



REPUBLIC OF KENYA



KENYA LAW
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**Kimani v Ruiru (Environment and Land Appeal E006 of 2022)
[2022] KEELC 15083 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15083 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL E006 OF 2022**

YM ANGIMA, J

NOVEMBER 24, 2022

BETWEEN

SAMAUUEL MWANGI KIMANI APPELLANT

AND

MIRIAM NJOKI RUIRU RESPONDENT

RULING

A. applicant's application

1. By a notice of motion dated March 28, 2022 expressed to be based upon sections 1A, 1B, 3A and 6 of the *Civil Procedure Act* (cap 21), order 42 rule 6 and order 51 rule 1 of the *Civil Procedure Rules, 2010* (the Rules) the appellant sought a stay of execution of the judgment and decree of the trial court in Engineer MC ELC case No 013 of 2021 dated February 28, 2022 pending the hearing and determination of the pending appeal.
2. The said motion was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the appellant on March 28, 2022. The appellant contended that unless a stay was granted he stood to suffer substantial loss and that the pending appeal stood the risk of being rendered nugatory. He did not, however disclose the nature of the substantial loss he apprehended he might suffer and he did not disclose the nature of the decree passed by the trial court.

B. The Respondent's Response

3. The respondent filed a replying affidavit sworn on April 26, 2022 in opposition to the application on several grounds. First, it was contended that the application was frivolous, scandalous and vexatious. Second, that it was an afterthought which was merely intended to deny him enjoyment of the fruits of his judgment. Third, that the intended appeal had no chances of success. Fourth, that the application was a waste of judicial time hence the same should be disallowed. Finally, the respondent prayed that



the appellant should be ordered to pay her 50% of the decretal amount whereas the balance of 50% should be deposited in an escrow account in the names of the parties' advocates.

C. The Appellant's Rejoinder

4. The appellant filed a supplementary affidavit sworn on May 2, 2022 in response to the replying affidavit. He denied all the allegations in the replying affidavit and contended that his appeal raised triable issues. He contended that the decretal amount was colossal hence he should not be ordered to pay a portion thereof to the respondent nor to deposit the same into an escrow account as sought by the respondent. He reiterated that he stood to suffer substantial loss in the absence of a stay and prayed that his application should be allowed.

D. Directions on Submissions

5. When the application was listed for inter partes hearing it was directed that the same be canvassed through written submissions. The parties were granted timelines within which to file and exchange their respective submissions. The record, however, shows that none of the parties had filed submissions by the time of preparation of the ruling.

E. The Issue for Determination

6. The court has perused the notice of motion dated March 28, 2022, the replying affidavit in opposition thereto as well as the supplementary affidavit. The court is of the opinion that the main question for determination herein is whether the appellant has satisfied the requirements for the grant of a stay pending appeal.

F. Analysis and Determination

7. It is evident from the material on record that although the appellant contended that he stood to suffer substantial loss in the absence of a stay, there was no demonstration of what loss he stood to suffer. He did not disclose the nature of the decree and the manner it shall affect him in the absence of a stay. Nevertheless, it emerged from the respondent's replying affidavit that the decree was a money decree. The appellant further indicated in his supplementary affidavit that it was so even though he did not disclose the figure of the amount. He only claimed that it was a 'colossal' amount and left the rest to the imagination of the court.
8. The principles to be considered in granting or refusing an application for stay are set out in order 42 rule 6(2) of the *Rules* as follows:
 - (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."
9. In the case of *Butt v Rent Restriction Tribunal [1979] eKLR* the Court of Appeal made the following observations with respect to such an application:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise discretion in a



way so as not to prevent the appeal, if successful from being nugatory, per Brett LJ in *Wilson v Church (No2) 12 Ch D [1879] 454* at P 459. In the same case, Cotton LJ at P 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory.”

10. The court is further aware that in the case of *Kenya Shell Limited v Benjamin Karuga & Another [1986] eKLR* it was held by the Court of Appeal that a stay of execution of a decree ought not to be granted unless the applicant has demonstrated substantial loss. It was held, inter alia, that:

“It is usually a good rule to see if order XLI 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 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.”

11. The court is not satisfied that the appellant has demonstrated substantial loss within the meaning of order 42 rule 6(2) of the *Rules*. He did not disclose how much he was directed to pay the respondent and he did not file an affidavit of means to demonstrate that he could not afford to pay the decretal amount without getting financially crippled.
12. There is also no material on record to demonstrate that the pending appeal shall be rendered nugatory if the decretal amount is paid. There is no evidence on record, or even an allegation, to the effect that once the decretal amount is paid then the respondent shall be unable to refund the amount in the event that the pending appeal is successful. Accordingly, the court finds and holds that the appellant has not satisfied the key requirement of substantial loss as required by the *Rules*.
13. The court has further noted that the appellant has not offered any security for due performance of the decree which may ultimately be binding upon him. In fact, he resisted the respondent’s suggestion that he should deposit 50% of the decretal amount in an escrow account in the joint names of the parties’ advocates. The appellant was certainly not acting in good faith by failing to provide any security for due performance of the decree should his appeal ultimately fail.

G. Conclusion and Disposal order

14. The upshot of the foregoing is that the court finds no merit in the appellant’s application for stay of execution pending appeal. Accordingly, the court makes the following orders for disposal of the application:
- a. The appellant’s notice of motion dated March 28, 2022 is hereby dismissed.
 - b. Costs of the application shall be costs in the appeal.
 - c. The matter shall be mentioned on February 6, 2023 to confirm the filing of the record of appeal.

It is so ordered.

RULING DATED AND SIGNED AT NYAHURURU THIS 24TH DAY OF NOVEMBER, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

N/A for the appellant



N/A for the respondent

C/A - Carol

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Y M ANGIMA

JUDGE

