intended appeal. However, if no security is so deposited, the applicant will bear the costs of this application.

Disposal Orders

29. I hereby enter conditional order of stay as follows:
 - a. An order of stay of execution in respect of Orders b, c, & e granted by this court in its Judgment delivered on 23/05/2022.
 - b. The applicant/Defendant shall deposit a sum of Kshs. 5,000,000/= in a joint interest earning account in the joint names of counsel for the applicant and counsel for the plaintiff/respondent being Security for Costs for the due performance of the decree within 30 days from the date of this Ruling.
 - c. The applicant/Defendant to file the Record of Appeal within 30 days from the date of this Ruling.
 - d. Failure to comply with orders (b) and (c) hereinabove, Order (a) hereinabove shall automatically lapse.
 - e. Costs of the Application to abide the Appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT ON THIS 23RD DAY OF JUNE AT NAIROBI 2022

.....

MOGENI J

JUDGE

IN THE PRESENCE OF:-

.....Plaintiff

.....Defendant

Mr Vincent Owuor.....Court Assistant

