



**Maguta v Mugo (Environment & Land Case E051 of 2022)
[2022] KEELC 13562 (KLR) (18 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13562 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E051 OF 2022**

JG KEMEI, J

OCTOBER 18, 2022

BETWEEN

KIMANI MBUGUA MAGUTA APPELLANT

AND

JULIUS MWANGI MUGO RESPONDENT

RULING

1. Aggrieved with the judgment delivered on May 19, 2022 in Ruiru SPMC MCL&E no of E024 of 2021 where the court ordered his eviction and demolition of structures on parcel known as Ruiru/Township/895, the appellant/applicant filed a Memorandum of Appeal dated June 8, 2022.
2. Additionally, the appellant sought stay of execution of the said judgment pending the hearing and determination of his appeal vide a Notice of Motion dated August 5, 2022 seeking the following orders;
 - a. Spent
 - b. Spent
 - c. This honourable court be pleased to grant a stay of execution of the judgment of the Hon C K Kisiangani, senior resident magistrate delivered on May 19, 2022 pending the hearing and determination of this appeal.
 - d. Costs of this application be in the cause.
3. The motion is based on the grounds on the face of it and the Supporting Affidavit of Kimani Mbugua Maguta, the appellant/applicant.
4. He deponed that the respondent instituted his suit in the trial Court vide a Complaint dated February 23, 2021 which he opposed by filing a defence and counterclaim dated March 30, 2021. That the suit was heard allowing the respondent's claim and dismissing his counterclaim as contained in KMM2 -



copy of the impugned judgment. That the appellant is dissatisfied with the judgment and apprehensive that the respondent may execute it. That if the application is not allowed, the appeal will be rendered nugatory as the suit land may be sold before the determination of his appeal.

5. On September 8, 2022 the respondent sought leave and was granted time to file his Replying Affidavit in opposition to the motion. He did not do so. The application is therefore uncontested.
6. Parties further agreed to prosecute the application by way of submissions; none of them filed.
7. The key issue for determination is whether the application is merited.
8. Order 42 rule 6 of the [Civil Procedure Rules](#) states thus; -

“6. Stay in case of appeal [order 42, rule 6

- (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 sub-rule (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.”

9. In the case of [Butt vs Rent Restriction Tribunal](#) (1982) KLR 417 the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal namely; -
 - a. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - b. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
 - c. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.



- d. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
10. In Civil Appeal no 107 of 2015, *Masisi Mwita vs 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 vs Thornton & Turpin Ltd*, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag JA) held that:-

“The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely; sufficient cause, substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must 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 Wakalo vs Straman EA Ltd* [2013] as follows:-

“In addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory.”

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

11. The court in its analysis of the application is conscious that it is not the main stay of the court to deprive a successful litigant of his fruits of his litigation. Equally the court is consciously appreciative of the purpose of stay of execution which is to preserve the subject matter of litigation so as not to render the appeal nugatory or for lack of a better word an academic exercise. The court has therefore to balance the rights of the parties in arriving at a justiciable end. I am guided by the case of *Consolidated Marine vs Nampijja & Anor* (1989) where the court stated as follows;

“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 appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.”

12. In the case of *Stephen Wanjohi vs Central Glass Industries Limited* HCCC No 6726 of 1991 the court held that

“For the court to order a stay of execution there must be sufficient cause, substantial loss, no unreasonable delay and security for the due performance of the decree and the grant of stay is discretionary.”

13. In this case judgment was delivered on the May 19, 2022 and the appellant moved the court for orders of stay of execution on August 5, 2022, a period of about 3 months.

14. In the case of *Utalii Transport Company Limited & 3 Others vs NIC Bank Limited & Another* [2014] eKLR the court held thus;

“Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to 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. On applying Court's mind on the delay, caution is advised for courts not to take the word 'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality."

15. It has also been held that even one day can be termed as inordinate delay and one year can be construed not to be inordinate delay. See the case of *Vincent Amolo Ambani T/A Fast Track Investment vs National Bank of Kenya Ltd* [2021] eKLR. In the circumstances of this case I find the delay was not inordinate.
16. On substantial loss, it is trite that an applicant must lead evidence to demonstrate the substantial loss that he is likely to suffer if the application is not granted.
17. In the case of *Machira T/A Machira & Company Advocates vs East African Standard* (No 2) 2002 2 KLR the court held that substantial loss must be specified, details or particulars thereof must be given and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the Applicant is likely to suffer substantial injury by letting the other party proceed further.
18. The appellant contended that the suit land may be sold and therefore render his appeal nugatory; the appellant is in occupation having constructed permanent structures; appeal will be rendered nugatory if the orders are not granted; interest of justice that stay of execution is granted.
19. It is evident from the judgment that the orders issued by the court directed the eviction and demolition of the structures on the ground. It is also evident that the appellant is in occupation of the subject property and in my view if stay is not granted there will be nothing to bind the respondent from not evicting the appellant thus rendering the appeal an academic exercise. This court finds that the appellant will certainly suffer loss and his appeal rendered a nullity if the prayers are not granted.
20. On security of costs it is trite that the granting of this order is in the discretion of the court. To provide security for the due performance of the decree this court orders the appellant to provide kshs 100,000/- within 30 days from the date of this ruling.
21. Final orders
 - a. Prayer (c) is granted.
 - b. The appellant is ordered to provide the sum of kshs 100,000/- being security for costs within the next 30 days, which amount is to be deposited in an interest earning account in the joint names of the advocates for the appellant and the respondent.
 - c. The appellant is directed to file and serve his Record of Appeal within the period of 60 days from the date of this ruling.
 - d. In default of (a) and (b) the orders of stay of execution shall lapse with no further orders from this court.
 - e. I make no orders as to costs.
22. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 18TH DAY OF OCTOBER, 2022 VIA MICROSOFT TEAMS.



J G KEMEI

JUDGE

Delivered online in the presence of;

Kinyua for appellant

Ms Irungu HB Ngugi for respondent

Court assistant – Phyllis Mwangi

