



**Kurutu v Simiyu & another (Environment & Land Case 239 of 2018)
[2022] KEELC 14903 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14903 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 239 OF 2018**

JG KEMEI, J

NOVEMBER 17, 2022

BETWEEN

JOSEPH MUTURI KURUTU PLAINTIFF

AND

JAMES MANASSEH SIMIYU 1ST DEFENDANT

JOSPEH NDIRANGU T/A NDIRANGU STORES 2ND DEFENDANT

RULING

1. The application is brought under Order 42 Rule 6 of the *Civil Procedure Rules*, 2010 and all the enabling provisions of the law and the inherent jurisdiction of the court. The Applicant seeks the following orders;
 - a. An order of stay of implementation and or execution of the Judgement delivered on the 30/9/2021 and the Decree issued on the 7/12/2021 in this suit pending the hearing and determination of CA No 719 of 2021 pending at the Court of Appeal at Nairobi.
 - b. Costs of the application be provided for.
2. The application is premised on the grounds annexed thereto read together with the supporting affidavit of the applicant sworn on the December 22, 2021 in which the deponent reiterated the historical background of the suit leading to the Judgement rendered on the 30/9/2021.
3. The applicant states that he is aggrieved by the said Judgement and has preferred an appeal in the Court of Appeal. The grounds of appeal were recited in great detail under paragraph 10 of his affidavit aforesaid. Interalia, that he stands to suffer substantial loss if the prayers of stay of execution are not allowed. That the substantial loss he is exposed to is further evidenced by the fact that it is not possible to ascertain the respondent's ability to reimburse him the loss in the event that he succeeds in his appeal.



4. With respect to the filing of the application for stay, the deponent stated that the same has been brought without any delay. Further that the respondents have not commenced the process of execution given they extracted the decree of the court on the 7/12/2021.
5. In addition, that he is ready and able to provide such security as may be necessary for the due performance of such decree or order as may ultimately be binding on the applicant and not in any way to punish the Judgment debtor.
6. Finally, that no prejudice shall be occasioned to the respondents if the application is granted as the same shall be geared at serving the greater interest of justice.
7. The application is opposed by the respondents vide the replying affidavit of James Manasseh Simiyu sworn on the 18/2/2022 on his behalf and on behalf of the co – Respondent. In it he deponed that the application is brought to deny them the realization and enjoyment of the fruits of their Judgment as embodied in the decision of the court rendered on the 30/9/2021. The applicant has not established substantial loss that he shall suffer if the orders are not granted. That the respondents have been in actual and physical possession of the property since 2006 having developed a learning institution on the suit land as well as residential premises. That the applicant occupies a distinct parcel of land and therefore stands to suffer no loss. Further that neither has the applicant offered any security for the due performance of the decree, he avers. That the applicant has not met the threshold set out in Order 42 Rule 6 of Civil Procedure Act as far as granting orders of stay of execution is concerned.
8. The respondents urged the court to strike a balance between the right of a litigant to appeal and the right of a successful party in a suit to enjoy the fruits of his Judgment. That being the successful party in this case, they should be allowed to enjoy the fruits of their litigation and let litigation come to its halting end. That neither has the applicant demonstrated any prejudice that it will suffer if the orders sought are declined.
9. I have carefully read and considered the application as well as the response from the respondents. I have similarly perused and considered the written submissions of the parties placed before the court by the applicant and the 2nd respondent. the 1st respondent did not file any written submissions.
10. The key issue for determination before the Court is whether the applicant is deserving of the orders of stay of execution of the Judgment delivered on the 30/9/2021.
11. The provisions governing stay of execution are found in Order 42 Rule 6 which states as follows;
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 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.”
- 12. stay of execution is a discretionary remedy granted by the court on satisfaction of certain known criteria. In the case of *Butt vs. Rent Restriction Tribunal* (1982) KLR 417 the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal namely-
 - a. 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.
 - b. 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.
 - c. 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.
 - d. the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
- 13. In the case of *Vishram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, it was held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the *Civil Procedure Rules* (then) is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
- 14. It is clear from the above precedents that in determining an application for grant of orders of stay of execution, the court is being called upon to establish whether the application was made timeously, the applicant has established substantial loss that is likely to be suffered should the application be denied and whether security for the due performance of the decree has been adequately provided.
- 15. It is borne of the record that the applicant has filed his record of appeal in the Court of Appeal. It is therefore erroneous for the Respondents to hold otherwise.
- 16. At the point that the court is being asked to determine an application as this, there exists two competing rights held by the parties; the applicant has an accrued right to appeal while the respondents have had their rights ascertained in the Judgment thus a right to enjoy the fruits of the said Judgment.
- 17. The court is therefore being called upon to balance the two competing interests. This was aptly captured in the case of *Kenya Commercial Bank Limited v Sun City Properties Limited & 5 others* (2012) eKLR where the court held;

“.... in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests



should always be balanced. ... In a bid to balance the two competing interests, the courts usually make an order for suitable security for the due performance of the decree as the parties wait for the outcome of the appeal.”

18. Is there delay in filing the application? It is borne of the record that the application was made within a period of 21 days from the issuance of Judgement. Although there is no hard and fast rule as to what constitutes inordinate delay, it is left to the court to assess the circumstances of each case. In this case I am satisfied that 21 days does not amount to inordinate delay.
19. Has the applicant demonstrated the substantial loss that he stands to suffer if the application is declined? In the case of *Machira T/A Machira & Company Advocates v East African Standard (No 2)* 2002 2 KLR the court held that substantial loss must be specified, details or particulars thereof must be given and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further.
20. It is trite that the purpose of stay of execution is to preserve the substratum of the subject property. The court has read the judgement of the court whose outcome was that the title held by the appellant was adjudged cancelled. If the orders are not granted there will be nothing to prevent the Respondents from executing on the Judgement and dealing with the property the way they wish including disposing thus changing the character of the subject matter while the appeal is pending with the risk of rendering the appeal nugatory as well as subjecting the ultimate winner in the case on appeal to unending litigation in securing the victory of the Judgment on appeal.
21. I agree with the court in the case of *James Wangalwa & anor v Agnes Naliaka Cheseto* (2012) eKLR when it stated that the right to appeal is a constitutional right that actualizes the right to access to justice protection and benefit of the law, whose essential substance encapsulates that the appeal should not be rendered nugatory for anything that renders the appeal nugatory impinges on the very right of appeal.
22. On the above ground I am persuaded that the applicant has demonstrated substantial loss that it shall suffer in the event that the orders are declined.
23. The applicant has proposed to provide security for the due performance of the decree as might be binding on him and in my view this is a clear sign of good faith that goes to show that the application for stay is not intended to deny the respondents the right to enjoy the fruits of their Judgement.
24. Accordingly, I find the application is merited. I allow it in the following terms;
 - a. There is hereby granted a stay of execution of the Judgment and decree of the court issued on the 30/9/2021 and the 7/12/2021 respectively pending the hearing and determination of the appeal lodged in E719 of 2021.
 - b. The applicant to deposit in court Kshs 100,000/- being security for the due performance of the Decree within a period of 30 days from the date hereof.
 - c. In default of b above, the application shall stand dismissed with no further orders from this court.
 - d. I make no orders as to costs.
25. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 17TH DAY OF NOVEMBER, 2022 VIA MICROSOFT TEAMS.



J G KEMEI

JUDGE

Delivered online in the presence of;

Otieno HB Karungo for Plaintiff

1st Defendant - Absent

Ngeresa for 2nd Defendant

Court Assistant – Kevin

