



REPUBLIC OF KENYA



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**Gichohi v Kimani & 2 others (Environment & Land Case 55 of 2017)
[2022] KEELC 13565 (KLR) (19 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13565 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 55 OF 2017
LN GACHERU, J
OCTOBER 19, 2022**

BETWEEN

ALLAN KAMAU GICHOHI PLAINTIFF

AND

SAMUEL GICHUHI KIMANI 1ST DEFENDANT

ARTHUR KIMANI GICHUHI 2ND DEFENDANT

SAMSON NGAHU GICHUHI 3RD DEFENDANT

RULING

1. Vide a Notice of Motion Application dated March 25, 2022, the Defendants/Applicants have sought for the following orders:
 1. Spent
 2. Spent
 3. That this Court Grants Stay of execution of the Judgment entered on the November 11, 2019, and all consequential orders thereof pending the hearing and determination of the Court of Appeal at Nyeri – Civil Appeal No 34 of 2022.
 4. Costs be in the cause.
2. The Application is premised on the following grounds; -
 - a. That the Applicants received the Respondent’s Application dated November 25, 2021, seeking to proclaim and attach the Applicant’s properties i e Loc 13/Karunge/3179, 13/Karunge/3180 and 13/Karunge/3181 (the suit properties).
 - b. That the process of execution was fundamentally and legally flawed;



- c. That the Applicants stands to suffer substantial and/or irreparable loss and damages not enough to be compensated through damages;
 - d. That there was no inordinate delay in making the current application and the Respondent shall not be unduly prejudiced.
3. The application is supported by the Supporting Affidavit of the Samuel Gichuhi Kimani, the 1st Defendant/Applicant even date, wherein he avers that he has the authority of his Co-Applicants to swear the Affidavit.
 4. He averred that being dissatisfied with the Judgement of this Court, he filed an Appeal at the Court of Appeal at Nyeri being – Civil Appeal No 34 of 2020.
 5. Further that the Applicants changed their advocates from N M Kiriba & Co Advocates to Mwaniki Warima & Co Advocates, and despite the change of advocates being allowed, the Plaintiff/Respondent wrongly served the application dated November 25, 2021, and Hearing Notice to the Defendants/Applicants’ former advocates.
 6. The deponent also averred that the Respondent is in the process of execution of the Judgment through the Application dated November 25, 2021, seeking a warrant of attachment and sale of the suit properties to be issued to Hippo General Merchant Auctioneers. That if the stay orders are not issued, they will suffer irreparable loss and damages. He prays that the application be allowed.
 7. A Memorandum of Appeal filed on March 4, 2020, was annexed to the application stating the Applicants’ Grounds of Appeal namely, that the judge erred in law by proceeding with the suit while the Applicants’ advocates was absent, awarding damages in respect to a non-existent parcel of land and failing to evaluate material placed before the Court and therefore arriving at an erroneous decision. The Applicants urged the Court of Appeal to overturn the Judgment of this Court.
 8. Additionally, the Defendants/Applicants attached a Replying Affidavit dated May 13, 2022, to the Respondent’s application dated November 25, 2021.
 9. The Respondent opposed the application through a Replying Affidavit dated May 17, 2022, wherein he averred that the instant application is a ploy by the Defendants/Applicants to delay him enjoying the fruits of his judgment which was entered in his favour on November 11, 2019. That in the said Judgment, the Court ordered that the Defendants/Applicants pay the Plaintiff/Respondent the principle amount of Kshs 175,000/=, costs and interest.
 10. Further, the Respondent averred that it would be unfair to grant stay of execution in these circumstances where there is a valid judgment, with a Memorandum of Appeal having been filed out of time, which is an abuse of the Court process. He further averred that the Intended Appeal has no chances of success and is clearly an afterthought, and that the Defendants/Applicants have not demonstrated how they will suffer substantial loss if stay is not granted. He urged the Court to dismiss the Instant Application with costs.
 11. The Application was canvassed by way of written submissions.
 12. The Applicants through Mwaniki Warima & Co Advocates filed their written submissions on September 20, 2022. They relied on various authorities which have been duly considered:
 13. Regarding the threshold set for granting of stay of execution orders, the Applicants relied on Order 42 Rule 6(2) of the *Civil Procedure Rules*, which states:
 - (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.
14. In support of Order 42 Rule 6 of the Rules, the Applicants relied on the case of *R W W v E K W* (2019), where it was held that the purpose of a stay application pending appeal is to preserve the subject matter in dispute, so that the rights of the appellant who is exercising the undoubted right to appeal are safeguarded and if the appeal is successful, not to be rendered nugatory. The same was also held in the case of *HE VSSM (2020)* eKLR, which the Applicants relied on too.
15. In relation to the attachment and sale of the suit properties, the Applicants stated that suit properties are the subject matter of an Appeal and hence opines that a stay ought to be granted till the appeal is heard and determined. That in determining whether to grant stay, the Court ought to weigh the consequences of granting stay and not granting stay. The Applicants further submitted that the Court ought to place the parties on equal footing and see where the scales of justice lie. They relied on the case of *Suliman v Amboseli Resort Ltd* (2004) 2KLR 589, where it was held that the Court in exercising its discretion should opt for the lower rather than the high risk of injustice.
16. The issue of equal footing in an appeal was further held by the Court in the case of *Samvir Trustee Ltd v Guardian Bank Ltd Nairobi* (Milimani) HCCC 795 of 1997, where it held as follows:

...at the stage of the application for stay of execution pending appeal, the Court must ensure that parties fight it out on a level playing grounds and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the Court is to ensure the execution of one party's rights should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the Court. Justice requires the Court to give an order of stay within certain conditions.
17. On the issue of security for costs, the Applicants suggested to be allowed to deposit half the decretal amount to the account of the Court. They relied on the case of *Peter Kiria & Eye Group Newspaper & Another* (2017) eKLR, wherein the Court held that insistence of policies that mandate security for the entire decretal amount is likely to stifle possible appeal where the underlying transactions tend to lead to colossal decretal amounts.
18. Lastly on the issue of delay in filing the application for stay, the Applicants submitted that had the Plaintiff/Respondent served the documents to the correct advocates, the Defendants/Applicants would have been aware of the execution and filed this instant application immediately.
19. The Plaintiff/Respondent through Karweru & Co. Advocates filed his written submissions on August 26, 2022, and he relied on the following authorities which have been duly considered:
20. Order 42 Rule 6(2) of the Civil Procedure Rules, which provides for stay of execution pending appeal.
21. On the issue of what amounts to substantial loss in order for stay to be granted, the Respondent relied on the case of *Mukuma v Abuoga* (1988) KLR 645, in which the Court held that:

Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”



22. The Respondent further submitted that the Defendants/Applicants have not demonstrated what substantial loss they stand to suffer should the stay not be granted. On this issue the Respondent relied on the case of *Kenya Shell Ltd v Kibiru* (1986) KLR 410 where Court held that there should be evidence of substantial loss to the Applicant in an application for stay of execution.
23. The Respondent also submitted that the application was made after an inordinate delay as evidenced by the 3-year period between December 2019, when the Judgment was delivered and the Court granted the Applicants 30 days Stay of execution so that the Applicants could file a formal Application which they failed to do, and March 2022, when the present application was made. The Respondent further submitted that the Defendants/Applicants have not given a reasonable explanation for the delay.
24. Lastly, the Respondent submitted that Order 42 of the Rules is couched in mandatory terms which mandates that the Applicant deposit security so as to be granted the stay order.

The issue for determination is;

1. Whether the Defendants/Applicants have met the threshold for granting stay of execution pending appeal?

25. The Court has considered the instant application, the response thereto and the rival written submissions filed by the parties herein to buttress their respective positions. What calls for determination in this matter is the issue for stay of execution by the Applicants pending the hearing and determination of the Appeal which has been filed at the Court of Appeal, in Nyeri.
26. In an Application of this nature, the Courts are guided by Order 42 Rule 6 of the Civil Procedure Rules, which enumerates the principles that should be considered before a Court may grant such stay of execution. It states 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.
27. Courts have further echoed their stand substantially on the issue of stay of execution. In the case of *Halal & Another vs Thornton & Turpin [1963] Ltd* [1990] eKLR, in the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held as follows:

“...thus the superior Court’s discretion is fettered by three conditions. Firstly, the Applicant must 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.



In addition, the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in the case of *Hassan Guyo Wakalo vs Straman EA Ltd* (2013) as follows:

These two principles go hand in hand and failure to prove one dislodges the other.”

(See ELC at Kitale ELC Appeal No 8 of 2021 - *Peter Nakupang Lowar v Nautu Lowar* [2022] eKLR)

28. As was held in the authority cited above, the grant of an order of stay of execution is a discretionary one. However, in exercising it, the Court must act judiciously, within the confines of the law and not capriciously. This Court is guided by the Court of Appeal decision in *COI & Another v Chief Magistrate Ukunda Law Courts & 4 Others* [2018] eKLR. To act judiciously means that the Court considers all facts and the law and then makes a reasoned judgment.
29. In Brian A. Garner (2019). *Black's Law Dictionary*, 11th Edition, Thompson Reuters, MN, the term “judiciously” is defined to mean “to use sound judgment.” What it means is that the Court has to apply its mind to the circumstances of the case and the law as any reasonable (learned) person would do and demonstrate or show it in its determination that it did so.
30. The purpose of an order for stay of execution pending appeal is to preserve the subject matter of the appeal. If the subject is not maintained before the determination of the appeal, then it may render the appeal nugatory or an academic exercise.
31. This Court will echo the decision in the case of *RWW vs EKW* (2019) eKLR, where it was held:

“.....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.”
32. Therefore, the Court should endeavour to balance the interests of both the successful party in litigation so as not to unnecessarily bar the winning party from enjoying the fruits of his judgment and that of the Appellant whose appeal may succeed and be rendered nugatory if stay of execution is not granted.

Have the Applicants herein established sufficient cause?

33. Stay of execution should only be granted where the Applicant has shown sufficient cause. And in determining whether a sufficient cause has been shown, the Court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:
 - (a) The application is brought without undue delay;
 - (b) The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and
 - (c) 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.

(See Antoine Ndiaye Vs. African Virtual University [2015] eKLR.)



On Whether the application was made without unreasonable delay?

34. In the instant case, the ruling was delivered on December 11, 2019, while the application for stay was filed on March 24, 2022. This is a period of over 2 years, 3 months. It is this Court's considered view that there has indeed been a considerable delay. The Defendants/Applicants submitted that their former advocates were served with the application dated November 25, 2021, which sought to attach the suit property, despite having effected a change of advocates which was allowed by the Court. For sure this is not a reasonable or variable explanation for the delay in bringing the application herein for stay of execution.
35. Further this Court has considered the Applicants Memorandum of Appeal filed on March 4, 2020. This was three months after the Judgment was delivered and no proper explanation for the delay has been provided or given by the Applicants herein.
36. In spite of the Defendants/Applicants filing the Memorandum of Appeal with considerable delay and without a viable explanation, and failure to prosecute the Appeal any further, it is only after the Respondent filed the application of attachment of the suit properties on November 25, 2021, that the Applicants were jolted into filing the present application for stay of execution pending appeal on March 25, 2022.
37. Indeed, litigation must come to an end and the Respondent herein should be allowed to enjoy the fruits of his Judgment.

On Whether the Court is satisfied that substantial loss would ensue from a refusal to grant a stay?

38. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The Applicant 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

(See *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR)

39. This Court has perused the Supporting Affidavit of the Defendants/Applicants which states that the Respondent is in the process of execution of the Judgment through the application dated November 25, 2021, seeking a warrant of attachment and sale of the suit properties which warrant is to be issued to Hippo General Merchant Auctioneers. The Defendants/Applicants have stated that if the stay orders are not issued, they will suffer irreparable loss and damages.
40. The Defendants/Applicants have stated that they stand to suffer irreparable loss if stay is not granted and on the other hand, the Plaintiff/Respondent has also waited over two years for the Judgment debt to be paid. The Respondent is yet to enjoy the fruits of his judgment. This Court while balancing these two interests, must satisfy itself that that no party would suffer undue prejudice.



41. This principle was enunciated in the decision of the Court of Appeal in *Absalom Dova vs Tarbo Transporters* [2013] eKLR, where it stated: -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the Court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation...”

42. It is this Court’s considered view that the Plaintiff/Respondent herein has waited long enough to enjoy the fruits of his judgment which was delivered over two years ago which was an award of Kshs.150,000/- being damages for his destroyed crops and developments and general damages for trespass in the sum of Kshs 10,000/-.

43. Therefore, there is no evidence that the Applicants herein will suffer substantial loss.

On whether the Applicants have furnished security?

44. On the issue of security for costs, the Applicants suggested that they be allowed to deposit half the decretal amount to the account of the Court. They relied on the case of *Peter Kiria & Eye Group Newspaper & Another* (2017) eKLR wherein the Court held that insistence of policies that mandate security for the entire decretal amount is likely to stifle possible appeals where the underlying transactions tend to lead to colossal decretal amounts.

45. On this issue of security, the Court has considered several authorities and in the case of *Arun C Sharma vs Ashana Raikundalia T/A/Rairundalia & Co. Advocates & 2 Others* [2014] eKLR, the Court stated:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor...”

46. Furthermore, in *Focin Motorcycle Co Limited Vs. Ann Wambui Wangui & Anor* [2018] eKLR, it was stated that:

“Where the Applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the Respondent the fruits of judgment. My view is that it is sufficient for the Applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security.”

47. From the above decisions, it is clear that the issue of security of costs is discretionary, and it is upon the Court to determine the same (See *Pascal Otieno Amoke v Collins Omondi Omollo* [2022] eKLR).

48. In the present instance, the Defendants/Applicants ought to have proposed to deposit the full decretal amount to the account of the Court, instead of the half that they offered to deposit. As the Court observed in *Gianfranco Manentbi & Another vs Africa Merchant Assurance Company Ltd* [2019] eKLR, thus:-

“... the Applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from



money decree of the lower Court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails. (See *Ena Investment Limited v Benard Ochau Mose & 2 others* [2022] eKLR).

49. Having now carefully considered the instant Notice of Motion Application dated March 25, 2022, and the fact that the Judgement sought to be stayed was delivered on November 11, 2019, the Court finds the said Application is not merited as the Defendants/Applicants have not established the principles for grant of stay of execution.

50. For the above reasons, the said Application is dismissed entirely with costs to the Plaintiff/Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 19TH DAY OF OCTOBER, 2022.

L GACHERU

JUDGE

In the presence of; -

Joel Njonjo - Court Assistant

Plaintiff/Respondent – N/A

M/s Waititu for the Defendants/Applicants

L GACHERU

JUDGE

19/10/2022

