



**Kibue & 2 others v Kiarie & 3 others; Kibue & 2 others (Respondent)
(Environment and Land Case Civil Suit 141 of 2012 & Environment & Land Case
91 of 2013 (Consolidated)) [2022] KEELC 2440 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2440 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 141 OF 2012 &
ENVIRONMENT & LAND CASE 91 OF 2013 (CONSOLIDATED)**

EK WABWOTO, J

JULY 21, 2022

CONSOLIDATED WITH

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

ELC CASE NO. 91 OF 2013 (OS)

**IN THE MATTER OF AN APPLICATION UNDER
SECTION 38 OF THE LIMITATIONS OF ACTIONS ACT**

AND

IN THE MATTER OF L.R NO. 5989/14

AND

**IN THE MATTER OF AN APPLICATION BY TENI LIMITED THAT IT
HAS BECOME ENTITLED BY ADVERSE POSSESSION TO L.R NO. 5989/14
REGISTERED UNDER THE REGISTRATION OF TITLES ACT TO BE
PROPRIETOR OF THE LAND IN THE PLACE OF JAMES ARAM KIBUE
(DECEASED) NOW REGISTERED AS THE PROPRIETOR OF THE LAND**

BETWEEN

ANNUNCIATA WAITHERA KIBUE 1ST PLAINTIFF

SUSAN NJERI KIBUE 2ND PLAINTIFF

PAUL KIMARI KIBUE 3RD PLAINTIFF

AND

PETER CHEGE KIARIE 1ST DEFENDANT

GRACE WANJIKU MBUGUA 2ND DEFENDANT



TENI LIMITED 3RD DEFENDANT

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 91 OF 2013**

IN THE MATTER OF

TENI LIMITED APPLICANT

AND

ANNUNCIATA WAITHERA KIBUE RESPONDENT

SUSAN NJERI KIBUE RESPONDENT

PAUL KIMARI KIBUE RESPONDENT

RULING

1. This is a ruling in respect to a Notice of Motion dated May 24, 2022 in which the Plaintiffs/Applicants seeks stay of execution pending appeal.
2. The Applicants contends that judgment against them was delivered on April 21, 2022. Being dissatisfied with the said judgment, they have preferred an appeal to the Court of Appeal. They therefore pray that there be stay of execution of the said judgment as they pursue their appeal.
3. The application is opposed by the Defendants/Respondents through a replying affidavit sworn on June 3, 2022 by John Njuguna Kiarie. The Respondents contend that the application has not met the threshold for grant of stay pending appeal. The Respondents further contend that the Applicants have not shown that they will suffer any substantial loss if stay is not granted and they neither have they furnished any security to the court.
4. During the plenary hearing of the application on June 7, 2022, Counsel for the parties were allowed to make oral submissions in support and opposition to the application. Learned Counsel Mr. Nga'ng'a submitted on behalf of the Applicants while Ms. Judy Thongori Learned Senior Counsel submitted for the Respondents. Counsel for the Applicants relied on the supporting affidavit sworn on May 24, 2022 and also referred to the list of authorities dated June 7, 2022 while Counsel for the Respondents equally relied on the Replying Affidavit sworn by John Njuguna Kiarie and several authorities that were filed in opposition to the application and which the court has considered.
5. I have considered the application, oral submissions made by the counsel for the parties, the affidavits filed and authorities that were filed by both parties. The only issue for determination is whether the Applicants have met the threshold for grant of stay pending appeal.
6. The issue of whether to grant stay pending appeal is a matter of discretion. This discretion is fettered by four conditions. First, an applicant must demonstrate that there is just cause to grant stay. Second, the Applicant has to demonstrate that he or she will suffer substantial loss should stay not be granted. Third, there has to be security provided for the due performance of the decree as may ultimately be binding upon the Applicant. Fourth, the application has to be brought without unreasonable delay.



7. The principles are further outlined under Order 42 Rule 6 (1) and (2) of the [Civil Procedure Rules](#), which provides:

- (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 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.

8. A stay of execution under order 42 of the [Civil Procedure Rules](#) is an interim order to suspend the rights of one party who is aggrieved with the judgment of the trial court or tribunal and wishes to exercise his or her right of appeal. Its main objective is to protect the substratum of the suit by delaying the execution process until the determination of the appeal. Being a discretionally remedy the applicant must demonstrate that he or she has approached the court of equity with clean hands as succinctly stated in the case of *Jajbhay v Cassim* 1939 AD 537-551 the court held on this maxim that: “All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice.”

9. The general principle of law is that the successful litigant in possession of a valid court judgement is entitled to the fruits of judgement unless there exist exceptional circumstances to deny him or her that right. Further The Court of Appeal in the case of [Visbram Ravji Halai vs Thornton & Turpin](#) [1990] KLR 365 stated 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 (now Order 46 Rule 2) of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.

10. In considering an application for stay of execution I am guided by the case of [Butt vs Rent Restriction Tribunal](#) Civil App No. NAI 6 of 1979 (Madan, Miller and Porter JJA) where the following guidelines were given:

“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.

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. 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. 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.”

11. The first limb of consideration is whether the application was filed without unreasonable delay. Judgment was delivered on April 21, 2022 and the Applicants filed their notice of motion under certificate of urgency on 26th May, 2022. There was no much delay in the filing of this instant application.

12. It is clear that for the Court to grant stay of execution, the Applicants needs to satisfy the Court that they will suffer substantial loss. In the case of *Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi* (Milimani) HCMCA No. 1561 of 2007 the court stated: -

“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue.

The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. 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.”

13. In Bungoma HC Miscellaneous Application No 42 of 2011 *James Wangalwa and another Vs. Agnes Naliaka Cheseto* the court further discussed what substantial loss entails:

“The application must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail.”

14. The Applicants should not only state that they are likely to suffer substantial loss but must also prove that they will suffer loss. The Applicants bears the burden of proving that by refusal to grant stay of execution they stand to suffer substantial loss

15. The mere filing of a Notice of Appeal does not automatically warrant the issuance of orders of stay of execution of the decree. In the present application, the Applicants have annexed a Notice and Memorandum of Appeal which they intend to file to the Court of Appeal.

16. The Applicants contends that the Court made orders to the effect that the 3rd Defendant/Respondent has acquired ownership of 1.5 acres of the Plaintiffs/Applicants parcel of land through adverse possession among others orders which are extremely prejudicial to them and they wish to appeal against. They submitted that they have a justifiable cause to prefer an appeal.

17. Back to the issue on whether the Applicants will suffer substantial loss if stay of execution is not granted, the Applicants submitted that if the Respondent is allowed to execute the judgement then the appeal will be rendered nugatory. I note that if the Respondents were to execute the decree,



it will indeed render the appeal nugatory as the suit property would have been transferred to the Respondents. This is a case for grant of stay of execution pending appeal.

18. Counsel for the Applicants submitted that his clients are willing to comply with whatever terms of security that the court would direct, an issue which was strongly objected to by the Respondents for the reason that the Applicants had not offered to furnish the Court with any security. On this aspect of security, considering that the Respondents who were successful in respect to the judgment delivered by this court on April 21, 2022 have been on the suit property for over 30 years and are still in occupation and further considering that the suit land will be there even after the Appeal has been heard and determined, an order for security for the due performance of the decree is not necessary at this stage.
19. In the end, I therefore find that the application dated May 24, 2022 is merited. The same is allowed as follows: -
 - i. An order staying the execution of the Judgment and Decree delivered on 21st April 2022 is hereby granted pending the hearing and determination of the Appeal.
 - ii. Each party to bear their own costs of the application.
20. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF JULY 2022.

E. K. WABWOTO

JUDGE

In the Presence of: -

No appearance for the Applicants.

Ms. Ndirangu holding brief for Judy Thongori S.C for the Respondents.

Court Assistant: Caroline Nafuna

E. K. WABWOTO

JUDGE

