



REPUBLIC OF KENYA



**KENYA LAW**  
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**Amour v Juma & 3 others (Environment and Land Appeal  
E14 of 2021) [2022] KEELC 4744 (KLR) (24 August 2022) (Ruling)**

Neutral citation: [2022] KEELC 4744 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND APPEAL E14 OF 2021**

**MAO ODENY, J  
AUGUST 24, 2022**

**BETWEEN**

**AMOUR ABDILAHY AMOUR ..... APPELLANT**

**AND**

**MWANAHAMISI MOHAMMED JUMA ..... 1<sup>ST</sup> RESPONDENT**

**JUMA ALI MOHAMMED ..... 2<sup>ND</sup> RESPONDENT**

**AMINA MOHAMED JUMA ..... 3<sup>RD</sup> RESPONDENT**

**ALY ZAID MOHAMED ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of a notice of motion dated November 3, 2021 by the appellant seeking the following orders: -
  - a) Spent.
  - b) Spent.
  - c) That pending the hearing and determination of this Appeal this honourable court be pleased to stay the ruling delivered herein on September 16, 2021 in Kilifi and any other order that may be issued pursuant thereto, pending the hearing of the appeal.
  - d) That pending the hearing and determination of this appeal this honorable court be pleased to order the Registrar of Lands Mombasa to file herein all certified copies as per his records title No 4348 plot No 143 section III/MN within (14) fourteen days.
  - e) That the costs of this application be provided for.



2. The application is premised on the grounds on the face of it and supported by the supporting affidavit sworn on the even date by the appellant.
3. The respondents opposed the application. They filed a replying affidavit sworn on December 8, 2021 by Juma Ali Mohamed and grounds of opposition.
4. Counsel agreed to canvas the application vide written submissions which were duly filed.

### **Appellant/Applicant's Submissions**

5. Counsel identified two issues namely; whether the appellant/applicant has met the threshold for grant of the orders sought and whether the application is merited and relied on the case of *Peter Samoei v Isaac K Ruto* [2012] eKLR.
6. Mr Nyanje submitted on the principles for grant of stay of execution which require an applicant to satisfy the court that he or she will suffer substantial loss if the order is not granted, that the application is made expeditiously without undue delay, and security for the due performance of the decree.
7. Counsel submitted that the appellant stands to suffer substantial loss as the order of eviction if executed would render the appellant homeless thus causing him substantial loss. Counsel also submitted that the application was filed timeously and for security for due performance of the decree need not be monetary. Further that since the respondents are the registered owners of the suit land, it would be impossible for the appellant to dispose of the same and relied on the cases of *Alex Simiyu & 2 others v Francis Simiyu Samita* [2017] eKLR *Machira T/A Machira & Co Advocates v East African Standard (No 2)* [2002] 2KLR 63, and *Gitabi & another v Waugongo* [1988] KLR 621.

### **Respondent's Submissions**

8. Counsel submitted that the respondents are not opposed to the application as long as security for the due performance of the decree is provided by the appellant as per order 42 rule 6 of the *Civil Procedure Rules*. It was counsel's submission that security of Kshs. 2,000,000/- would suffice and relied on the cases of *Charles Kariuki Njuri v Francis Kimaru Rwara [suing as administrator of estate of Rwara Kimaru alias Benson Rwara Kimaru (deceased)]* [2020] eKLR; *Arun C.Sharma v Ashana Raikundalia t/a Raikundalia & Co Advocates & 2 others* [2014] eKLR.

### **Analysis And Determination**

9. This is an application for stay of execution pending the hearing and determination of an appeal. An applicant must meet the threshold provided for under order 42 rule 6 of the *Civil Procedure Rules* for an order of stay of execution to be issued. Order 42 rule 6 provides as follows: -
  - 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.
- 3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
  - 4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
  - 5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
  - 6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
10. The court has the discretion to grant an order of stay pending appeal depending on the circumstance of each case. It is also trite that the court has to balance the right of the applicant to appeal and that of the successful litigant to enjoy the fruits of his/her judgment.
  11. It should be noted that the respondents did not oppose the order of stay being granted, but urged the court to order for security of either Kshs 1,000,000/ or Kshs 2,000, 000/. The judgment of the lower court awarded the respondents Kshs 200,000/- as damages for trespass.
  12. The application was also filed timeously hence complied with the dictates of order 42 rule 6 of the Civil Procedure Rules and further that the applicant established that the eviction would cause him to suffer substantial loss.
  13. I have considered the application and the submission by counsel and find that the application has merit and is therefore allowed on condition that the applicant deposits Kshs 150,000/ in court in the next 30 days failure to which the order lapses. Prayer No (d) of the application is declined requiring the Land Registrar to file to all certified copies as per his records title No 4348 Plot No 143 section III/ MN within (14) fourteen days as this is an appeal not a leave to file further documents.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 24<sup>TH</sup> DAY OF AUGUST, 2022.**

**MA ODENY**

**JUDGE**

**NB: In view of the Public Order No 2 of 2021 and subsequent circular dated March 28, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving order 21 [1] of the Civil Procedure Rules.**

