



**Chepawoy v Yano & 2 others (Environment & Land Case
E018 of 2023) [2025] KEELC 3088 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3088 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E018 OF 2023**

CK YANO, J

APRIL 3, 2025

BETWEEN

ROBERT OLEITEREM CHEPAWOY PLAINTIFF

AND

EZEKIEL KIPKEMBOI YANO 1ST DEFENDANT

STEPHEN KEMNOI MARABA 2ND DEFENDANT

ALEX KOECH 3RD DEFENDANT

RULING

1. The 1st Defendant/Applicant herein filed a Notice of Motion application dated 9th December, 2024 seeking the following orders:-
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to order stay of execution of the ruling given on 5th December 2024, pending the hearing and the determination of the intended appeal.
 - d. That the Honourable Court do take judicial notice of the fact that the person constructing the said land is a third party, Alex Koech, whose application to be enjoined to the proceedings is pending herein dated 2.4.2024 and not the Applicant.
 - e. That costs of this application be provided for.
2. The application is supported by the grounds therein and an affidavit of even date sworn by the 1st Defendant/Applicant. The 1st Defendant deponed that vide ruling delivered on 5th December, 2024 he was found guilty of contempt and directed to appear in court on 11th December, 2024 for sentencing. Being aggrieved by the whole decision, he has since filed a Notice of Appeal. He stated that he is not



- the one constructing on the land and the person responsible, one Alex Koech (now joined as the 3rd Defendant), had at the time applied to be joined to these proceedings. He deponed that there was no wilful disobedience of the court order on his part as the said Alex Koech has admitted that he is the one on the ground, thus the order issued should be stayed awaiting his Appeal.
3. The 1st Defendant also deponed that he was neither served with the order nor did he have constructive knowledge thereof, and he denied disobeying the court order. That none of the lawyers herein informed him of the order and the mistakes of counsel cannot be visited on him. He claims that he stands to suffer irreparable loss and damage, and further that his appeal will be rendered nugatory, if the orders sought are not granted. He deponed that the application was filed promptly. In addition, that he is ready and willing to abide by the orders the court may grant regarding security.
 4. The 1st Defendant annexed to his application copies of the ruling dated 5th December, 2024, his Notice of Appeal as well as a letter requesting certified copies of the proceedings and the ruling both dated 5th December, 2024, the application for joinder by Alex Koech alongside the supporting affidavit thereto, an agreement for sale between the 1st Defendant and Alex Koech, a letter dated 4th September, 2023 from the 2nd Defendant, the impugned order and his Memorandum of Appeal.
 5. The Plaintiff/Respondent filed a Replying Affidavit dated 20th December, 2024 opposing the Application for stay. He deponed that his application for contempt was indeed allowed on 5th December, 2024. That in his reply to the application for contempt, the 1st Defendant averred that nothing was ongoing on the suit property and gave casual evasive explanations exhibiting the casual manner he viewed the court order. Further, that in the said reply, there was no mention of any alleged sale of the suit land to a third party or any agreement thereof. The Plaintiff averred that the 1st Defendant is introducing new information and adding a third party, which is an afterthought and an attempt to defeat justice. He pointed out that the annexed agreement is dated 25th November, 2022 and the 1st Defendant was aware of it at the time of filing his said reply.
 6. The Plaintiff accused the 1st Defendant of defying the authority and dignity of the court and the law. He also deponed that the 1st Defendant has shown no justifiable reason to warrant a stay of execution of the contempt of court orders. The Plaintiff also averred that this court having issued the contempt orders after being satisfied that the 1st Defendant disobeyed the court, it cannot now stay the said orders, especially since no sentencing has been done. He asked that the instant application be dismissed with costs.
 7. On 28th January, 2025 the court directed that the Application be canvassed by way of written submissions and the 1st Defendant was granted leave to file a Further Affidavit. When the matter came up for mention on 5th March, 2025 Counsel for the 1st Defendant confirmed that he had filed the Affidavit and was directed to serve it before close of the said business day. I have perused the file and checked on the CTS online filing system and have confirmed that the Affidavit was never filed or placed in the court file. I note also that the 1st Defendant filed written submissions on the Application, while the Respondent did not.

Analysis and Determination;

8. That being said, I have carefully considered the Application and the affidavit filed in support thereof, the replying affidavit as well as the submissions and authorities cited. The only issue for determination is whether the 1st Defendant is entitled to the order of stay of execution pending appeal.
9. Before I delve into the merits of the instant Motion, I must mention that at prayer 3 of the Motion, the 1st Defendant asked this Court to take judicial notice of the application for joinder by the



person allegedly constructing on the suit land, one ALEX KOECH. At the time of the filing of this Application, there was indeed a pending application for joinder by Alex Koech dated 2.4.2024. The said Application was not opposed and on 19th December, 2024 he was joined to the suit as a 3rd Defendant.

Whether the 1st Defendant is entitled to an order of stay of execution;

10. The purpose of an order for stay of execution pending appeal is to safeguard the rights of the appellant who is exercising their undoubted right of appeal. An order of stay of execution also ensures that if the appeal is successful, it is not rendered nugatory (see *Munene v Kingara & 2 others* (Application 12 of 2014) [2014] KESC 27).
11. The law governing the granting of orders for stay of execution pending appeal is Order 42 Rule 6(1) and (2) of the Civil Procedure Rules which stipulates as follows:-
 - “ 6. Stay in case of appeal [Order 42, rule 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.
 - (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.”
12. From the above provision, the 1st Defendant is required to establish that he has a sufficient cause for seeking the orders, that he stands to suffer substantial loss if the orders are not granted and lastly, that he is willing to furnish security for the due performance of the decree. In addition to the above conditions, an application for stay of execution pending appeal must be made without unreasonable delay.
13. Accordingly, to prove that he is entitled to the order of stay of execution, the 1st Defendant must first show that there is sufficient reason and that he will suffer substantial loss unless the order is granted. The issue of substantial loss has been held to be the cornerstone of applications for stay of execution. It is what has to be prevented by preserving the status quo because such loss would render the appeal



nugatory. The concept of substantial loss was explained in *Jason Ngumba Kagu & 2 Others v Intra Africa Assurance Co. Limited* [2014] eKLR, where it was held that:

“The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.”

14. In this application, the 1st Defendant has expressed his intention to appeal against the ruling delivered on 5th December, 2024. I have taken time to read the copy of the Memorandum of Appeal exhibited herein. It is evident that the 1st Defendant is challenging the order which declared him in contempt. As was held in *Samvir Trustee Limited v Guardian Bank Limited Nairobi* [2007] eKLR, the 1st Defendant deserves to be heard on the issues raised on the Appeal. In the said case, the court observed that:-

“I agree that every party aggrieved with a decision of this court has a natural and undoubted right to seek the intervention of the Court of appeal. And as far as this matter is concerned, I do not think this court should put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. In my understanding a stay would be granted unless there is overwhelming hindrance to the exercise of the discretionary powers of the court. I appreciate and understand that the court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner.”

15. This being a civil dispute, it could be argued that even if execution were to issue, it would not render an appeal nugatory because if the appeal succeeded, the decision of the trial court would be nullified and the court may make an order for costs to compensate the Plaintiff for any loss or damage suffered.
16. In this instance however, the 1st Defendant faces penal consequences by way of possible incarceration. It goes without saying that no award of damages could possibly compensate him for the possible denial of his liberty. To this end, even the fact that an applicant has not purged the alleged contempt would not be sufficient reason to deprive him the right to be heard on his appeal. Denying the 1st Defendant the stay he seeks would in effect automatically render the intended appeal nugatory.
17. See the case of *Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & another* [2006] KECA 341 (KLR), where the court, though dealing with the issue of stay of proceedings, explained that:-

“But matters involving penal consequences must, of necessity, be treated differently. It can be of no consolation to tell a man that his appeal will not be rendered nugatory even if he went to prison for only one week. The appeal would have been rendered nugatory.”



18. In the circumstances, I am convinced that the 1st Defendant stands to suffer substantial loss per Order 47 Rule 6(2)(a) of the Civil Procedure Rules, if the orders sought herein are not granted.
19. The second limb of the test is the requirement that the application must be made without unreasonable delay. The ruling subject of these proceedings was delivered on 5th December, 2024. The instant Motion is dated 9th December, 2024 and was filed on the same date. There is a period of only 4 days between the date of the ruling and the filing of the instant Motion. I agree with the 1st Defendant therefore that the Application was filed without undue delay.
20. Lastly, the party seeking an order for stay of execution must give such security as the court orders for the due performance of such decree or order as may ultimately be binding on him. The purpose of security was explained in the case of *Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR, the court stated:-

“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 the 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.”

21. The issue of security is discretionary and it is upon the court to determine the same. Evidently also, the court is not bound by the type of security offered by an applicant, it is at liberty to make appropriate orders which serve the interest of justice.
22. The subject matter of the order sought to be stayed herein is not money, and so ordering the 1st Defendant to deposit money into court may not serve the purpose for which security is intended for. It would have been sufficient to have the title deed to the property deposited in court. However, I note that the 1st Defendant alleges that he sold the suit property to the 3rd Defendant. Although the 2nd Defendant wrote a letter on 4th September, 2023 that he would only sell the land to the 1st Defendant, it has not been made clear whether the land was transferred to the 1st Defendant. In short, it is not clear who currently holds title to the land.
23. The 1st Defendant stated with regard to the issue of security that, he is ready to abide by any conditions that may be imposed by court. Courts have held that the willingness to abide by any conditions on security that the court may issue has been held to be enough to demonstrate good faith on the part of an Applicant. Further, that such expression of willingness is sufficient to satisfy the condition for security under Order 42 Rule 6. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the Court held that:-

“ 18. I agree with the Respondent that the Applicants have not offered or proposed any security for the due performance of the decree of the lower court. This should be done as a sign of good faith that the Applicant is ready and willing to commit to giving security. But my reading of order 42 rule 6(2) (b) of the CPR reveals that, it is the court that orders the kind of security the applicant should give as may ultimately be binding on the applicant. This modelling of the law is to ensure the discretion of the court is not fettered.”



24. I am also persuasively guided by the decision of the High Court in *Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another* [2018] eKLR, where it was held that:-

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

25. Therefore, Appellant’s willingness to abide by any conditions and terms as to security as the court may deem fit to impose, sufficiently meets the condition of security that is necessary for grant of an order of stay of execution.

26. It is trite that the duty of the court, while considering an application for stay of execution is to balance the rights of the parties before it to ensure that the ends of justice are met. In the *Samvir Trustee Limited Case* (Supra), the court further held that:-

“But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement, hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant. ...The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

27. The aim of the intended Appeal herein is to challenge the ruling and order of contempt and avoid potential jail time. It is then evident that it would be rendered nugatory if the instant application is not allowed.

28. Understandably, the Plaintiff has a right to enjoy the outcome of his litigation. And while that right may be curtailed by the issuance of an order of stay, the harm that he will be exposed to cannot compare to the possible loss of liberty to the 1st Defendant if execution herein is not stayed. Furthermore, any such loss on the part of the Plaintiff can easily be compensated by an award of damages. It follows therefore, that a proper balance of the rights will be maintained only by allowing the stay sought.

Orders:-

29. The 1st Defendant has satisfied the requirements for grant of an order of stay of execution pending appeal. Consequently, the 1st Defendant’s Motion dated 9th December, 2024 is allowed in the following terms:-

- a. An order of stay of execution be and is hereby issued staying the execution of the ruling given on 5th December 2024, pending the hearing and the determination of the intended appeal.
- b. The costs of this application shall be costs in the cause.

30. Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 3RD DAY OF APRIL, 2025 VIDE MICROSOFT TEAMS.

HON. C. K. YANO

ELC, JUDGE

In the presence of;

Ms. Salim holding brief for Mr. Mwetich for the Plaintiff.

Dr. Chebii for the 1st Defendant.

Ms. Kipseii for the 3rd Defendant.

No appearance for 2nd Defendant.

Court Assistant - Laban.

