



**Limo v Kutto & another (Environment & Land Case 413 of 2015)
[2022] KEELC 14838 (KLR) (18 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14838 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 413 OF 2015
JM ONYANGO, J
NOVEMBER 18, 2022**

BETWEEN

ROSA JEPTOO LIMO APPLICANT

AND

RICHARD KIPKEMBOI KUTTO 1ST RESPONDENT

GIDEON KIPLETING TUWEI 2ND RESPONDENT

RULING

1. By a Notice of Motion dated February 24, 2022 the Plaintiff filed an application seeking a stay of execution of the decree and all consequential orders pursuant the judgment delivered on February 23, 2022 pending the hearing and determination of the intended appeal.
2. In the alternative, the plaintiff sought an order of status quo pending the hearing and determination of the intended appeal.
3. The application is premised on the ground that the Applicant has lodged an appeal against the judgment of this honourable court and he is apprehensive that if a stay of execution is not granted, she will be evicted from the suit property and she and her children who reside thereon will be rendered homeless and destitute.
4. The application is further supported by the Applicant's affidavit sworn on the February 27, 2022 in which he reiterates the reasons stated above and states that the application has been made without inordinate delay and that he is willing to abide by any reasonable conditions that the court may impose.
5. He adds that the Respondent shall suffer no prejudice as he has never utilized the suit property which forms the subject matter of this suit. He further contends that his appeal has very high chances of success and if the application is not granted, the same shall be rendered nugatory.



6. The application was canvassed by way of written submissions and both parties filed their submissions which I have considered.

ISSUES FOR DETERMINATION

7. The sole issue for determination is whether the Applicant has met the conditions for the grant of a stay of execution pending appeal.

ANALYSIS AND DETERMINATION

8. The principles that guide the court in the exercise of its discretion to grant a stay of execution are now well settled. The substantive provision for grant of stay pending appeal is found in Order 42 Rule 6 of the *Civil Procedure Rules*.

Order 42 Rule 6 provides in part as follows: -

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 *M.O.M Amin Transporters Limited & Another v Alexander Ndung'u Mbugua & 2 Others* [2017] eKLR the court held that all the three conditions had to be met and satisfied simultaneously in order for the court to exercise its discretion to grant a stay of execution. The court stated as follows:

“13. In the cases of *Kiplagat Kotut vs Rose Jebor Kipngok* [2015] eKLR, *Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others* [2012] eKLR and *Kenya Shell Limited vs Kibiru* (Supra), the common thread was that a stay of execution will not be granted unless the conditions in Order 42 Rule 6 of the *Civil Procedure Rules* are satisfied.

10. Furthermore, in the case of *Equity Bank Limited v Taiga Adams Company Limited* [2006] eKLR Mutungi J stated as follows:

“It is not enough to satisfy 1 or 2 of the requirements under 42 Rule 6. All of the requirements must be met for the court to grant orders of stay pending appeal”.

11. In the instant suit the Applicant has mentioned in her affidavit that if a stay of execution is not granted, they will be displaced from their home thus they will suffer substantial loss and prejudice and their appeal will be rendered nugatory.



12. In the case of *Wangalawa & Another v Agnes Naliaka Cheseto* (2012) eKLR the Court observed as follows:

“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. v Chesoni* (2002) 1 KLR 867 and also in the case of *Mukuma v Abuoga* quoted above. The last case referring to the exercise of discretion by the High Court and Court of Appeal in the granting of stay of execution, under Order 42 of the CPR and Rule 5 (2) (b) of the *Court of Appeal Rules* respectively, emphasized the centrality of substantial loss thus:

“...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.”

13. Substantial loss has been defined to be the kind of a loss that is assessed by the totality of the consequences awaiting the Applicant if stay is not granted. In *Dawie Chebutal Rotich & 2 others vs Emirates Airlines*, Civil Case No. 368 of 2001, Mutunga J deformed substantial:-

“.....is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum”

14. With regard to the first condition which is that the Applicant must demonstrate that he or she shall suffer substantial loss, the Applicant has stated that the suit property is her matrimonial home where she resides with her children. This fact was not controverted by the Respondent during the trial. I am therefore satisfied that if the Applicant is thrown out of her matrimonial home before her appeal is heard and determined, the substratum of her appeal will be destroyed and her appeal shall be rendered nugatory.

Moving on to the second condition which is timeliness, it is clear that the application which was filed a day after the judgment was delivered was filed without any delay whatsoever.

Finally, with respect to the third condition for stay which relates to security for costs, the Applicant has in her supporting affidavit deposed that she is willing to abide by any reasonable condition as regards costs as the court may impose. This in my view is sufficient demonstration of her willingness to furnish security for costs.

All in all, the Applicant has satisfied that three conditions set out in Order 42 rule 6 of the *Civil Procedure Rules* and I hereby grant the application and make the following orders:

- a. That a stay of execution of the decree issued *vide* the judgment delivered on February 23, 2022 is hereby granted pending the hearing and determination of the intended appeal on condition that the Applicant deposits Kshs. 100,000/= in court within 30 days, as security for costs. If the said amount is not deposited in court within the stipulated time the order for stay shall automatically lapse.
- b. The costs of the application shall abide the appeal.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 18TH DAY OF NOVEMBER, 2022

J.M ONYANGO



JUDGE

