



**Nurbhai v Noorbhai (Environment & Land Case 306 of 2019)
[2022] KEELC 3503 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3503 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 306 OF 2019**

**LN MBUGUA, J
JULY 21, 2022**

BETWEEN

MOIZ GULAMHUSSEIN NURBHAI PLAINTIFF

AND

BURHAN GULAMHUSSEIN NOORBHAI DEFENDANT

RULING

1. The background to this matter is well captured in the introductory part of the ruling delivered by this court on February 23, 2021 and I need not rehash the same save to state that the Applicant was ordered to be depositing the rental income emanating from the suit property in a joint account and he was also to render accounts of the rental income and expenses as from year 2009. The defendant has brought forth an Application dated 19th March 2021, the subject of this ruling. He is seeking orders to stay the proceedings in this matter as well as the aforementioned orders of February 23, 2021 pending the hearing and determination of the intended appeal at the Court of Appeal as well as costs of this application. He has since filed an appeal.
2. This application is premised on the grounds elucidated on its face and in the Affidavit sworn by the Applicant/ Defendant dated 19th March 2021. The Applicant avers that he intends to appeal against the order dated 23rd February 2021, as the same was prejudicial to him, and that he stands to suffer substantial loss and damage. He avers that the rental income he was supposed to deposit in a joint account comes from the suit property and is used to maintain and pay incidental expenses of the suit property including the Kenya Revenue Authority (KRA) taxes.
3. The Applicant contends that he has an arguable appeal case with chances of success and he was ready to pay Kshs. 400,000 as security for costs which was equivalent to 1/3 of the rental income and in default to provide security as set by court.



4. In his Supplementary Affidavit dated June 29, 2021, the Applicant denies that he is deliberately failing to comply with the court order or that he is acting in bad faith. He avers that he is 84 years old and he has managed the suit land for many years. He contends that there are challenges in complying with the court order in that the houses in question are old having been built in the 1970s and they don't attract colossal monthly income. There are no consistent clients and that the Covid 19 pandemic also adversely affected the occupation of the properties by the tenants. The applicant avers that he has duly filed an appeal which will be rendered an academic exercise unless the orders sought herein are allowed.
5. The Respondent/Plaintiff has opposed the application vide his Replying Affidavit dated 7th May 2021 stating that the Applicant had not indicated how he would suffer loss and damage should the order be executed, noting that the Applicant had been collecting rental income from the suit properties from the year 2009.
6. The Respondent also contested the Kshs. 400,000 amount proposed by the Applicant as security stating that, security ought to be binding but the Applicant's proposal was a mockery to justice highlighting that the residential houses on the suit property fetched between Kshs. 100,000 and Kshs. 300,000 each, every month.
7. The Respondent also stated that this application was meant to delay and deny him execution of the orders and should be dismissed.
8. I have considered all the arguments raised herein including the rival submissions. To grant or not to grant a stay of the proceedings herein including the ruling of this court delivered on February 23, 2021 is the issue for determination.
9. Order 42, Rule 6 of the [Civil Procedure Rules](#) provides that:
 - “(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,.....”
 - (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.”
10. The court has discretion to grant or to refuse an application for stay of execution pending appeal in that the court when granting a stay, it has to balance the interests of the applicant with those of the respondent. In determining this balance, the court gives due consideration to the three criteria set out under the above mentioned provisions of law.
11. In the Court of Appeal case of [Halai & another v Thornton & Turpin \(1963\) Ltd](#) [1990] eKLR, it was stated that:

“Before the superior court can exercise its discretion in favour of an applicant for a stay of execution, the applicant must first establish a sufficient cause... secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly



the applicant must furnish security. The application must, of course, be made without unreasonable delay...”

12. In the case of *Samvir Trustee Limited vs. Guardian Bank Limited Nairobi* [2007] eKLR, Warsame J (as he then was) stated:

“ ... It is my humble view that for the applicant to obtain a stay of execution, it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss...”

13. As pointed out by this court (Judge Eboso sitting) in the ruling of February 23, 2021, the protagonists are siblings and co-owners of the suit property. However, all along, it is the Applicant who has been collecting rent from the residential houses and he does not render accounts. A stay of the order of February 23, 2022 would mean that the Applicant will continue having leverage over the suit property which is jointly owned by the two parties.

14. I have perused the documents annexed to the application, and I am in agreement with the Respondent that the said receipts are for the year 2020 and 2021 and do not really indicate the substantial loss that the Applicant would incur. The said receipts relate to payments of land rates and land rent, KRA payments, provision of insurance, paying for security, casuals and repairs et al.

15. In the ruling dated 23rd February 2021, this Court ordered the Applicant to file a statement of account as follows:

“c) The defendant is directed to, within sixty (60) days from today, file in court and serve upon the plaintiff’s advocates a full statement of accounts relating to all rental income and all expenses relating to the suit property from January 2009 to the date when the joint interest earning account is opened and operationalized...” .

16. I pose the question; “what part of this order didn’t the applicant understand? The court order was crystal clear that the applicant was to factor the expenses in the statement; thus the issue of unleashing various receipts of expenses to prove the difficulties of complying with the court order is uncalled for. In any event, the various expenses (land rates, land rent et al) happens to be the ordinary expenditures and obligations that befall property owners.

17. In the case of *Sophinah Kalondu Mbiti v Arun Mahendra Adalja & 3 others* [2021] eKLR, I was dealing with an issue appertaining to none compliance with court orders including the rendering of accounts and I stated thus;

“If the Plaintiff had really set out to comply with the court orders mentioned herein, what was so difficult in stating so in a clear and concise manner”.

18. Similarly, the Applicant is meandering around and about as to how he is the one who has been managing the properties for decades, how the houses are old with no constant tenants and so forth. I find that the applicant has not demonstrated that he stands to suffer any substantial loss and damage as his claim amounts to mere allegations and assertions.



19. Whereas it is trite that courts have a duty to balance litigants interests in a just manner as stipulated under Section 1A and 1B of the *Civil Procedure Act*, and that no party should be ejected from the seat of justice, Justice Odunga in the case of *Michael Ntouthi Mitheu v Abraham Kivondo Musau* [2021] eKLR stated that:

“In an application for stay the Court must consider the overriding objective and balance the interest of the parties to the suit since the court is enjoined to place the parties on equal footing. Since the overriding objective aims, inter alia, to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act, the balancing of the parties’ interest is paramount in an application for stay of execution pending appeal”.

20. This Court is not convinced that a stay of execution and a stay of the proceedings herein would be in line with the spirit of just, expeditious and proportionate resolution of disputes from the analysis above. As such, the application dated 19th March 2021 is hereby dismissed with costs to the plaintiff / respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21st DAY OF JULY 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

M/s Amayo for Defendant/Applicant

Musyoki holding brief for Mingo for Plaintiff/Respondent

Court Assistant: Joan

