



REPUBLIC OF KENYA



**KENYA LAW**  
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**Keroka Highway Services Station v Ogot (Environment & Land Case  
1356 of 2014) [2022] KEELC 15720 (KLR) (19 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15720 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1356 OF 2014  
EK WABWOTO, J  
DECEMBER 19, 2022**

**BETWEEN**

**KEROKA HIGHWAY SERVICES STATION ..... PLAINTIFF**

**AND**

**MAURICE ODONGO OGOT ..... DEFENDANT**

**RULING**

1. This ruling is in respect to the applications dated 14<sup>th</sup> September, 2023 and 5<sup>th</sup> October, 2023. The Plaintiff herein seeks for the release of Kshs 500,000/- deposited by the Defendant as a Security on 30<sup>th</sup> day of July, 2020 pursuant to a Court Order issued on 2<sup>nd</sup> July, 2020. The Plaintiff prayed that the said sum be released to the Plaintiff's Advocate Ms. Ayieko Kangethe & Co. Advocates. The application was supported by the affidavit sworn by Charles Mwangi Kangethe Advocate on 14<sup>th</sup> September, 2023. It was averred that pursuant to the ruling delivered by Okongo, J on 2<sup>nd</sup> July 2020 wherein the Defendant was ordered to deposit a sum of Kshs 500,000.00 within 30 days as security for the loss the Plaintiff was likely to incur as a result of the Defendant's continued occupation of the suit property if the Defendant lost the case at retrial.
2. The said application was opposed by the Defendant. The Defendant filed an application dated 5<sup>th</sup> October, 2023 seeking to stay the execution of the judgment of this Court delivered on 30<sup>th</sup> August, 2023 and proceedings for the release of Kshs 500,000.00 deposited in the Court pending the hearing and determination of the Defendant's appeal. The Defendant's application was supported by the affidavit sworn by Maurice Odongo Ogot on 5<sup>th</sup> October, 2023.
3. It was deposed that the Defendant was dissatisfied with the judgment of the Court and had filed an appeal against the said judgment. The Defendant also deposed that the sum of Kshs 500,000.00 should not be released to the Plaintiff owing to the Appeal that had been filed.



4. During the plenary hearing of the applications, learned counsel Mr. Kang'ethe made oral submissions on behalf of the Plaintiff while learned counsel Mr. Mugambi submitted on behalf of the Defendant. Parties also filed written submissions which the court has duly considered.
5. The Court has considered the applications and oral submissions made together with written submissions that were filed by the parties and is of the view that the following are the key issues for determination:
  - i. Whether the Defendant is entitled to the orders of stay pending appeal.
  - ii. Whether this Court should direct the release of the sum of Kshs 500,000.00 to the Plaintiff.
6. In respect as to whether or not the Defendant has satisfied the Conditions for granting of stay of execution, it is worth noting that the issue of whether to grant stay pending appeal is a matter of discretion of the court. This discretion is fettered by four conditions. First, an applicant must demonstrate that there is just cause to grant stay. Second, the Applicant has to demonstrate that he or she will suffer substantial loss should stay not be granted. Third, there has to be security provided for the due performance of the decree as may ultimately be binding upon the Applicant. Fourth, the application has to be brought without unreasonable delay.
7. The principles are further outlined under Order 42 Rule 6 (1) and (2) of the [Civil Procedure Rules](#), which provides:
  - (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

A stay of execution under order 42 of the [Civil Procedure Rules](#) is an interim order to suspend the rights of one party who is aggrieved with the judgment of the trial court or tribunal and wishes to exercise his or her right of appeal. Its main objective is to protect the substratum of the suit by delaying the execution process until the determination of the appeal. Being a discretionally remedy the applicant



must demonstrate that he or she has approached the court of equity with clean hands as succinctly stated in the case of *Jajbhay v Cassim* 1939 AD 537-551 the court held on this maxim that:

“All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice.

8. The general principle of law is that the successful litigant in possession of a valid court judgement is entitled to the fruits of judgement unless there exist exceptional circumstances to deny him or her that right. Further The Court of Appeal in the case of *Visbram Ravji Halai vs Thornton & Turpin* [1990] KLR 365 stated 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 is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.

9. In considering an application for stay of execution I am guided by the case of *Butt vs Rent Restriction Tribunal* Civil App No. NAI 6 of 1979 (Madan, Miller and Porter JJA) where the following guidelines were given:

“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.

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. 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. 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. In the instant case, it is evident that the Defendant is still residing in the suit property and has been in occupation of the same for over 20 years and further that there is already a sum of Kshs 500,000.00 which was deposited in Court as security pursuant to a ruling delivered on 2<sup>nd</sup> July, 2020 which the Defendant have submitted that the same should suffice as adequate security. In the circumstances, the Court is satisfied that the conditions of grant of stay of execution have been met and the Defendant is entitled to the said order.

11. As to whether or not the sum of Ksh 500,000/- should be released to the Plaintiff, the said money was deposited in Court by the Defendant pursuant to the ruling delivered on 2<sup>nd</sup> July 2020 as security for the loss the Plaintiff was likely to incur as a result of the Defendant’s continued occupation of the suit property if the Defendant loss the case at retrial. The Defendant in his grounds of opposition dated 5<sup>th</sup> October, 2023 and his submissions dated 16<sup>th</sup> November, 2023 submitted that no loss/damage has been adjudged/assessed as suffered by the Plaintiff and payable by the Defendant and that in the absence of any such assessment, the same ought not to be released to the Defendant.

12. In view of the foregoing, it is the finding of this Court that having found that the Defendant is entitled to the stay orders sought, it may not be in the best interest of justice to grant the said order for the release of the security of the deposit made of Kshs 500,000 to the Plaintiff at this stage. In the circumstances the said prayer is declined.

13. In the end, the Plaintiff’s application dated 14<sup>th</sup> September, 2023 and the Defendant’s application dated 5<sup>th</sup> October, 2023 are disposed of in the following terms:



- i. A stay of execution of 45 days in respect to the judgment and decree of this Court delivered on 30<sup>th</sup> August, 2023 is hereby granted.
- ii. The sum of Kshs 500,000.00 deposited by the Defendant shall operate as security herein for 45 days.
- iii. Each party to bear own costs of the application.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY OF DECEMBER, 2023.**

**E.K. WABWOTO**

**JUDGE**

**In the presence of:**

Mr. Kangethe for the Plaintiff.

Mr. Mugambi for the Defendant.

Court Assistant: Caroline Nafuna.

**E.K. WABWOTO**

**JUDGE**

