



REPUBLIC OF KENYA



KENYA LAW
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**Ngugi v Kamau & another (Environment & Land Case 36 of 2020)
[2022] KEELC 13591 (KLR) (13 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13591 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 36 OF 2020
LN GACHERU, J
OCTOBER 13, 2022**

BETWEEN

SAMUEL NDAMBO NGUGI PLAINTIFF

AND

ANTHONY MUCHINA KAMAU 1ST DEFENDANT

STANLEY KINUTHIA KAMAU 2ND DEFENDANT

RULING

1. Vide a notice of motion application dated July 4, 2022, the 2nd defendant/applicant sought orders as follows;
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 3. That the court be pleased to order stay of execution of the judgement given on June 23, 2022, in Murang'a ELC Case No 36 of 2020, the decree and all consequential orders therein, pending hearing and determination of the appeal pending in the Court of Appeal.
 4. That the costs of this application be provided for.
2. The application is premised on ground set out on the face of the said application and on the supporting affidavit of the 2nd defendant/applicant Stanley Kinuthia Kamau sworn on July 4, 2022.
3. It is the applicant's disposition that this court gave judgement in favour of the plaintiff/respondent on June 23, 2022, and ordered cancellation of the title. That the applicant has lodged an appeal by filing a notice of appeal and he has also applied for copies of typed proceedings and paid for the same. That he has fully developed the suit property and there is a commercial building that is occupied by tenants



- and businesses. That the court found that he was a bonafide purchaser for value of the suit property without notice of defect in title.
- 4 Further that he took possession of the suit property in good faith and on reliance on earlier court order that the property was properly included in the succession cause and also guided by the records issued by the county government. That the plaintiff/respondent is now threatening to forward the judgment to the county government to have his title deed cancelled. That the plaintiff/respondent is also threatening to evict his tenants at any time. That he will suffer substantial loss if the suit property is demolished and tenants evicted. That the said loss will be irreparable and cannot be compensated by way of damages. That he has an arguable appeal with overwhelming chances of success. That unless the orders sought herein are granted, his appeal will be rendered nugatory and that he was willing to furnish the court with any such security as may be ordered.
- 5 In addition, the 2nd defendant/applicant depones that the plaintiff/respondent will be reaping where he has not sown if he took the building, which he has constructed without compensating him. That the plaintiff/respondent will suffer no prejudice if the orders sought are granted and that it is in the interest of justice to allow the 2nd defendant/applicant's application as prayed.
- 6 The application is opposed by the plaintiff/respondent via the replying affidavit of Samuel Ndambo Ngugi, sworn on July 15, 2022. It is the plaintiff/respondent's disposition that the judgement having been entered in favour of the plaintiff and the heirs of his three brothers, he was entitled to enjoy the fruits of that judgment. That the 2nd defendant/applicant has not developed the suit property as alleged, as it was already developed and all that he did was to put up a wall on one side of the property and to renovate the building including putting shelves. That the applicant being a bonafide purchaser for value had the option of claiming from the 1st defendant who sold the suit land to him. That allowing the applicant's application would amount to legalization of the fraud found to have been committed.
- 7 Further, it is the plaintiff/respondent's disposition that in the alternative, the applicant should be ordered to deposit Kshs 200,000/= per month as rent to the plaintiff/respondent, pending hearing and determination of the alleged appeal. That in the 2nd alternative, the applicant should be ordered to deposit a total sum of Kshs 4,950,000/= as security in a Joint Interest earning account opened in the names of both the applicant and respondent herein. That the appeal has no chances of success and if it has, the 2nd defendant/applicant's loss can be compensated by way of damages. In conclusion, that the application is misconceived and an abuse of the court process and should therefore be dismissed with costs.
- 8 The applicant responded further to the respondent's allegations via a supplementary affidavit sworn by himself on July 27, 2022, and reiterated his dispositions in the supporting affidavit attached to the application.
- 9 The instant application was canvassed by way of written submissions.
- 10 The applicant filed his written submissions dated August 8, 2022, through the law firm of Gatitu Wang'oo and Co Advocates. It is the applicant's submissions that the principles for stay of execution pending appeal at the High Court are well settled and are enumerated in order 42 rule 6(2) of the Civil Procedure Rules, 2010.
- 11 That the applicant's application satisfies the principles set out in order 42 aforementioned. The applicant further submitted that the instant application has been brought without unreasonable delay and the applicant is ready and willing to provide security. Further that he stands to suffer irreparable harm if the instant application is not allowed. He relied on the case of *Magdalene Wanjiku Ndungu v Jane Njoki Njuguna* (2020) eKLR, where the court's stated that the court's discretion to grant stay of



execution are fettered by three conditions being sufficient cause, substantial loss, that the application must be made without unreasonable delay, and that the applicant needs to prove that if the application is not granted, the appeal will be rendered nugatory.

12 Based on the foregoing, the 2nd defendant/applicant urged this court to allow this application as prayed with costs to the applicant.

13 The plaintiff/respondent on the other hand filed his written submissions dated August 2, 2022, through the law firm of Gori, Ombongi, & Company Advocates. The plaintiff/respondent reiterated his disposition in his replying affidavit of July 15, 2022, and relied on the provisions of order 42 (6) (2) of the [Civil Procedure Rules 2010](#).

14 The plaintiff/respondent further submitted that the 2nd defendant/applicant has failed to demonstrate to this court that he has sufficient cause to warrant grant of stay of execution. He relied on the case of [Jason Ngumba Kagu & 2 others v Intra Africa Assurance Co Limited](#) [2014] eKLR, where the court in discussing substantial loss stated;

The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under order 42 rule 6 of the Civil Procedure Rules. The court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the respondent to the fruits of his judgment and the right of the applicant on the prospects of his appeal. ...”

15 It is the plaintiff’s/respondent’s further submissions that the right of the respondent to enjoy the fruits of his judgment far out ways that of the 2nd defendant/applicant who is enjoying property sold to him through fraud and his prospects of appeal are minimal. The plaintiff/respondent urges this court to dismiss the instant application with costs because the applicant has failed to demonstrate the requisite principles for grant of stay of execution.

16 This court has considered the pleadings filed in relation to the instant application, the evidence attached therein, the rival written submissions and the relevant provisions of the law and finds that the main issue for determination is whether the instant application is merited.

17 The plaintiff/respondent filed the instant suit via a plaint dated October 19, 2020. The pleadings in response thereto were filed and the matter was heard on merit. On June 23, 2022, this court delivered its judgment in favor of the plaintiff against the defendants jointly and severally.

18 It is the said judgment that is the foundation of the instant application which as above stated was filed on July 5, 2022, seeking stay of execution of the judgment of this court pending appeal.

19 Having highlighted the foregoing, this court will move to determine the main issue arising herein; to wit whether the application meets the threshold for grant of stay of execution pending appeal.

20 The law on stay of execution pending appeal is laid down in order 42 rule 6 of the [Civil Procedure Rules](#). It is trite that no appeal can operate as stay, hence an application for stay shall be made to court by the desiring parties. The principles for granting of stay are well laid down in said order 42 rule 6(ii) which provides:

ii. 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

21 In application No 5 of 2014; - *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others* [2014] eKLR, the Supreme Court while determining an issue of stay held:

“Before a court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the court that:

- (i) the appeal or intended appeal is arguable and not frivolous; and that
- (ii) Unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

(88) These principles continue to hold sway not only at the lower courts, but in this court as well. However, in the context of the *Constitution* of Kenya, 2010, a third condition may be added, namely:

- (iii) That it is in the public interest that the order of stay be granted”

Basing our minds on the foregoing, the applicant must demonstrate that:

- i. The application has been made without unreasonable delay
- ii. She will suffer substantial loss
- iii. The appeal is not frivolous
- iv. The appeal will be rendered nugatory

22 The impugned judgment was delivered on the June 23, 2022, while the instant application was filed on the July 5, 2022. Notably, the 2nd defendant/applicant also filed a notice of appeal on July 5, 2022.

23 Once a court issues orders, there is always an existing uncertainty as to what time execution can issue as a result therefore, an aggrieved party is required to take immediate action to avoid execution by staying the orders of court. Borrowing from the case of, *Utalii Transport Company Limited & 3 others v Nic Bank Limited & another* [2014] eKLR, the court in considering what amounted to inordinate delay had this to say;

“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”

24 This court associates itself fully with the above holding. the 2nd defendant/applicant filed the application 12 days after the Judgment was delivered. While delay even for a day can be delay, this court finds and holds that the applicant is not guilty of any unreasonable delay.



- 25 On the second limb of substantial loss, the court in the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR, held that;

Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money”

- 26 Substantial loss was defined by the court in *Tropical Commodities Suppliers Ltd and Others v International Credit Bank Limited (in liquidation)* (2004) EA LR 331 to mean

Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”

- 27 To establish the loss, this court has to interrogate the evidence presented by the applicant. The courts have however held that the process of execution does not amount to substantial loss. This was so held in the case of *James Wangalwa & another v Agnes Naliaka Cheseto* (2012) eKLR where the court observed as follows:

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, that does not amount to substantial loss under order 42 rule 6 of the Civil Procedure Rules. This is 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”.

- 28 In *Machira T/A Machira & Co Advocates v East African Standard* (2002) 2 KLR 63 Kuloba J (as he then was) stated that:

In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must provide specific details and particulars. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay”.

- 29 The impugned judgment was delivered in favour of the plaintiff and had the effect of cancelling the 2nd defendant’s title and registering the suit land in the name of the plaintiff. This court notes that while the 2nd defendant/applicant herein has a right of appeal, the plaintiff/respondent has an equal and corresponding right to enjoy the fruits of the judgment delivered in his favour. This court therefore has to balance the right of the applicant to appeal and that of the successful litigant to enjoy the fruits of his judgment as was held in the case of *Machira T/A Machira & Co Advocates v East African Standard (No 2)* [2002] KLR 63 it was held that:

to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the



court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

- 30 The applicant avers that he has fully developed the suit property with a commercial building that is occupied by tenants and businesses. That the court found him to be a bonafide purchaser for value and he will suffer substantial loss if the suit property is demolished, vandalized and/or or the tenants are evicted.
- 31 The plaintiff/respondent on the other hand avers that the applicant did not develop the property and that the suit property was already developed and the applicant only made some renovations and developments on it.
- 32 In support of his allegation for substantial loss, the applicant herein has produced a valuation report for the suit land. Further, the applicant avers that the plaintiff/respondent is threatening to forward the judgment to the county government to cancel his registration as the owner of the suit land. That the plaintiff/respondent is also threatening to evict his tenants.
- 33 Save for deponing that there is a threat of eviction and demolition of his building and /or investment, the 2nd defendant/applicant did not file in this court any evidence to buttress his claim. Therefore, it is not enough to suggest that the applicant will suffer loss as this court has to be furnished with evidence as to the loss that will be suffered and the injury that will occasion to the applicant. The court in *Samvir Trustees Limited v Guardian Bank Limited* [2007] eKLR, held:
- It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value, but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss”.
- 34 It cannot be gainsaid that the applicant presented no evidence in support of his claim for substantial loss, in any case, it has been contended that the applicant is not the one who constructed the building on the suit land.
- 35 The court notes that while the allegations by the plaintiff/respondent have been rebutted by the applicant, the applicant too failed to produce any evidence to substantiate his claim. Further, this court has perused the court record and notes that there is nothing in there that shows that the plaintiff/respondent has begun the execution process against the applicant herein.
- 36 This court does not see what it ought to prevent, the mere assertion of substantial loss without substantiating cannot be the reason that this court will infer substantial loss. If the subject matter of the suit was at risk, this court would have been otherwise persuaded. To this end, this court finds and holds that the 2nd defendant/applicant has not demonstrated the substantial loss he will suffer.
- 37 On whether the appeal will be rendered nugatory, this court appreciates that preserving the subject matter of the intended appeal is important. The onus is on the applicant to demonstrate that the appeal will be rendered nugatory. The case of *Shah Munge & Partners Ltd v National Social Security Fund Board of Trustees & 3 others* [2018] eKLR, the Court of Appeal when considering whether to allow an application for injunction and stay pending appeal looked at the definition of “nugatory” as was defined in reliance *Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232 where the court opined that nugatory has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling, essentially one which is of little or no legal consequence.



- 38 Based on the foregoing, 2nd defendant/the applicant is by law mandated to demonstrate how the success of the appeal will have no significance since the substratum of the appeal will be interfered with or lost. There is no such evidence as to an attempted execution by the plaintiff/respondent. In *James Wangalwa & another v Agnes Naliaka Cheseto*{2012}, the court found that substantial loss is what has to be prevented by preserving the status quo because such loss would render an appeal nugatory.
- 39 Apart from filing the notice of appeal, the applicant has not presented before this court any memorandum of appeal to show that there is a live appeal. This court is alive to the provisions of the *Court of Appeal Practice Directions* and specifically rule 82 of the said rules which require that an appeal is instituted by filing of memorandum of appeal and record of appeal. Additionally, rule 83, provides that a party who does not file an appeal within the stipulated time after filing notice of appeal is deemed to have withdrawn the notice of appeal. That being the law and practice within the apex court, this court is not well guided whether there is an appeal that is actively before the said court.
- 40 On security for costs, the purpose of it is to ensure due performance of the decree. The applicant averred that he is ready to deposit such security as may be advised by court. Having failed to satisfy the foregoing conditions, a grant for security of costs will be of no legal effect and this court shall not grant. Justice Kuloba R (as he then) was in *Machira T/A Machira & Co Advocates v East African Standard (No 2)* [2002] KLR 63, when dismissing an application for stay had this to say

This means that in whatever we do in the civil courts, we must, so far as is practicable, ensure that the parties fight it out on level ground on equal footing, attempt to minimize and save costs, ensure expeditious and fair disposal of the case in hand, allotting to every case an appropriate share of judicial resources as account is taken of the need to allot those resources to other cases, and the way a case is dealt with must be proportionate to (a) the amount of money involved, (b) the importance of the case, (c) the complexity of the issues, and (d) the financial position of the respective parties. In the exercise of any power under any rule, or in its interpretation, we must strive to give effect to this overriding objective; and it is the duty of the parties to help the court in the furtherance of the overriding objective to yield justice and fairness”.

- 41 The court could not agree anymore with the learned judge. the applicant’s conduct towards the process of doing justice is against the spirit of overriding objectives on the just and expeditious disposal of matters. To this end, the applicant has not met the requisite principles for grant of orders of stay of execution as such, the instant application is unmerited.
- 42 Having now carefully considered the instant notice of motion application by the 2nd defendant/ applicant, the court finds that all the elements necessary for grant of stay execution pending appeal, have not been met. This court further finds and holds that the said notice of motion application dated July 4, 2022, is not merited and the same is dismissed entirely with costs to the plaintiff/respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 13TH DAY OF OCTOBER, 2022.

L. GACHERU

JUDGE

Delivered virtually in the presence of; -

Joel Njonjo – Court Assistant



Plaintiff/Applicant- Absent

1st Defendant –N/A

Mr Gatitu Wang’oo for the 2nd Defendant/Applicant

L. GACHERU

JUDGE

13/10/2022

