



REPUBLIC OF KENYA



KENYA LAW
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**Tesot v Kenduiywo (Environment & Land Case 1 of 1997)
[2022] KEELC 2197 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2197 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 1 OF 1997**

MC OUNDO, J

JUNE 23, 2022

BETWEEN

KITUR ARP TESOT APPLICANT

AND

DANIEL KIPROP KENDUIYWO RESPONDENT

RULING

1. Before me for determination is a Notice of Motion dated 5th December 2019 brought under the provisions of Sections 1A, 1B, and 3A of the *Civil Procedure Act*, Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*, where the Applicant seeks for orders of stay of execution of the judgement of 8th November 2019 as they may lead to their eviction and/or his removal from suit land, L.R. Kericho/Kipchorian/Lelu Block 5(Kebeneti)/18 and 154, pending the hearing and determination of his intended Appeal.
2. The Application is supported by the grounds set on its face as well as on the sworn affidavit of Daniel Kiprop Kenduiywo the Applicant herein, sworn on the 5th December 2019.
3. The said Application was opposed vide the Respondent 's Grounds of Opposition and Replying Affidavit both dated the 20th January 2019 in which the Respondent sought for the said Application to be dismissed with costs for being misconceived bad in law and an abuse of the process of court . That it was scandalous, frivolous and vexatious, had no merit and was intended to delay the court process and deny him the long awaited fruits of judgment that had taken over 22 years. That the Applicant was in illegal occupation of the suit land as per the court order and therefore he could not claim to suffer any loss arising from the court order that required him to vacate from the land. That should the court be inclined to allow the application, the Applicant be ordered to deposit security for payment of costs that may arise from the intended Appeal as well as costs of the suit.



4. By an order of the court of 6th February 2020, it had been directed that the disposal of the Application be by way of written submission wherein only the Applicant complied.

Defendant /Applicant's submissions

5. The Applicant's submission was based on three issues for determination to wit;
 - i. Is there any inordinate delay caused by the Defendant/Applicant to the Plaintiff/Respondent in the present application?(sic)
 - ii. Will the Defendant/Applicant suffer irreparable loss and damage if (sic) order for stay is not granted?
 - iii. Do court have powers to grant a stay of execution pending Appeal?
6. The Applicant submitted that being aggrieved by a judgment delivered by the court, he had moved expeditiously and filed the present application as well as a Notice of Appeal 12 days after the delivery of the judgment thus demonstrating his willingness and readiness to pursue the intended Appeal. That there was no inordinate delay.
7. He further submitted that he had done extensive developments on the suit land where he and his family had been residing for over 50 years and therefore stood to suffer irreparable loss and damage if the orders for stay of execution were not granted and he was evicted. That should the Respondent execute the judgment and his (Applicant's) Appeal succeeded, he would not only suffer substantial loss but the Appeal would be rendered nugatory.
8. He relied on the provisions of Order 42 Rule 6 of the *Civil Procedure Rules* to submit that the law empowered the court to stay execution of either of its judgment or that of the Court whose decision is being appealed from. The Applicant sought for the court to exercise judiciously the discretionary powers granted under this provision of the law in such a way so as not to prevent the intended appeal.
9. That the object of stay of execution pending Appeal was to preserve the subject matter more so that the right of the Appeal could be exercised without prejudicing the Applicant. He sought for the application to be allowed.

Determination

10. I have considered the Applicant's Application for stay of execution of the court's judgement dated the 8th November 2019, pending the hearing and determination of his intended Appeal. I have also considered the reasons given for and against granting the orders sought in the said application although there were no submissions filed by the Respondent.
11. The Applicant contends that he would suffer substantial loss if stay is not granted, because he had done extensive developments on the suit land where he and his family have been residing for over 50 years. That his Appeal had overwhelming chances of success and would be rendered nugatory were the orders for stay of execution not granted.
12. The Respondent on the other hand contended that the application, had no merit and was intended to delay the court process and deny him the long awaited for fruits of judgment that had taken over 22 years. That the Applicant was in illegal occupation of the suit land as per the court order and therefore he could not claim to suffer any loss arising from the court order that required him to vacate from the land. That should the court be inclined to allow the application, the Applicant be ordered to deposit security for payment of costs that may arise from the intended Appeal as well as costs of the suit.



13. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which stipulates 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.

(2) No order for stay of execution shall be made under subrule (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.

14. 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.

15. I find issues for determination arising therein namely:

- i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
- ii. What orders this Court should make

16. For the Applicant to succeed in the present application the onus was on him to satisfy the conditions as set down under order 42 Rule 6 of the Civil Procedure Rules. Indeed the purpose of stay of execution is to preserve the substratum of the case. In the case of Consolidated *Marine v 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”.

17. The Applicant’s contention is that if the stay orders were not granted, he stood to suffer substantial loss in that he would be evicted. Indeed in the case of *Charles Wabome Getbi v Angela Wairimu Getbi* [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 stuff fifth, and is thus clear as youknowyou know of a year and no suit against them.”

18. In the case of *Jumilla Attarwalla & another v Hussein Abdulaziz & another* [2015] eKLR the court held that

“The mischief that Rule 6 of Order 42 sought to meet is to ensure that the Applicant’s loss would be shown to be greater than the prejudice or loss that would be suffered by a successful party. The Defendant s did not state that if they are evicted they will be rendered homeless. Indeed they did not state that the subject property was the only accommodation available to them. Why then should the court deny the Plaintiffs the fruits of their Judgment?”
19. 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 to consider also, in all fairness, the interest of the Respondent who could be denied the fruits of his Judgment. See Kenya *Shell Ltd v Kibiru & another* [1986] KLR 410.
20. In an application of this nature, the Applicant was bound to show the damages he would suffer if the order for stay is not granted since by granting stay it 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 *Kenya Shell Ltd (supra)*.
21. I find in the present circumstance, that the Applicant has not established sufficient cause to warrant the court to exercise its discretion in his favour and therefore this ground must fail.
22. On the second condition, I find that the Application herein was brought without undue delay and the issue rests at that.
23. 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 not pledged any security although the Respondent is not opposed to the application being granted as long as the Applicant deposits security for payment of costs that may arise from the intended Appeal as well as costs of the suit.
24. 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.”
25. 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.



26. Given that the grant or refusal to grant orders of stay of execution is discretionary, 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.”

27. The two conditions necessary for grant of Orders for stay of execution to issue under Order 42 Rule 6(2) of the Civil Procedure Rules having not been met by the Applicant and further in regard to the provisions of the law as stipulated under Section 3A of the *Civil Procedure Act*, this Court is not inclined to grant the Order of stay of execution so sought. However since I find that there would be no prejudice occasioned to the Respondent if the grant of stay of execution is granted, In the circumstance, I make the following orders:

- i. The Application dated 5th December 2019, is hereby allowed and there shall be stay of execution of the judgment delivered on 8th November 2019 pending the hearing and determination of the Applicant's Appeal
- ii. The Applicant shall within 30 days from the date of this ruling deposit Kshs.100,000/=(one Hundred Thousand) in Court. In default, the stay shall automatically lapse.
- iii. That the Applicant/Appellant shall within 30 days from the date of this ruling compile, file and serve upon the Respondent a complete record of Appeal.
- iv. iv. Costs to abide as per the outcome of the Appeal.

27. It is so ordered.

DATED AND DELIVERED AT KERICHO VIA TEAMS MICROSOFT THIS 23RD DAY OF JUNE 2022

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

