



**Justino v Wangare (Environment and Land Appeal 16 of 2021)
[2022] KEELC 15104 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15104 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL 16 OF 2021
A KANIARU, J
NOVEMBER 23, 2022**

BETWEEN

MARKO NJAGI JUSTINO APPLICANT

AND

HELLEN WANGARE RESPONDENT

RULING

1. The application before me for determination is a notice of motion dated February 4, 2022 and filed on February 14, 2022. It is expressed to be brought under order 22 rule 22, order 42 rule 6 of [Civil Procedure Rules](#), sections 1A & 1B of [Civil Procedure Act](#) and all other enabling provisions. The applicant – Marko Njagi Justino – is the appellant in the appeal and was the defendant in the lower court suit while the respondent – Hellen Wangare – is the respondent in the appeal and was the plaintiff in the lower court suit.

Application

2. The motion came with four (4) prayers but prayers 1 and 2 are moot. The prayers for consideration are therefore two (2) _ prayers 3 and 4 _ and they are as follows:

Prayer 3: That this honourable court do order stay of execution of the decree made on October 5, 2021 pending the hearing and final determination of the applicant's appeal.

Prayer 4: That the costs of this application be provided for.

3. The application is premised on grounds, inter alia, that the applicant is in possession of land parcel No Kagaari/Weru/3294 which he is stated to have extensively developed for many years. It was deposed that the appeal has high chances of success; that if stay is not granted the appeal would be rendered nugatory and the applicant will suffer irreparable damage; and finally that the applicant was willing and ready to abide with such reasonable conditions that the court may order.



4. In a supporting affidavit sworn by the applicant, he averred that he is the registered owner of the suit parcel of land Kagaari/Weru/3294 which land he claimed to have bought from Samuel Kavanda Kamau the respondent's husband, who is now deceased. It was his assertion that prior to his demise they had done all relevant processes and he had obtained title to his land and occupied it. He deposed that the respondent had filed a suit against him and that judgment had been rendered in the respondent's favour and being aggrieved, he preferred the present appeal.
5. He deposed that the respondent had already made attempts to harvest his farm produce and whilst he had filed an application to seek for stay of execution at Runyenjes, he was informed that the file had already been transferred to this court. In that regard, he filed the present application which he urges the court to allow, lest the appeal be rendered nugatory. He further reiterated that he has exclusive use of the suit parcel of land and the respondent would therefore not suffer any prejudice if the application is allowed.

Response

6. The respondent made a response in reply to the application dated March 7, 2022. She acknowledged that her husband had sold land to the applicant but stated that the portion sold was 1 ½ acres and not 2 acres as alleged by the applicant. She deposed that the applicant had entered into the suit land immediately before her husband's death and encroached into her husband's land LR Kaagari/Weru/3293 by ½ an acre. She further accused the applicant of relocating the boundary of the two parcels of land Kaagari/Weru/3293 and Kaagari/Weru/3294 and further harvesting mangoes which her late husband had planted. She contended that the appeal had been filed out of time and stated that she would be moving the court to have it dismissed.
7. Further with regard to the application, she was of the view that the applicant is not warranted to be granted the orders sought as he had failed to show any loss or damage he would suffer if the orders are not granted. On her part, she argued that she would suffer loss in the event the orders are granted as the applicant has been enjoying the ½ acre of land that belongs to her husband. She deposed that the applicant should be ordered to deposit substantial amount as security for costs in the event that the court allows the application for stay of execution.
8. The application was canvassed by way of written submissions. The applicant filed his submissions on September 26, 2022. He set out the guiding principles for grant of stay of execution and relied on the case of *Victory Construction vs BM (Minor) Civil Appeal No 19 of 2019*. He further identified three issues for determination by the court. The first was on the success of the appeal. On this, he reiterated that he had purchased two acres of land from the respondents husband and he submitted that in the appeal, the court was being called upon to make a determination of whether his title can be interfered with after thirty (30) years of having been in possession.
9. On the second issue of whether the applicant will suffer substantial loss, he submitted in the affirmative and stated that he has attached sentimental value to the portion unlike the respondent who has never used the portion and would therefore suffer no loss if an order for stay is granted. On the issue of security for costs, he submitted that the court has discretion to grant a stay with such conditions as security for due performance. Lastly, he was of the view that the application had been instituted without delay and urged the court to grant the application as prayed.
10. The respondent on her part filed submissions on August 11, 2022. He gave a synopsis of the case and identified three issues for determination by the court. The first was whether the applicant had established the required legal threshold for grant of orders for stay of execution pending appeal. She relied on the legal provisions for stay of execution pending appeal as provided under order 42 rule (6)



- (1) of the Civil Procedure Rules. The respondent invited the court to look at the pleadings filed by the applicant and make a finding that they did not disclose any likely loss and damage that the applicant would suffer if stay of execution is not granted. It was argued that a mere statement that the applicant was likely to suffer loss and damage was not enough to demonstrate such loss and damage.
11. The respondent maintained that the applicant had encroached on her land and submitted that the judgment by the trial court was solid and was based on sound reasoning. To support her case, she relied on the case of *Richard Kubondi vs Ndungu Waweru (2019) eKLR* where the court set out the grounds which ought to be satisfied for an applicant to be granted stay of execution orders, to wit; 'substantial loss may result to the applicant unless the order is made, The application has been made without unreasonable delay, such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.'
 12. Further, the respondent was of the view that the applicant did not have a strong case with a likelihood of success. It was said that the evidence tabled was clear that the applicant has trespassed and remained on the respondent's land. It was equally stated that the appeal was time barred as the applicant did not seek for extension of time when filing it bearing in mind that the judgment was rendered on October 5, 2021 and the appeal lodged on November 5, 2021, a day late.
 13. The applicant further relied on the case of *Rana Auto Selection Ltd vs Lillian Osebe Moses (2021) eKLR* where the court relied on the decision in the case of *National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & Another [2006] eKLR* where it was stated that 'this court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge — see for example section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya'. Lastly it was submitted that if the court is inclined to grant stay orders as prayed then it should order the applicant to deposit such amount of money as security of costs.
 14. I have considered the application, the response made by the respondent, and the rival submissions by the parties. From the pleadings herein there is only one issue for determination by this court, which is whether the applicant has demonstrated that the orders of stay of execution pending appeal ought to be granted. Before I proceed to determine the merits of the application, I note that the applicant has argued that the appeal which the applicant has filed was filed out of time. There is therefore need to consider this allegation as granting orders for stay of execution in appeal filed out of time and without leave of court would be in vain because of want of jurisdiction.
 15. The legal provision governing the timelines for filing an appeal from the subordinate court to the high court is section 79G of the **Civil Procedure Rules** which provides that 'every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for preparation and delivery to the appellant of a copy of the decree or order'. The argument made that the appeal was filed out of time in my view does not lie. The judgment in the matter was filed on October 5, 2021 while the appeal was filed on November 5, 2021. The appeal in my view was filed on time being 30 days after delivery of judgment and this court can now proceed to determine the application before it.



16. The principles for consideration in an application for grant of a stay of execution pending appeal are well stated under the provisions of order 42 rule 6(2) of the Civil Procedure Rules which provides: '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.
17. The said conditions were restated by the court in the case of *Elena Doudoladova Korir v Kenyatta University [2014] eKLR* which cited with approval the case of *Halai & Another v Thorton & Turpin (1963) Ltd [1990] KLR 365* where the Court of Appeal Gicheru JA, Chesoni & Cockar Ag JA (as they all were) held that :-
- 'The High 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 stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay. In that case that court went ahead to rely on the decision of Hassan Guyo Wakalo v Straman East Africa Ltd [2013] eKLR where it was stated 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'
18. On whether the application was lodged expeditiously, the applicant filed the present application on February 14, 2022 while judgement in the matter was delivered on October 5, 2021. There is a notice of appeal on the court record which was filed on November 5, 2021. The present application was filed at least four months after delivery of judgment, I find there was delay in filing the present application but that delay is not unreasonable.
19. On the issue of whether the applicant will suffer substantial loss if the application is not granted, the court, in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR*, stated 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.'
20. The applicant herein contends that he has attached sentimental value to the portion of land considering that he has been in use of the land for the period of time he has occupied it. He further argued that the applicant has already made attempts to harvest his farm produce and if the application is not granted he would suffer substantial loss. He contended that the respondent would not suffer any loss as she has never used the said portion. The respondent on the other hand argues that a mere statement that the applicant was likely to suffer loss and damage was not enough to demonstrate such loss and damage. I am however of the view that the applicant did not just make a mere statement as he has gone ahead to inform the court of the imminent threat to his farm produce and further that he has sentimental



value to the land. In addition if stay is not granted there is a likelihood that the subject matter may be alienated by the time the appeal is heard and determined, hence rendering it futile. I find that the condition on substantial loss has been established.

21. On the last issue of security, the applicant has submitted that the court has discretion to grant stay with such conditions as security for due performance. The respondent is of the view that in the event that the court allows the application for stay of execution, the applicant should be ordered to deposit substantial amount as security for costs.
22. On this issue of costs, the court in the case of *Absalom Dova vs Tarbo Transporters [2013] eKLR*, 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.'
23. As correctly stated in the above authority, security for costs is what balances the interest of both litigants, that of the applicant who has a right to ventilate his appeal while the subject matter is preserved and the one for the respondent who has a right to enjoy her fruits of judgment. Although the applicant has not expressed whether he is ready to offer security of costs, this court is of the opinion that the Applicant can be directed by the court to do so. Thus, this court shall exercise its discretion regarding the security of costs to be offered by the applicant. It directs that he deposits Kshs 30,000/= as security for due performance of the decree.
24. In conclusion therefore, the applicant's application dated February 4, 2022 is allowed and a stay of execution of the judgment/decree in SPM's court at Runyejes ELC No 11 of 2019 is granted on the following conditions: -
 - a. That the applicant shall deposit Kshs 30,000/= in court as security for costs within fourteen days from the date of this ruling.
 - b. The applicant shall compile, file and serve a record of appeal within 60 days and move the court appropriately towards the finalization of this appeal from the date of this ruling.
 - c. Failure by the applicant to abide by any of the above stated two conditions within the fixed timelines will lead to an automatic lapse of the stay of execution.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 23RD day of NOVEMBER, 2022.

In the presence of Kimanzi for M/s Ndorongo for appellant and IC Mugo (absent) for respondent.

Court assistant: Leadys

A.K. KANIARU

JUDGE

23.11.2022

