



Kamau t/a Lukaka Services v Nderitu & another (Environment and Land Appeal 47 of 2020) [2022] KEELC 15515 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15515 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 47 OF 2020**

JG KEMEI, J

DECEMBER 20, 2022

BETWEEN

DAVID NDERI KAMAU T/A LUKAKA SERVICES APPELLANT

AND

EUNICE MUTHONI NDERITU 1ST RESPONDENT

GRACE WATARE MURIUKI 2ND RESPONDENT

RULING

1. This Motion was initially filed on the 14/1/2021 and dated the 22/12/2020. When the Court determined the Application inter alia, it noted that this Application was missing on record. It would appear that the Applicant vide an Application dated the 4/5/2022 regularised the same. I must note this manner of doing pleadings is quite inelegant and not to be encouraged. In keeping with the Constitutional tenets as espoused in Article 159 (2) (d) of the *Constitution* of Kenya which mandates this Court to mind the substance of the Application, the Court will determine the Application on merit.
2. The Applicant seeks the following orders; stay of execution pending the hearing and determination of the pending appeal; costs of the Application.
3. The Applicant avers that he is aggrieved by the judgment of the trial Court delivered on the 19/10/2020 which dismissed his suit leading to the filing of the appeal herein. The Application is supported by the grounds annexed thereto and the Supporting Affidavit deponed by David Nderi the Applicant herein. He deponed that should the 1st Respondent execute the Judgment he stands to suffer irreparable loss; that the Application ought to be allowed to prevent the appeal from becoming nugatory and therefore an exercise in futility. That the Application has been brought without any inordinate delay.
4. The 1st Respondent opposed the Application vide her Replying Affidavit dated the 30/5/2022. The deponent impugned the form of the Application and stated that the same is geared at delaying the



execution and enjoyment of the fruits of the judgement given that the 2nd Respondent is still in occupation of the suit land and continues to enjoy possession to her detriment.

5. Parties filed written submissions which I have read and considered.
6. The main issue for determination is whether the Application is merited.
7. The legal provisions for stay of execution are anchored in Order 42 rule 6 of the [Civil Procedure Rules](#) that;

“6. Stay in case of appeal [Order 42, rule 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.”

8. It is trite that for an Applicant to succeed in an Application of this nature, one must establish three conditions namely; establishment of substantial loss upon timely filing of the Application and the furnishing of security.
9. In the case of *Butt v 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 principal 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.
10. I am satisfied that the Applicant has demonstrated the substantial loss that he stands to suffer if the eviction is allowed.
11. It is trite that the provision of security for the due performance of the decree is within the discretionary purview of the Court. In this case I shall make the final orders in the end as follows;
 - a. The Application is allowed on terms that the Applicant shall provide the sum of Kshs 200,000/- (Kenya Shillings Two Hundred Thousand Only) for the due performance of the decree which sums shall be deposited in Court within 30 days in default the orders shall automatically lapse with no further orders of this Court.
 - b. Costs shall be in favour of the 1st Respondent.
12. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 20TH DAY OF DECEMBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Maina HB Gichio Ms. for Appellant

Ms. Githaiga for 1st Respondent

Ms. Tipira HB Mr. Tumu

Court Assistant – Phyllis / Kevin

