



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kyuvi v Kwinga & another (Environment and Land Appeal  
E004 of 2021) [2022] KEELC 2254 (KLR) (15 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2254 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT AND LAND APPEAL E004 OF 2021**

**TW MURIGI, J  
JUNE 15, 2022**

**BETWEEN**

**MULINGE PETER KYUVI ..... APPLICANT**

**AND**

**LAWRENCE K. KWINGA ..... 1<sup>ST</sup> RESPONDENT**

**IMELDA N KWINGA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before this Court is a Notice of Motion application dated 5<sup>th</sup> of August 2021 brought under Order 42 Rule 6, Order 51 Rule 1 of the *Civil Procedure Rules*, Section 1A, 1B and 3A of the *Civil Procedure Act* and all other enabling provisions of the law where the Applicant is seeking for the following orders: -
  - 1) Spent.
  - 2) That pending the hearing and determination of the application herein inter partes, there be a stay of execution of the judgment delivered on 6<sup>th</sup> of May 2021 in Kilungu MELC No. 16 of 2018.
  - 3) That pending the hearing and determination of the Appeal herein, there be a stay of the judgment delivered on 6<sup>th</sup> of May 2021.
  - 4) That the Honourable Court makes any other appropriate orders to preserve the subject matter of the Appeal herein.
  - 5) That the cost of the application be provided for.
2. The application is premised on the grounds on the face of the application and on the supporting affidavit of the Applicant sworn on the even date.



### **Applicant's Case**

3. A summary of the grounds and the averments is that on 6<sup>th</sup> of May 2021, Hon Mayamba delivered judgment in MELC No. 16 of 2018, in favour of the Respondent herein. That being dissatisfied with the judgment, the Applicant filed an Appeal dated 3<sup>rd</sup> May 2021. The Applicant argued that the Appeal has overwhelming chances of success and that unless the orders sought are granted, the Appeal would not only be rendered nugatory, that he would also suffer irreparable loss since the Respondents had already commenced the execution process. The Applicant contends that the Respondents would not suffer any prejudice if the judgment is stayed.

### **Respondents' Case**

4. Opposing the application, the 1<sup>st</sup> Respondent vide his replying affidavit sworn on 18<sup>th</sup> of October 2021 on his own behalf and on behalf of the 2<sup>nd</sup> Respondent averred that the application is incompetent as the Applicant had not annexed a certified copy of the judgment and the decree of the trial Court. He further averred that the Memorandum of Appeal had not been served upon them.
5. The Respondent further averred that the Appeal was invalid since the Applicant had not attached the certified copies of the proceedings, a copy of the judgment and decree and copies of the pleadings. The Respondent argued that the Applicant had not demonstrated why he should be granted an order of stay of judgment or the loss or the damage that he would suffer if the orders sought are not granted. The Respondents contend that the judgment of the trial court was valid and that they are entitled to the fruits of their judgment.
6. The Respondents further contends that the Applicant is not entitled to the orders sought as he has not met the conditions required for the grant of stay of execution pending Appeal.
7. The application was canvassed by way of written submissions.

### **Submissions**

8. The Applicant's submissions were filed on 2<sup>nd</sup> of December 2021.
9. Counsel for the Applicant submitted that the Court has discretion to grant orders of stay as long as a party has met the requirements set out in Order 42 Rule 6 of the [Civil Procedure Rules](#). To buttress his submissions, Counsel relied on the following cases: -
  - a) [Turbo Transporters Ltd v Absalom Dova Lumbasi](#) [2012] eKLR.
  - b) [Butt v Rent Restriction Tribunal](#) [1982] KLR 417.
10. On the issue as to whether the Applicant would suffer substantial loss, Counsel submitted that the Applicant was apprehensive that the Respondents are likely to sell the suit property as they do not reside on it, unlike the Applicant who resides on the suit property. Counsel contends that the Respondents had not demonstrated that they are capable of compensating the Applicant with such land if the Appeal succeeded.
11. As regards the provision of security of costs for, Counsel submitted that although the suit land is sufficient security for the due performance of the decree or order, the Applicant was ready to furnish security for costs.
12. As regards the issue as to whether there has been a delay in presenting the instant application, Counsel submitted that the delay in filing the present application was attributed to the fact that the judgment



was delivered in the absence of the Applicant and without notice to the Applicant's Counsel who upon being notified, filed the Memorandum of Appeal.

13. The Respondents submissions were filed on 28<sup>th</sup> of January 2022.
14. Counsel for the Respondent submitted that the Applicant did not seek for stay in the trial Court before filing the present application. He went on to submit that there was no Record of Appeal since the Respondent had not been served with any. .
15. Counsel argued that the Applicant did not tender any evidence to demonstrate that the Respondent had commenced the execution process and hence stay of the judgement should not be guaranteed. Counsel contends that the Applicant is not entitled to the orders sought as he had not met the conditions required for the grant of the stay of execution pending Appeal.

### **Analysis And Determination**

16. Having considered the application, affidavits and the rival submissions, I find that the issue for determination is: -
  - i) Whether the Applicant has satisfied the conditions set out in Order 42 Rule 6 of the [Civil Procedure Rules](#) for the grant of stay of execution pending Appeal.
17. Order 42 Rule 6 (1) and (2) of the [Civil Procedure Rules](#) outlines the guiding principles to be met for the grant of stay and provides that;
  - “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, 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 and such security of costs for the performance of such decree or order as may ultimately be binding on him has been given by Applicant.”
18. Going by the above provisions of the law, it is clear that in an application for stay of execution pending Appeal, the Applicant must satisfy the following three conditions: -
  - a) The Court is satisfied that substantial loss may result to the Applicant unless the order is made.
  - b) The application has been made without unreasonable delay.
  - c) Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the Applicant has been given by the Applicant.



19. In considering an application for stay of execution, I am guided by the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 where the Court of Appeal gave the following guidelines;

“The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicants at the end of the proceedings. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

20. The grant of an order of stay of execution is a discretionary one. In the case of *RWW v EKW* [2019] eKLR the court held that;

“...the purpose of an application for stay of execution pending an appeal is to preserve the subject in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and The appeal if successful is not rendered nugatory. However, in doing so the court should weigh the right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of damages.”

21. The Court is therefore called upon to balance both the successful party so as not to hinder him from his fruits of judgment and those of the Appellant whose Appeal may succeed and be rendered nugatory if stay of execution is not granted.

22. 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.

23. The issue for determination is whether the Applicant has satisfactorily discharged the conditions for the grant of stay of execution pending Appeal.

24. The Applicant is seeking to stay the judgment of Hon. Mayamba delivered on 6<sup>th</sup> of May 2021.

25. The Court will now determine whether the Applicant has satisfied the conditions upon which the orders can be granted.

26. On the first condition of proving substantial loss may result unless stay orders are granted, the Applicant should not only state that he is likely to suffer substantial loss, he must prove that he will suffer substantial loss if stay orders are not granted. In so finding, I am persuaded by the Court of Appeal decision in the case of *Charles Wabome Gethi v Angela Wairimu Gethi* [2018] eKLR where the court held that;

“...it is not enough for the Applicants to say that they live or reside on the suit land and 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.”

27. What amount to substantial loss was expressed by the Court of Appeal in the case of *Mukuma v Abuoga* [1988] KLR where the Court held that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

28. In *Tropical Commodities Suppliers Ltd and Others v International Credit Bank Ltd (in Liquidation)* [2004] 2 EA 331 the court defined substantial loss as follows;

“substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”

29. The Applicant averred that he is apprehensive that going by the Respondents behaviour, they are capable of selling the suit property before the Appeal is heard and determined as they do not reside on the suit property. The Applicant further averred that he was apprehensive that the Respondent would execute the judgment and evict him from the suit property and as a result he would suffer irreparable loss.

30. In addition, the Applicant submitted that he was apprehensive that if the Court does not grant the stay orders, the Respondents would dispose of the properties in a bid to try and rectify their illegal dealings before the verification process is finalized thus barring the Applicant from the suit properties.

31. The Respondents on the other hand argued that the Applicant had not demonstrated that there was a danger of execution as the Applicant had not annexed a copy of the decree to demonstrate that the Respondents were in the process of executing the judgment.

32. I have read the judgment by Hon. Mayamba delivered on 6<sup>th</sup> of May 2021. The Court in its findings stated as follows;

“I do make the following orders: -

- a) An order of injunction is hereby granted and issued restraining the defendant, his agents, servants and/or employees or whomsoever from entering, constructing, wasting, selling, trespassing, entering, destroying or in any other way from interfering with the plaintiff’s properties known as plot no 300A and 300B Emali Town.
- b) The claim on mesne profits is dismissed.
- c) Orders (a) is suspended for 90 days to await an investigation by the National Land Commission on the authenticity of the documents tendered herein and possible prosecution of any one found culpable of land fraud.
- d) The plaintiff must ensure that a reference to National Land Commission is made through the service of this order within the next 20 days from the date herein to enable verification process to commence.



- e) The officer in charge of Emali Police Station shall ensure full compliance with the orders herein upon receipt of the report from the National Land Commission together with the orders of this court.
- f) The counter claim is consequently dismissed with costs.”

33. It is evident from the judgment of Hon Mayamba that the order of injunction granted against the Defendant his agent, servant and/or employees from entering, constructing, wasting, selling, trespassing, destroying or in any other way interfering with the Plaintiff’s properties known as plot number 300A and 300B Emali Town was suspended for 90 days to await the outcome of the investigations carried out by National Land Commission on the authenticity of the documents tendered in Court as evidence. It is also evident that the Plaintiff was to ensure that the orders were served upon the National Land Commission within 20 days as from the date of the judgment.
34. It is not clear from the evidence on record whether the Plaintiff effected service upon the National Land Commission as directed by the Court or whether the National Land Commission has verified the authenticity of the documents and presented its report to the Officer in charge of Email Police Station to comply with the orders therein as ordered by the Court. The Court finds that if the orders issued in the judgment have not been complied with and the Applicant’s rights are infringed, he will suffer irreparable loss as no amount of money will compensate him.
35. I find that the Applicant has satisfied this Court that he is likely to suffer substantial loss if the substratum of the Appeal is sold or transferred to third parties.
36. In an application for stay of execution pending Appeal, an Applicant must also satisfy the Court that the application has been made without unreasonable delay. It is not in dispute that the judgment was delivered on 6<sup>th</sup> of May 2021. The Applicant averred that he was granted a stay of execution pending his Appeal before this Court. The present application was filed 6<sup>th</sup> of August 2021. I find that the application was brought without undue delay.
37. On the last condition as to the provision of security for costs, Order 42 Rule 6 (2) (b) of the Civil Procedure Rules is couched in mandatory terms to the effect that the Applicant must furnish security for the performance of the order or decree. In the case of Arun C Sharma v Ashana Rikundalia T/A Raikundalia & Co. Advocates, the court held that;
- “The purpose of the security under Order 42 is to guarantee 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 applicant 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 a security for the 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.”
38. Although the Applicant has not provided security for the due performance of the order, he has expressed his willingness to provide security as directed by the Court for the due performance of any decree that may be binding on him.
39. In the end I find that the Applicant has satisfied the conditions required for the grant of an order of stay of execution pending Appeal. The upshot of the foregoing is that the application dated 5<sup>th</sup> of August 2021 is allowed in the following terms;



- i) Stay of execution of the judgment/decree herein is granted pending the hearing and determination of the Applicant's Appeal.
- ii) The Applicant shall deposit Kshs 200,000/- as security for costs in Court within 30 days from the date of delivery of this ruling in default the stay orders shall automatically lapse.
- iii) Each party to bear its own costs.

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**HON. T. MURIGI**

**JUDGE**

**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 15<sup>TH</sup> DAY OF JUNE, 2022.**

**IN THE PRESENCE OF: -**

Court Assistant – Mr. Kwemboi

Kiluva for the Respondent

