



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Ndoro v Ali & 2 others (Environment & Land Case 45 of 2018)  
[2022] KEELC 3613 (KLR) (16 August 2022) (Ruling)**

Neutral citation: [2022] KEELC 3613 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 45 OF 2018  
MAO ODENY, J  
AUGUST 16, 2022**

**BETWEEN**

**SAMUEL WALE NDORO ..... PLAINTIFF**

**AND**

**ZEINAB KATANA ALI ..... 1<sup>ST</sup> DEFENDANT**

**ELISHA KAZUNGU ..... 2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR KILIFI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of a notice of motion dated August 18, 2021, by the plaintiff seeking the following orders:-
  1. Spent
  2. Spent
  3. That this honourable court be pleased to issue an order of temporary stay of execution of the judgment delivered on November 13, 2020, the decree dated December 10, 2020 and the warrant to court bailiff to give possession issued on July 1, 2021 pending the hearing and determination of the intended appeal.
  4. That this honourable court be pleased to give or issue such other interlocutory orders as may appear to the court to be just and convenient.
  5. That costs of this application be in the cause.
2. Counsel agreed to canvas the application by way of written submissions which were duly filed.



### **Plaintiff's Submissions**

3. The plaintiff's application is based on the grounds on the face of the application and a supporting affidavit of Samuel Wale Ngoro where he deposed that judgment in this case was delivered on November 13, 2020 whereby the court dismissed his case and allowed the defendants' counterclaim.
4. The plaintiff further stated that he only became aware of the judgment on August 16, 2021 when he was served with a notice to vacate the suit premises and this was due to lack of cooperation between himself and his former advocates Lucy Wangari & Company Advocates who failed to inform him of the delivery of the judgment.
5. Counsel relied on Order 42 rule 6 of the *Civil Procedure Rules* and submitted that the plaintiff will suffer substantial loss if evicted together with his family from the suit land. Further that the plaintiff has lived in the suit property for a very long time, grown crops and buried his loved ones on the suit property.
6. On the issue whether the respondent will suffer any prejudice if the application is allowed counsel submitted that the respondent does not stay on the suit land hence will not suffer any prejudice. It was counsel's further submission that the delay in filing the application was due to lack of communication by the plaintiff's previous advocate on record and upon receiving the notice to vacate he moved with speed to file the current application on August 18, 2021 which is 8 months after the judgment was delivered.
7. On the issue of security of costs, counsel submitted that Order 42 rule 7 of the *Civil Procedure Rules* states that the court has discretion of determining what constitutes security for the performance of the decree and that the court can order security upon application by either party or on its own motion.
8. Counsel relied on the case of *Samson Kazungu versus Robert Shume & 3 Others* 2014 eKLR where the court stated that where a decree is in respect to recovery of land, the applicant need not provide security for the performance of the decree, the subject matter in itself can be security enough considering the fact that whoever succeeds in the Court of Appeal will keep the land, land being an immovable asset will always be there to satisfy the decree.

### **Defendants' submissions**

9. The 1<sup>st</sup> and 2<sup>nd</sup> defendants opposed the application and relied on a replying affidavit sworn on August 27, 2021 by Patrick Shujaa Wara, counsel for the defendants. He deposed that the application has not been brought within reasonable time as the plaintiff was served with a notice to show cause why execution should not issue on July 5, 2021 but failed to immediately move the court for stay.
10. On the issue as to whether the applicant has shown sufficient cause, counsel submitted that the applicant has not shown that he has already set in motion the process of appealing against the judgment as no notice of intention to appeal has been exhibited in the application and lastly the applicant has not shown that he has taken any steps to obtain copies of proceedings and the judgment in order to prepare a record of appeal.
11. Mr Shujaa also submitted that the applicant has not satisfactorily explained the delay of 8 months in filing the application as the applicant did not make any follow up with his former advocates so as to know the outcome of the case and just stated that the advocate was uncooperative. Counsel submitted that the delay of 8 months was inordinate hence the application should be dismissed with costs.



## Analysis And Determination

12. The issues for determination in an application for stay of execution pending appeal are as provided for under Order 42 rule 6 of the [Civil Procedure Rules](#). Under this Order, the court must be satisfied that substantial loss may be occasioned if the order of stay is not granted, the application must be made without undue delay and the court may order for security for the performance of such decree or order as may ultimately be binding on the applicant.
13. In the case of [Winfred Nyawira Maina v Peterson Onyiego Gichana](#) [2015] eKLR. Aburili J at paragraph 24 stated that the court considers various factors in exercising its discretion when considering granting stay of execution orders pending appeal under Order 42 rule 6. It stated as follows: -

It is not in doubt that the relief of stay of execution pending appeal under Order 42 rule 6 of the [Civil Procedure Rules](#) is discretionary; except, the discretion of the court should be exercised judicially. See *Shah v Mbogo*. I see the Order uses the phraseology, ie 'may for sufficient cause order stay of execution of such decree or order' which is quite wide in scope; I believe the wide scope allows the court to follow after the constitutional prescription under Article 159 and the overriding objective in the administration of justice in matters falling under Order 42 rule 6 of the [Civil Procedure Rules](#). But as the court takes the preferred wider approach on the application for stay pending appeal, the same law goes ahead to set out certain major considerations in making the decision on whether or not to order a stay; I repeat, this is all to ensure the ever cardinal adage that exercise of discretion of court must be upon defined principles of law; not capriciously; not whimsically. Some of the major prerequisites to ordering a stay of execution are that:

- a. The applicant has filed an appeal;
  - b. The court is satisfied that substantial loss may result to the applicant unless the order is made; and
  - c. That the application has been made without unreasonable delay; and
  - d. 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.
14. The applicant has to meet the threshold for grant of stay of execution as provided for under Order 42 rule 6 of the [Civil Procedure Rules](#). It is on record that the applicant filed this application after 8 months upon delivery of the judgment on November 13, 2020 and the reason given for the delay was that his former lawyer was uncooperative. The applicant has not stated what he means by the lawyer being uncooperative.
  15. There is no mathematical calculation of what undue or inordinate delay means but what is required is a satisfactory explanation of the delay in filing the application. The court will exercise its discretion to determine whether the delay is inordinate upon consideration of the explanation given by the applicant.
  16. In the case of [Mwangi S Kimenyi v Attorney General & another](#) [2014] eKLR the court held that:

There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus



test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. Caution is, however, advised for courts not to take the word “inordinate” in its dictionary meaning, but to apply it in the sense of excessive as compared to normality. Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases.”

17. I find that the explanation by the applicant is unsatisfactory taking into account that the judgment was delivered on November 13, 2020 but the plaintiff filed this application on August 18, 2021. Further that the plaintiff was served with a notice to show cause why execution should not issue on July 5, 2021 but failed to immediately move the court for stay.
18. The applicant wants the court to order a stay pending appeal but he has not shown that he has kick started the process of intended appeal by way of a notice of appeal, request for proceedings, certificate of delay or an application to file an appeal out of time. This evidence was not annexed to the application taking into account that the application was filed 8 months after the delivery of judgment. Courts do not give orders in vain which are not able to be implemented. Will the court give an order of stay pending what then later upon application give orders for leave to file a notice of appeal out of time?
19. In the case of *RWW v EKW* [2019] eKLR, the court explained the purpose of stay of execution pending appeal as follows:-

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter 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 this 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 costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellant with those of the respondent.”
20. The purpose of stay of execution is to preserve the substratum of the case so as the appeal not to be rendered nugatory when it is finally determined. The order of stay is at the discretion of the court which upon analysis of the application balances the rights of both parties and issues a determination in the interest of justice.
21. The most important ingredient that the applicant must establish is that he or she will suffer substantial loss if the order of stay is not granted and that the essence of filing the appeal will be defeated and rendered nugatory.
22. In the case of *Charles Wabome Getbi v Angela Wairimu Getbi* [2008] eKLR the Court of Appeal held that:

It is not enough for the applicants to say that they live or reside on the suit land and that 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.”
23. If courts were to consider residing on the suit land even if illegally so, as an explanation of substantial loss, then it would be automatic for courts to grant stay of execution where parties state that they reside on the suit land. A successful litigant who has gotten orders for eviction of a defendant also has a right to enjoy the fruits of a judgment not a delay on the grounds that a party is residing on the suit land.



Each application for stay of execution where a party is residing on the suit land must be determine on its own merits and the surrounding circumstances. It is not a one size fits all scenario.

24. I have considered the application together with the submissions by counsel, the relevant authorities and find that the applicant has not met the threshold for grant of stay of execution as provided for under Order 42 rule 6 of the *Civil Procedure Rules*. The upshot is that the application is dismissed with costs to the respondents.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 16<sup>TH</sup> DAY OF AUGUST, 2022.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 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.

