



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Wanyoike & 16 others (Environment and Land Appeal
65 of 2019) [2022] KEELC 3407 (KLR) (13 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3407 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 65 OF 2019**

JG KEMEI, J

JUNE 13, 2022

BETWEEN

GACHIE KAMAU APPELLANT

AND

LIVINGSTONE KINYANJUI WANYOIKE 1ST RESPONDENT

FREDRICK NGANGA 2ND RESPONDENT

MICHAEL KINUTHIA GATOTO 3RD RESPONDENT

STEPHEN MUTHAMA MATHU 4TH RESPONDENT

EUSTACE GITHAIGA NDIRANGU 5TH RESPONDENT

HUMPHREY MALIMU LILECHE 6TH RESPONDENT

MICHAEL NDICHU MBURU 7TH RESPONDENT

ROBERT RUIGU NJOROGE 8TH RESPONDENT

STEPHEN MAORE 9TH RESPONDENT

JAMES WANYOIKE 10TH RESPONDENT

PETER MUNENE NJOROGE 11TH RESPONDENT

STEPHEN KIONG 12TH RESPONDENT

JOEL KAMATU KIARIE 13TH RESPONDENT

GIDEON MARUBUA KIBURU 14TH RESPONDENT

DAMARIS WACU NDUATI 15TH RESPONDENT

ESTHER NYAGUTHEE GITHAIGA 16TH RESPONDENT

ANN NJERI KAMATU 17TH RESPONDENT



RULING

1. Dissatisfied with the trial court's ruling delivered on October 15, 2019 that declined to review its judgment dated December 10, 2018 against him, the appellant filed his memorandum of appeal dated 7/11/2019 in this court. The appeal was opposed and prosecuted by way of written submission before Judgment was delivered on 30/9/2021. This Court found the appeal unmerited, dismissed it with costs and affirmed the trial court's ruling and orders made on October 15, 2019.
2. Aggrieved by that Judgment, the appellant filed a notice of appeal herein dated 6/10/2021 and filed on October 12, 2021. On the other hand, the respondents opted to enjoy the fruits of their judgment by filing their bill of costs dated 9/11/2021.
3. One month later, the appellant filed a notice of motion application dated December 16, 2021 predominantly seeking stay of execution of the Judgment delivered on October 30, 2021 (sic) and any decree and or certificate of costs emanating therefrom pending the hearing and determination of the Appeal (sic). That application is the subject of the instant Ruling.
4. The Application is based in the grounds thereto and the supporting affidavit of Bernard Gachie Kamau, the appellant. He deponed that being aggrieved by this court's judgment dated October 30, 2021, he has lodged his Appeal at the Court of Appeal namely Nairobi Civil Appeal No. E741 of 2021. He stated that the Respondents have filed their party and party costs in their execution of the judgment and decree of the court aforesaid. He is of the view that he stands to suffer substantial loss if he pays up costs and thereafter he becomes successful in the appeal that he had lodged in the appellate court and is apprehensive that in that event of successful appeal, he will not be able to recover any amounts that he would have previously paid as party and party costs.
5. Further he added that the application has been brought timeously and that he is ready to comply with the furnishing of security as imposed by the court. On prejudice, he was of the view that the respondents will not stand to suffer any loss should the court grant the orders and consequently urged the court to grant the said orders.
6. The application is not opposed by the respondents. In the appellant's submissions, mention has been made of the respondents grounds of opposition dated the 27/1/2022 however the same is not on record. (See para 3 of the said written submissions). The 2nd -17th Respondents filed written submissions while the 1st Respondent failed to so file submissions though served.
7. On the issue of substantial loss the applicant submitted that the object of stay of execution of orders pending an appeal is to safeguard the rights of the parties and the integrity of the ensuing appeal proceedings. See the case of *John Muange Matili v Beatrice Mwavi Mbusya & anor* (2018) eKLR. In allowing the Appeal the Court stated as follows;

“It is trite that a stay of execution is issued to balance claims pending the finalization of litigation, and to preserve the subject matter in dispute. From the judgment of this court, the title to the suit land is supposed to be transferred to the Respondent who may dispose the land or deal with it in a manner that is prejudicial to the applicants. This is likely to lead to substantial loss to the applicants and render the pending Appeal nugatory. In the circumstances, the prevailing status quo should be maintained so that the suit property is not removed out of the applicants' reach in the event they win the Appeal.”



8. That the matter of substantial loss is a matter of fact and should be pleaded by the applicant and responded to by the respondent. It was the applicant's case that in the event of the success of his pending appeal he may not recover any amount he would have paid in party and party costs. He conceded that the respondents have not rebutted the affidavit evidence and therefore the same stands unchallenged.
9. Further the applicant argued that there is need to preserve the subject matter and safeguard the right of the appellant in the appeal to pursue his appeal to the logical conclusion. See the case of [*Joel Kazungu Yaa Mangi v the Director of Land Adjudication & Settlement & 3 others*](#).
10. On substantial loss the applicant stated that the respondents have filed party and party bill of costs and execution of the same is nigh. That the judgement which is being sought to be executed is subject of the appeal in the Court of Appeal. He urged the court to grant orders of stay of execution pending the hearing and determination of the appeal.
11. It was his case that he filed the application timeously in that the respondents served the party and party costs on the November 25, 2021 and the instant application was brought on the December 16, 2021.
12. On the issue of security for costs, the applicant urged the court to hold that the land itself should be adequate security in the case of an appeal. He cited the case of [*David Oyiare Ntugani v Matuiya Ole Naisuaku Orket*](#) (2017) eKLR & [*Stanley Kiplagat Rono & anor v William Kiprotich Cherus*](#) (20210 eKLR. In addition, the applicant indicated his willingness to comply with any directions as to the furnishing of security that the court may impose for the grant of the orders of stay of execution.
13. As to whether the application is merited the respondents submitted that the application is geared at delaying the process of execution and frustrate the respondents in the enjoyment of the fruits of judgment. That no loss has been established to warrant the grant of the orders. That there is no justification for holding that the 2nd – 17th respondents will not be able to repay the decretal amount if the appeal is successful and that the appeal will be rendered nugatory. It was their case that they have acquired properties of substantial amounts and as such are men and women of caliber and are financially endowed.
14. That the applicant has not offered any security for the due performance of the decree and therefore have not met the threshold for grant of orders of stay of execution. Reliance was placed on the cases of ; [*Mwaura Karuga T/A Limit Enterprises v Kenya Bus Services Ltd & 4 others*](#) (2015); [*Gianfranco Manenthi & anor v Africa Merchant Assurance Company Limited*](#) (2019) eKLR.
15. The key issue for determination is whether the application is merited.
16. The provisions governing stay of execution are found in Order 42 rule 6 which states as follows;
 - (1) No appeal or second appeal shall operate as a stay of execution or 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.
 - (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.”
17. In the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal namely; -
- a. 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.
 - b. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
 - c. 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.
 - d. The court in exercising its discretion whether to grant or refuse an Application for stay will consider the special circumstances of the case and its unique requirements.
18. In determining an application for grant of orders of stay of execution, the court is being called upon to establish whether the application was made timeously, the applicant has established substantial loss that is likely to be suffered should the application be denied and whether security for the due performance of the decree has been adequately been provided.
19. In the case of *Visbram Raji Halai vs. Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, it was held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the [Civil Procedure Rules](#) (then) is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
20. With the incoming of the new constitutional dispensation and in light of the overriding objectives stipulated in sections 1A and 1B of the [Civil Procedure Act](#), the Court is now enjoined to give effect to the overriding objective in the exercise of its powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions. According to section 1A(2) of the [Civil Procedure Act](#):
- “The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective.”
21. It is with the above in mind that I shall now evaluate the application. It is on record that the applicant lost the case in this court and has appealed to the court of appeal. in the meantime, the respondents have filed a party and party bill of costs as the triumphant party in the judgment delivered by this court on the 30/9/2021. A party and party bill of costs is on record dated the 9/11/2021 seeking to recover Kshs 987,385/- from the Applicant/Appellant.
22. The applicant has stated that he has a good appeal with a good chance of success and if he pays the decretal amount being party and party costs, the respondents will not be able to refund or pay back the money should he succeed in his appeal. It was his case that this is the substance of the case for which it is a subject of appeal. To the contrary the Respondents view the application as a delaying tactic to prevent them from enjoying the fruits of their judgment.



23. As to whether the application was brought timeously, the court answers this in the positive. The party and party bill of costs was filed on the November 24, 2021 while the application was filed on the December 17, 2021, about 22 days thereafter.
24. On the issue of substantial loss, it is trite that Substantial loss is the corner stone of both jurisdictions for granting a stay. The applicant is required to proof the loss that he stands to suffer if the orders of stay are not granted. The applicant must lead evidence to demonstrate the substantial loss that he is likely to suffer if the Application is not granted. The appellant maintains that he demonstrated substantial loss in his supporting affidavit and further that if he may not recover the party and party costs should he be condemned to pay them now. The courts have been consistent that execution alone does not constitute substantial loss. See the case of James Wangalwa supra and *Machira T/A Machira & Company Advocates v East African Standard (No 2)* 2002 2 KLR where the court held that substantial loss must be specified, details or particulars thereof must be given and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further. In this case, the appeal was dismissed with costs to the respondents and the costs are pending taxation which proceedings are lawful.
25. Where the allegation is that the respondent will not be able to refund the decretal sum the evidential burden is upon the applicant to proof that the respondent will not be able to refund to the applicant any sums paid in satisfaction of the decree. See *Caneland Ltd. & 2 others v Delphis Bank Ltd.* Civil Application No Nai 344 of 1999.
26. It is true that even in the attempt to satisfy the evidential burden it may not be possible for the Applicant to know how much money or worth the Respondent has/is with respect to the issues of ability to pay. See the case of *Michael Ntouthi Mitheu v Abraham Kivondo Musau* [2021] eKLR where the Court faced with similar facts had this to say;
- “The law, however appreciates that it may not be possible for the applicant to know the respondent’s financial means. The law is therefore that all an Applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an Applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then, in those circumstances, where the applicant has reasonable grounds which grounds must be disclosed in the application that the respondent will not be in a position to refund the decretal sum if the appeal succeeds, have shifted to the respondent to show that he would be in a position to refund the decretal sum.”
27. The legal burden still remains on the Applicant, but the evidential burden would then, in those circumstances, where the Applicant has reasonable grounds which grounds must be disclosed in the application shifts to the respondent. See *Kenya Posts & Telecommunications Corporation v Paul Gachanga Ndarua* Civil Application No Nai 367 of 2001; *ABN Amro Bank, NK v Le Monde Foods Limited* Civil Application No 15 of 2002.
28. The respondents did not offer a response to this averment. What amounts to reasonable grounds for believing that the Respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In this case it is the holding of the court that the applicant has



proven substantial loss which is the cash outlay that he has to pay with respect of the party and party bills of costs; should execution ensue.

29. In balancing the right of the applicant to pursue his appeal and the right of the respondents to enjoy their fruits of judgment, I am inclined to grant the application on terms as follows;
- a. The applicant to give security of costs to cover the payment of party and party fees in the sum of Kshs 450,000/- within a period of 30 days.
 - b. The undertaking to be in form of a bank guarantee from a reputable bank with prior approval of the Respondents or in the alternative a deposit of cash equivalent to Kshs 450,000/- in an interest earning account in the names of the learned counsels for the applicant and the 2nd -17th respondents.
 - c. In default of a and b above the application shall stand dismissed with no further orders from the Court.
 - d. Costs of this application shall be in favour of the Respondents.

30. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 13TH DAY OF JUNE 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Simiyu for the Appellant

Respondent 1 – Absent

Ms. Wanjiku holding brief for Gachie for 2nd – 17th Respondent

Court Assistant - Phyllis

