



**Kimani v Mwakuriwa & 5 others (Environment & Land Case
373 of 2009) [2022] KEELC 13627 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13627 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 373 OF 2009
LL NAIKUNI, J
SEPTEMBER 29, 2022**

BETWEEN

RICHARD KIMANI PLAINTIFF

AND

SWALEH MOHAMED MWAKURIWA 1ST DEFENDANT

HAMISI AYUBU MWAMJITA 2ND DEFENDANT

HASHIM GOT SAT 3RD DEFENDANT

DR. KAWALJEET SINGH REKHI 4TH DEFENDANT

SHEILA LOVERIDGE 5TH DEFENDANT

THE HON. ATTORNEY GENERAL 6TH DEFENDANT

RULING

I. Introduction

1. On January 31, 2022, the 4th defendant/applicant – M/s Sheila Loverridge herein moved this honorable court through the notice of motion application dated January 28, 2022 for its determination. The 4th defendant/applicant herein brought the said application under the dint of order 42 rule 6 order 51 rule 1 of the *Civil Procedure Rules*, 2010 and sections 1A, 1B & 3A of the *Civil Procedure Act* Cap 21 of the Laws of Kenya.

II. The 4th defendant/applicant's Case

2. The 4th defendant/applicant vide this notice of motion application sought for the following orders:-
 - a. Spent;



- b. That pending the inter - parte and final determination of this application, the execution of the judgment, orders and/ or decree given herein on January 20, 2022 be temporarily stayed.
- c. That pending the hearing and final determination of the intended appeal, the execution of the judgement, orders and/or decree made on January 20, 2022 be stayed.
- d. That costs of this application be provided for.

The said notice of motion is premised on the grounds, testimonial facts and the averments of the fifteen (15) paragraphed supporting affidavit of Sheila Loveridge sworn and dated January 28, 2022 and one (1) annexure marked as "SL-1" annexed thereto.

She deponed being the 4th defendant/applicant hence conversant with the matters giving rise to this case.

She held having bought the suit property in the year 2005 upon conducting adequate, due diligence and confirming that her predecessors, the 5th defendant in title had acquired ownership of it in a lawful manner. She stated that prior to purchasing it, she did everything in the law to ensure that the legality of the title held by the 5th defendant including carrying out searches, visiting the property, instructing surveyors to verify the beacons, cutting down trees and cleaning bushes had been done so that it could be sure that the property was free from claims by third parties.

3. She pointed that immediately after obtaining title to the property, she took possession and constructed her residential/ retirement home together with other facilities and had been in occupation of the property to date. It's her contention that sometimes in the year 2008, the plaintiff claimed ownership of the Suit Property and alleged fraud on the part of the defendant leading to arrest and prosecution of the 1st, 2nd & 3rd defendants. However, upon hearing of the criminal case, judgment was delivered whereby they were all acquitted.
4. The plaintiff filed this civil suit in the year 2009 alleging fraud on the part of the defendants. All the defendants filed their statement of defence denying the said allegations meted against them by the plaintiff. They maintained that the property had been acquired legally and on the contrary it's the plaintiff who had acquired it through irregular or fraudulent means. She reiterated that she believed having obtained her title lawfully.
5. She held that the civil case was heard and judgement delivered on January 20, 2022 whereby unfortunately decided the case in favour of the plaintiff holding that he was the lawful owner of the Suit property.

She asserted that she was fully dissatisfied by the Judgment and wished to prefer and appeal against it. A notice of appeal had already been filed together with a letter requesting for certified and true copies of the proceedings, judgment, orders/ decree.

A copy of the memorandum of appeal was attached marked as "SL-1".

6. The deponent opined and reiterated that she had an active possession/ occupation of the suit property for over sixteen (16) years whereby she had build a residential home and other properties, an investment made through hard earned finances, from her savings and it was the only place her family and her called home for all these years.

Thus, she was apprehensive that if the stay of execution orders were not granted, the plaintiff/ respondent would hasten to evict her and her family by demolishing her home and completely put to waste all her investment hence occasioning substantial loss to her.



She held having timeously and promptly filed this application for stay of execution without any delay, further she was willing to abide by any direction that may be given by this honorable court as a condition to the stay of execution.

III. The Plaintiff's/Respondent's Grounds Of Opposition

7. The learned counsel for the plaintiff/respondent the law firm of Messrs Nyachoti & Co Advocates on March 29th, 2022 while opposing the notice of motion by the defendant/respondent filed a five (5) paragraphed grounds of opposition dated March 28, 2022. The grounds are summarized as follow:-
- a. That the notice of motion application is grossly misconceived, gravely misplaced, fatally and incurably defective, incompetent, frivolous, vexatious and therefore an abuse of the process of this honorable court.
 - b. That the application had not met the pre-requisite for grant of the orders sought under order 42 rule 6 of the *Civil Procedure Rules*, 2010 hence it should be dismissed, in that:-
 - i. The applicant had not offered any security as required by order 42 rule 6 (b) of *Civil Procedure Rules*, 2010.
 - ii. The applicant had not demonstrated any substantial loss in light of the findings of this honorable court in the judgment of this court delivered on January 20, 2022.
 - iii. That the applicant had not filed any appeal or demonstrated any efforts to file the same timeously since judgment was delivered.
 - c. That the applicant had not demonstrated any arguable appeal in view of the court's findings in the judgment of January 20, 2022.
 - d. That there was no counter claim by the applicant challenging the respondent's title known as Land Reference No Kwale/Galu-kinondo/676.
 - e. That the reliefs granted in favour of the plaintiff/respondent in the Judgment of January 20, 2022 were by themselves in the nature of stay of the Judgment in view of the timelines given for execution of the said Judgment.

Hence in view of these, the plaintiff/respondent sought for the notice of motion application by the 4th defendant/applicant be dismissed with costs.

IV. The 4th Defendant's/Applicant's Response To The Plaintiff's/Respondent's Grounds Of Opposition.

8. On April 27, 2022, the 4th defendant/applicant filed a ten (10) paragraphed further affidavit sworn by Sheila Loveridge in response to the issues raised from the grounds of opposition on the issue of security for costs, she referred court to the averment made under paragraph 13 of the supporting affidavit and reiterated her willingness to comply with the direction that would be made by court including depositing security as pre-condition to the stay execution of which the deposit and the amount were the discretion of the court.

She affirmed having filed the notice of appeal and draft memorandum of appeal timeously and the efforts made by her advocate through several correspondences made to have typed and certified copies of the proceedings and decree to enable them file an appeal as the court file had been missing from its usual place of safekeeping.



9. On the substantial loss she was likely to suffer was well demonstrated under the averments of paragraphs 2 to 10 of her supporting affidavit if the order for stay of execution was not granted.

She held that her intended appeal raised serious and arguable grounds and the issue of failure to file a counter claim was one of the key grounds of the intended appeal.

She held that the orders granted in the judgment would only operate until April 20, 2022 when the same could expire.

Further she argued that the plaintiff/respondent never indicated any prejudice he stood to suffer if an order for stay of execution was granted.

V. Submissions

10. On diverse dates of March 8, 2022 and May 19, 2022, while in the presence of all the parties this honorable court directed that the notice of motion application dated January 28th, 2022 be canvassed by way of written submissions. Pursuant to that, all the parties fully complied and the honorable court reserved a date to deliver its ruling accordingly.

A. The 4th defendant's/applicant's Written Submissions

On May 25, 2022, the learned counsel for the 4th defendant/applicant the law firm of Messrs HM Lugongo & Co Advocates filed their Written Submissions dated May 25, 2022. Mr Hamisi advocate submitted that the 4th defendant/applicant would suffer substantial loss of the orders if stay of execution was not granted and hence render the intended appeal nugatory. To support his case he relied on the decisions of "Butt v Rent Restriction Tribunal & HE v SM (2020) eKLR" and "James Wanjala & Anor v Agnes Naliaka Cheseto (2012) eKLR" which was also cited and relied upon by the plaintiff/respondent herein.

Whereupon the purpose of stay of execution was well articulated as being one 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 before the court of appeal if successful is not rendered nugatory. The court is called upon to look at the interests of both parties.

The learned counsel submitted that the 4th defendant/applicant stood to suffer substantial loss if the orders of stay were not granted, in that:-

- a. She had been actively in possession/occupation of the property for sixteen (16) years and has constructed a permanent/ retirement home there with all her savings;
- b. The only place they regarded as a family home;
- c. She feared the plaintiff/respondent would move to execute the decree from the judgment of January 20, 2022 meaning an eviction and demolition of their developed structures on the property.
- d. The execution of the decree by the plaintiff/respondent would mean declaring the intended appeal nugatory. Further, the land registrar would also proceed to cancel the title deed and change it to the names of the plaintiff/respondent.
- e. There would be no prejudice which the plaintiff/respondent would suffer if the stay of execution orders were granted. The plaintiff/respondent alleged having bought it in the year 1979 but did nothing until the year 2009 when he filed this Suit.



The only risk he stood to suffer if the appeal was not successful was the costs of the suit and amount which would be recoverable from the investments put on the suit property by the 4th defendant/applicant.

The plaintiff/respondent had not demonstrated that he had the means to comfortably satisfy the applicant's loss that would be suffered as result of the execution process. on this point of the burden of proof he relied on the Court of Appeal decision of "*National Industrial Credit Bank Limited v Aquinas Francis Wasike & ANor* (2006) eKLR".

11. The learned counsel contention was that the applicant timeously filed a notice of appeal and a draft memorandum of appeal from the time of the delivery of the judgment. He demonstrated that he had been writing a lot of correspondences seeking to be supplied with certified and true copies of the proceedings to this effect.

Additionally, on the security for costs, the learned counsel held that the 4th defendant/applicant was willing to abide by any instructions given by the court such as making a deposit and furnishing security which were the discretion of the court to determine upon ordering stay to ensure the performance of the obligation by the applicant as to costs and to satisfy the decree.

The learned counsel argued that from the given circumstances of the case, the thorough due diligence and no wrong had been specifically attributed to her in the process of purchasing it; the massive investment, the house and swimming pool and being a holder of the title deed were adequate security to the matter and hence waive the requirement for provisions for additional security.

He urged court to consider and allow the application as prayed thereof.

B. The plaintiff's/respondent's written submissions

On May 16, 2022 the learned counsel for the plaintiff/respondent the law firm of Messrs Nyachati & Co Advocates filed their written submissions dated May 13, 2022. Mr Nyachoti advocate submitted for the orders for stay of execution under order 42 rule 6 (2) of *Civil Procedure Rules*, 2010, the test for the High Court set out by Court of Appeal in "*Halai & Anor v Thornton & Turpin* (1963) Limited (1990) eKLR" which held:-

"Firstly the applicant must establish a sufficient cause; secondly the court must be satisfied that sustainable loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security, the application, of course, be made without unreasonable delay".

The learned counsel from these requirement conceded that the application was filed without unreasonable delay.

12. However, he argued that the applicant had totally failed to meet the other fundamental conditions for granting the orders for stay of execution.

In saying so, the learned counsel held firstly the applicant failed to demonstrate it had sufficient causes which are rational, plausible, logical, convincing, reasonable and truthful questions of facts to be proved before court. It is a special circumstance to be proved by the applicant. The 4th defendant/applicant had failed on this test.

Secondly, the learned counsel held that the applicant had not made any attempt at all to demonstrate the substantial loss she may suffer, incur and/or result in the event that decree is executed.



He relied on several cases to support its case being - “*Kenya Shell Limited v Benjamin Karuga Kibiru & Anor* (1986) eKLR *Mochira t/a Mochira & Co Advocates v East African Standard* (2002) eKLR; & *David Kipkoskei Kimel v Titus Barmasai* (2019) eKLR”.

He held that the occupation of the suit property since the year 2005 had been found to be illegal by the judgment January 20, 2022 and that it was not enough for the applicant to merely say that they lived or resided on the suit land hence they would suffer substantial loss. The applicant must go further and show the substantial loss that she stood to suffer if the execution took place.

13. Further, the learned counsel held that the 4th defendant/applicant had not offered any security as required by law. She had merely alluded that she would be willing to abide by any reasonable conditions for security as the court may order. He submitted that this was too general a proposition the burden to furnish security was mandatory.

He argued that the applicant must furnish security which court may then exercise its discretion to ascertain whether the same is sufficient or not before granting an order for stay of execution.

In conclusion, the learned counsel argued that the court should therefore balance the parties’ right to appeal and to be safeguarded from its appeal being rendered nugatory with other party’s right to enjoy the fruits of his judgment. He added that the plaintiff had been kept away from the suit property for over seventeen (17) years hence incurred great loss from his potential investment being a beach property with all sort of business investment available at his disposal. he urged the application to be dismissed with costs.

Vi. Analysis And Determination

14. I have keenly considered thenotice of motionapplication dated January 28, 2022, the supporting affidavit, grounds of opposition, the replying affidavits, the written submissions, the authorities cited, the relevant provisions of the *Constitution of Kenya*, 2010 and statutes herein.

In order to arrive at an informed, fair, reasonable and just decision on this matter, the honorable court has framed the following three (3) salient issues for its determination. These are:-

- a. Whether the 4th defendant/applicant through the filednotice of motionapplication dated January 28, 2022 meets the founded threshold for granting stay of execution as provided for under the provision of order 42 rule 6 (1) of the *Civil Procedure Rules*, 2010;
- b. Whether the 4th defendant/applicant herein is entitled to the relief sought hereof; and
- c. Who will bear the costs of the filed notice of motion application.

Issue No (a) Whether the 4th defendant/applicant through the filed notice of motion application dated January 28, 2022 meets the founded threshold for granting stay of execution as provided for under the provision of order 42 rule 6 (1) of the Civil Procedure Rules, 2010

15. In order for the order for stay to be granted it’s assumed the 4th defendant/applicant herein has already preferred an appeal against the judgement of this honorable court before the Court of Appeal against the judgement of this honorable court. It is based on that fundamental fact that the honorable court, may be in a better position to proceed on to consider the application filed and the reliefs sought herein. Ideally, it is now well established that for one to be granted stay of execution upon the delivery of Judgment and the resultant issuance of a decree under order 42 rule 6 (1) of *Civil Procedure Rules*,



2010. The legal substratum of stay of execution is founded under this provisions of the law. it is entitled - “stay in case of appeal” and hold “inter alia”:-

“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 an 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”.

16. Therefore, based on this provision of the law, it follows that for the court to order a stay of execution, there must four (4) fundamental ingredients to be met to qualify for the said orders. These are:-
- a. There being sufficient cause of action
 - b. There being substantial loss likely to be suffered by the applicant if not granted the orders.
 - c. The application should be made without inordinate and unreasonable delay.
 - d. For the performance of the appeal there should be security for costs to be placed and/or undertaken by the Appellant.

While the provision of order 42 rule (6), (6) of the [Civil Provision Rules](#), 2010 provides:-

“Notwithstanding anything contained in Sub-rule (1) of the rule the High Court shall have power in 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 the sub-ordinate court or tribunal has been complied with.

17. In considering whether to grant the stay of execution and/or temporary injunction, the High Court based on the doctrine of “*Stare Decisis*” relies on settled decisions or precedents and the set out principles under the above provisions of the law. There are plethora of decided cases on the issue of grant of stay of execution pending appeal. For instance, in the Civil Appeal No 107 of 2015 – [Masisi Mwita v Damaris Wanjiku Njeri](#) [2016] eKLR the court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of “Halal & Another v Thornton & Turpin Limited where the Court of Appeal Gicheru JA, Chesoni & Coker AG 1A) held that: “The High Court’s discretion to order stay of execution of its order or Decree is fettered by three (3) conditions namely:- sufficient cause, substantial loss would ensue from a refusal to grant stay the applicant must furnish security, the application may be made without unreasonable delay. In addition the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakolo v Straman EA Ltd [2013] as follows:-

“In addition the appellant must prove that if the orders sought are not granted and his appeal eventually succeeded then the same shall have been rendered nugatory”. These twin principles go hand in hand and failure to prove one dislodges the other.

The court notes with great humility the plaintiff/applicant agrees with it by citing the case of Vishram Rouji Halal v Thrornton & Turpour Civil Appeal No 15 of [1990] KLR 365.



18. To strengthen this legal position further, I also make reference to the case of “*Canvass manufacturers Limited v- Stephen Reuben Korunditu* Civil application No 158 of 1994 [1994] LLR 4853 – where the court held that:-

“Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised”.

It is evident from the above provisions of law that the court has discretion to issue an order of stay of execution. However, the said discretion must be exercised judicially and not capriciously.

While considering all these ingredients the honorable court must always be privy and not far from being informed that the party who succeeded in getting a judgment in his or her favour should not be denied unnecessary from enjoying the fruit of their judgment.

19. As the court also embarks on determination of the 4th defendant/applicant’s application dated 28th January, 2022, in the instant case, it will take into account that it is not the practice of the courts to deprive a successful litigant, in this case the plaintiff/respondent, of the fruits of their litigations from the judgment entered in their favour. Further, the honorable court will take into consideration that the purpose of stay of execution pending appeal is to preserve the subject matter as stated out in the case of *Consolidated Marine v Namprijad An.* Civil Appeal No 93 of 1989 Nairobi where court held that:-

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellants who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.

Issue No (b) Whether the parties the 4th defendant/applicant is entitled to the relief Sought.

20. Under this sub heading, based on the above detailed set out principles, this honorable court will proceed to determine whether the 4th defendant/applicant herein has fully satisfied the required standard for granting of stay orders pending appeal. Firstly, on the whether she may suffer substantial loss. Being aggrieved by the judgement of this court of January 20, 2022, the 4th and 5th defendants/applicants filed two (2) notices of appeal at the Court of Appeal and later on a memorandum of appeal dated January 20, 2022. Ideally, and as indicated herein above, the purpose of an application for stay of execution is with an aim to preserve the subject matter in dispute so that the right of the 4th defendant/applicant is safeguarded. be that as it may, the 4th defendant/applicant’s claim to have actively been in occupation and possession of the suit property for over sixteen (16) years. She claims to have conducted thorough due diligence being official search, engaged surveyors to establish beacons and entered into an agreement with the 5th defendant before thereafter purchasing it. She constructed the permanent house for her residential and retirement purposes, this is where she lived and called home for the past sixteen (16) years with her family. She held that these investment and development was as a result from her hard earned financial earning. Unfortunately, the applicant was not been able to provide any empirical documentary evidence such as photographs or bank statements or receipts used to purchase these materials. suffice to say, for the benefit of doubt the honorable court considers the 4th defendant/applicant is likely to endure some substantial loss if the stay orders are not granted whatsoever.
21. Secondly, the 4th defendant/applicant must satisfy court that thenotice of motionapplication was made without “undue and unreasonable delay”. Undoubtedly, the honorable court confirms and indeed the plaintiff/respondent has conceded that the application was filed without any delay. Evidently, after the delivery of its Judgment on January 20, 2022, within a period of seven (7) days, on January 31,



2022, the 4th defendant/applicant filed its application dated January 28, 2022, which is fairly within a reasonable timeously framework.

22. Thirdly, on the security for costs, I fully concur with the 4th defendant/applicant under order 42 rule 6 (1) of *Civil Procedure Rules*, 2010, the security of cost is not defined as the same is at the discretion of the court. Nonetheless, I reiterate that although the interest of the decree holder has to be safeguarded so that he/she enjoys the fruit of the judgement, the honorable court is also compelled to balance the scale of justice as it needs to ensure that the applicant who has an arguable appeal is not rendered nugatory and hence prejudiced in the long run. All said and done, in the instant case, the 4th defendant/applicant conditionally stated that she is ready to give undertaking as to costs provided the orders sought are granted to wit:-

“Undertake to comply with any of the conditions to be made by this court on security for costs which included furnishing deposit for the security.....”

23. With this, it is sufficient for the 4th defendant/applicant for the performance of its obligation and which the plaintiff/respondent can be compensated with incase the appeal is not successful, the proposition that the plaintiff/respondent may be compensated from the supposedly massive investment on the suit property such as the permanent house and swimming pool although as stated above there is nothing tangible to demonstrate the said investment indeed exists.
24. Hence, the honorable court sees the level of commitment on the part of the 4th defendant/applicant. To apportion the land to the security is convincing as the ownership of the land is the integral part of the dispute hereof. Hence, for this reason, application by the 4th defendant/ applicant is successful hereof.

Issue No (b) Whether the Parties herein are entitled to the relief sought hereof

25. Based on the above detailed analysis from the framed issues this honorable court is of the view that in the interest of justice, equity and the inherent powers vested in this court under the provisions of sections 3 & 13 of the *Environment and Land Act* No 19 of 2011, section 101 of the *Land Registration Act* and section 150 of the *Land Act*, articles 159 (1) & (2) of the *Constitution of Kenya*, 2010.
26. Without belaboring the point, the 4th defendant/applicant is entitled to the orders sought from the filednotice of motionapplication dated 28th January, 2022 under Order 42 Rule 6 (1) of Civil Procedure Rules, 2010.

Issue No (c) Who will bear the costs of the filednotice of motionapplication.

27. It is well established that costs are at the discretion of court. costs mean the award granted to a party at the conclusion of any legal action, process and proceedings in litigation. Under the Provisions of Section 27(1) of *Civil Procedure Rules*, 2010 provides that costs follow the events. Event means the result of the suit. In this case, the 4th defendant/applicant has succeeded in being granted the orders sought. Nonetheless, in the given circumstances, the surrounding facts and inference of the case, it's fair that each party to bear their own costs.

Vii. Conclusion And Disposition

28. Consequently, upon conducting the indepth analysis of the framed issues herein from the filednotice of motionapplication dated January 28, 2022, on preponderance of probability and principles of natural Justice, equity and conscience this honorable court now proceeds to make the following orders:-



- a. That the notice of motion application dated January 28, 2022 be and is hereby allowed subject to the fulfilment of the conditions stipulated herein.
- b. That the 4th defendant/applicant be and is hereby directed to deposit a sum of Kenya shillings five million (Kshs 5,000,000.00) in an interest earning Escrow account of the Law firms of Messrs Nyachoti & Company Advocates and Messers HM Lugongo & Company Advocates within the next thirty (30) days from the date of this ruling as security for costs pending the hearing and final determination of the intended appeal.
- c. That failure to comply with the conditions enshrined in the orders emanating from this ruling the notice of motion application dated January 28, 2022 will automatically stand dismissed.
- d. That each party to bear their own costs.

RULING SIGNED, DELIVERED AT MOMBASA AND DATED ON THIS 29TH DAY OF SEPTEMBER 2022

HON. JUSTICE MR. L.L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:

- a. Mr. Ben - Court Assistant;
- b. M/s. Nyagah Advocate holding brief for Mr. Nyachoti Advocate for the plaintiffs/Respondent;
- c. No appearance for the 1st defendant/Respondent;
- d. No appearance for the 2nd defendant/Respondent;
- e. No appearance for the 3rd defendant/Respondent;
- f. Mr. Hamisi Advocate for the 4th defendant/applicant; and
- g. No appearance for the 5th defendant/Respondent.
- h. No appearance for the 6th defendant/Respondent.

