



**Nderi (Suing as the Attorney for and on behalf of John Mburu Karanja) v Wahome & 3 others
(Environment & Land Case 138 of 2010) [2022] KEELC 13397 (KLR) (6 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13397 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 138 OF 2010
OA ANGOTE, J
OCTOBER 6, 2022**

BETWEEN

**ALOIS IRIGA NDERI (SUING AS THE ATTORNEY FOR AND ON BEHALF OF
JOHN MBURU KARANJA) PLAINTIFF**

AND

**SAMUEL WANJOHI WAHOME 1ST DEFENDANT
ANASTASIA KIMEU MUTHIKE 2ND DEFENDANT
MICHAEL WAWERU MBUGUA 3RD DEFENDANT
CONTINENTAL DEVELOPERS LIMITED 4TH DEFENDANT**

RULING

1. The 3rd Defendant's Notice of Motion application dated November 3, 2021 is before this Court for determination. In the application, the Applicant, has sought for the following orders:
 - a. That this court be pleased to issue an order of temporary stay of execution pending final determination of the appeal filed herein.
 - b. That the Officer In-charge Donholm Police Station does supervise the enforcement of the orders herein.
 - c. That the costs of this application be provided for.
2. This application is based on the grounds on the face of it and the supporting affidavit of the applicant, Anastacia Kimeu Muthike, sworn on November 3, 2021. The Applicant deponed that being dissatisfied with this court's judgement, which was pronounced on September 23, 2021, has preferred an appeal at the Court of Appeal and that this matter involves a plot which she bought from the 2nd Defendant for value without knowledge of the defect in title if any.



3. The 3rd Defendant/Applicant deponed that she is apprehensive that the Plaintiff/ Respondent may move to execute the Judgment which shall render the appeal nugatory or just an academic exercise and that she has a good appeal with a high probability of success evident from the Memorandum of Appeal.
4. The 4th Defendant/Respondent opposed the Applicant's motion *vide* Grounds of Opposition dated November 22, 2021. He deponed that the application is incurably defective as it does not state what is sought to be stayed in execution and that the Applicant has not demonstrated or shown any form of execution by the Decree holder/ Plaintiff.
5. The 4th Defendant averred that even if the plaintiff were to execute the decree herein, the subject matter in the house is a fixed asset/house which cannot be moved and that if the 3rd Defendant's appeal is successful, the execution can be reversed or compensation made for any loss suffered.
6. The 4th Defendant further argued that the applicant's intended appeal has no chances of success since she did not defend her claim to the suit property by filing a defence and that she did not demonstrate how she acquired the suit property.
7. In his replying affidavit dated February 18, 2022, the plaintiff, opposed the application and deponed that the application is malafides and an abuse of the court process as their assertion that the plaintiff has allegedly blocked the road passage leading to the suit property is false and that the application further lacked merit as the applicant failed to tender sufficient reason for this court to interfere with the execution of the decree issued on October 12, 2021.
8. The plaintiff deponed that the applicant is seeking to pitch an appeal for the sake of it, despite being aware of the fatal omission that she did not file any defence and that the 3rd defendant failed to produce documentary evidence to support her claim of having acquired the suit property for valuable consideration.
9. The plaintiff averred that he discharged his burden of proof to the required standard, having demonstrated ownership through tangible evidence and that he would suffer undue prejudice and curtailment of his right to his fruits of justice if the judgement herein is stayed.
10. It was argued that the Applicant has failed to disclose the nature of substantial loss she is likely to suffer if the orders of stay of execution sought herein are not granted. The Plaintiff further argued that the Applicant has failed to show how her intended appeal is likely to be rendered nugatory should execution proceed.
11. He argued that the Plaintiff, as the successful litigant, ought to be allowed to enforce its fruits of judgement, noting that the title held by the 3rd Defendant has already been cancelled in partial execution of the Decree issued by this Court.
12. The 4th Defendant averred that the suit property now devolves in the name of the 4th Defendant and that the Plaintiff is willing to give an undertaking not to proceed with the transfer of the suit property, subject to this Court making an order that the Plaintiff be allowed to collect the rental income derived from the suit property. The Applicant and the Respondents canvassed their case by way of written submissions which I have considered.

Analysis and Findings

13. The issue for determination before this court is whether this court should restrain the Plaintiff from executing the judgement and decree in this case pending the 3rd Defendant's/Applicant's Appeal.



14. A brief history of this matter is that the Plaintiff filed this case on the basis that the 1st Defendant obtained a certificate of lease fraudulently and did not pass a good title to the 2nd and 3rd Defendants. The Plaintiff consequently sought for orders of injunction restraining the Defendants from dealing with the suit property, Nairobi/ Block 82/1910 Tena Estate.
15. The Plaintiff also sought for an order that the purported sale by the 2nd Defendant to the 3rd Defendant be set aside, reversal of the entries made in the land register, cancellation of the 3rd Defendant's Certificate of Lease and an order of mandamus compelling the 3rd Defendant to deliver vacant possession of the suit property.
16. It was the 3rd Defendant's case that she purchased the suit property from the 2nd Defendant upon conducting a search, for the consideration of Kshs. 1,600,000 and the property was thereafter transferred to her and she obtained a Certificate of Lease.
17. After hearing the case, the court entered judgement for the Plaintiff against the 1st, 2nd and 3rd Defendants and granted the sought orders of a permanent injunction against the Defendants from dealing with the suit property, setting aside the sale of the land to the 3rd Defendant, reversal of the relevant entries in the land register, cancellation of the 3rd Defendant's Certificate of Lease and an order of *mandamus* compelling the 3rd Defendant to deliver vacant possession of the suit property.
18. The 3rd Defendant/Applicant is seeking for a temporary order of stay of execution pending the determination of the appeal as well as costs of this application. The Plaintiff and the 4th Defendant have opposed the application on the grounds that the Appellant's appeal is likely to fail having not filed a Defence.
19. The law governing the grant of stay of execution pending appeal is Order 42 Rule 6 (1) and (2) of the [Civil Procedure Rules](#) which 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 appeal case of 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.”
20. It is trite law that the grant of orders of stay of execution is subject to the court's discretion, the court being guided in this regard by the provisions of Order 42 rule 6 of the [Civil Procedure Rules](#). This



Court is also guided by the decision of the Court of Appeal in [Butt vs Rent Restriction Tribunal](#) [1982] KLR 417 where it extensively discussed the question of how the court should exercise this discretion:

- “1. 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.
2. The general principle 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.
3. 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.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4(2)(b) of the [Civil Procedure Rules](#), can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

21. In the case of [Halai & Another vs Thornton & Turpin \(1963\) Ltd](#) [1990] eKLR the Court of Appeal held, *inter-alia*, as follows:

“The Superior Court’s discretion to order a stay of execution of its order or decree 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.”

22. In considering whether the Applicant will suffer substantial loss unless an order of stay of execution is granted, the court is guided by the decision of the Court of Appeal in [Kenya Shell Limited vs Benjamin Karuga Kibiru & another](#) [1986] eKLR in which the court stated as follows:

“It is usually a good rule to see if Order 41 Rule 4 of the [Civil Procedure Rules](#) can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an Appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

23. The court in [James Wangalwa & Another vs Agnes Naliaka Cheseto](#) [2012] eKLR canvassed what substantial loss entails in detail 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, 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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma vs Abuoga* quoted above.”

24. It is apparent that the application of stay of execution pending appeal was filed without unreasonable delay. While the judgement against which an appeal is sought was delivered on September 23, 2021, this application was filed on November 3, 2021.
25. The court entered judgement for the Plaintiff against the 1st, 2nd and 3rd Defendants and granted the sought orders in the Plaintiff for a permanent injunction against the Defendants from dealing with the suit property, set aside the sale of the land to the 3rd Defendant, reversed the relevant entries in the land register, cancelled the 3rd Defendant’s Certificate of Lease and ordered the 3rd Defendant to deliver vacant possession of the suit property.
26. These orders have a far reaching effect in terms of the status of the suit property and the fact that the 3rd Defendant will be rendered homeless in the event that he is evicted from the suit property in execution of the Decree. That being the case, the court finds that the 3rd Defendant will suffer substantial loss unless the Decree is stayed.
27. Considering that the suit land will be there even after the Appeal has been heard and determined, an order for security for the due performance of the decree is not necessary.
28. For the reasons I have given above, I allow the application dated November 3, 2021 as follows:
 - a. An order of stay of execution pending the final determination of the appeal is hereby granted.
 - b. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 6TH DAY OF OCTOBER, 2022.

O. A. Angote

Judge

In the presence of;

Mr. Gikaria for Plaintiff

Mr. Kimondo for 4th Defendant

Court Assistant - June

