



**Mukoya v National Bank of Kenya (Environment & Land Case
105 of 2016) [2022] KEELC 15680 (KLR) (19 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15680 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 105 OF 2016
BN OLAO, J
DECEMBER 19, 2022**

BETWEEN

AMISI ONYANGO MUKOYA APPLICANT

AND

NATIONAL BANK OF KENYA RESPONDENT

RULING

1. Amisi Onyango Mukoya (the Plaintiff herein) moved to this Court vide his plaint dated August 30, 2021 seeking various orders against the National Bank of Kenya (the defendant herein) with respect to the land parcels No Teso/Angoromo/2299 and 2296.
2. The dispute was heard by Omollo J and by a judgment delivered on June 8, 2022, the Plaintiff's suit was dismissed with costs.
3. Aggrieved by the judgment, the Plaintiff promptly filed a Notice of Appeal on June 9, 2022.
4. I now have for my determination the Plaintiff's Notice of Motion dated November 11, 2022 and filed on November 15, 2022 in which he seeks the following orders:
 1. Spent
 2. That this Honourable Court be pleased to stay execution pending the outcome of Kisumu Court of Appeal Case No 194 of 2022.
 3. That costs of the application be in the cause.
5. The application is premised on the grounds set out therein and is also supported by the affidavit of the Plaintiff dated November 11, 2022.
6. The gravamen of the application is that the defendant has threatened to sell the land parcels No Teso/Angoromo/2299, 2996, 2538 and 2900 which are the subject of this case yet there is a pending appeal



No 194 of 2022 at the Court of Appeal Kisumu. That the Plaintiff has been served with a Statutory Notice through his whatsapp No 0726xxxxxx to pay the sum of Kshs 8,656,900.40 or the above mentioned parcels of land will be sold. That the defendant is not entitled to recover the said sums and unless the orders of stay are granted, the defendant will proceed to sell the land. That the Plaintiff has an arguable appeal and is willing to abide by any conditions to be set by the Court.

7. Annexed to the application are the following documents:
 1. Notice of Appeal dated June 9, 2022.
 2. Statutory Notice
8. The application is opposed and Ezra Omari The Defendant's Relations Officer has filed a replying affidavit dated December 14, 2022 in which he has deponed inter alia, that the dismissal of the Plaintiff's suit was a negative order and no stay can be granted in respect of such order. Further, that the application is an abuse of the process of the Court and does not meet the threshold for such an application and should therefore be dismissed with costs.
9. When the application was placed before me on November 15, 2022, I certified it as urgent and directed that it be canvassed by way of written submissions to be filed on or before December 6, 2022. However, it was not until December 14, 2022 that the defendant filed their submissions. The Plaintiff did not file submissions and sought more time to do so on the ground that negotiations were going on between the parties but this was denied by Ms Sidika Counsel for the defendant. The Court declined to grant the Plaintiff more time as sought by Mr. Juma holding brief for Mr. Jumba for the Plaintiff.
10. I have considered the application, the rival affidavits and the submission by Mr. Bogonko instructed by the firm of Bogonko Otanga & Company Advocates for the defendant.
11. The application is premised on Order 42 Rule 6(1) and (2) of the Civil Procedure Rules which provides 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 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." Emphasis mine.



12. It is clear from the above that a party seeking an order for stay of execution pending appeal must meet the following conditions:
 1. Show sufficient cause.
 2. Demonstrate that unless the order for stay pending appeal is granted, he may suffer substantial loss.
 3. File the application without un-reasonable delay.
 4. Offer security.
13. The above were reiterated by the Court of Appeal in the Case of *Ravji Halai & Another –v- Thornton & Turpin* (1963) Ltd C.a Civil Appeal No 15 of 1990 (1990 KLR 365) where it held:

“Thus, the superior Court’s discretion 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 a stay; and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”
14. In *Kenya Shells Ltd v Benjamin Kibiru* 1982 – 88 IKAR 1018 [1986 KLR 410]. Platt Ag JA (as he then was) underscored the importance of an applicant establishing substantial loss in order to justify the grant of an order of stay of execution pending appeal. He said:

“It is usually a good rule to see if order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondents should be kept out of their money.”
15. In the same case, Gachuhi Ag JA (as he then was) added:

“It is not sufficient by merely stating that the sum of shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted.”
16. Substantial loss is therefore the cornerstone upon which such an application must be founded and a party seeking orders of stay of execution pending appeal must satisfy the court that indeed such loss will ensue. Of course the party must also meet all the other conditions set out in Order 42 Rule 6(1) and (2) of the *Civil Procedure Rule*. It is not enough to satisfy only some of those conditions.
17. Guided by the above, it is not in dispute that the judgment sought to be appealed was delivered by Omollo J on June 8, 2022 and a Notice of Appeal was filed on June 9, 2022. The prompt filing of the Notice of Appeal is sufficient cause.
18. The Plaintiff was however also under a duty to satisfy the other grounds. On the issue of substantial loss, the Plaintiff has averred in paragraph 7 of his supporting affidavit as follows:
 7. “That unless there is a stay of execution, the Respondent will proceed to sell my property thus rendering my appeal No Kisumu Court Of Appeal No 194 of 2022 nugatory and occasioning loss of property worth more than Kshs 16 million”.



19. It is not clear where the Plaintiff obtained the figure of Kshs 16 million from. The Statutory Notice annexed to his supporting affidavit is clear. It reads:

“Re-chargee’s Notice of Intention to sell Lr No South Teso/Angoromo/2538 Amisi Mukoya Onyango (the property) for outstanding Debt of Kshs 3,278,765.30.”

As was held in *Machira & Company Advocates v East African Standard (No 2) 2002 2 KLR 63*, “a Court will not order a stay upon mere vague speculation; there must be the clearest ground of necessity disclosed on evidence ...”

This being a remedy within the discretion of the court, the Plaintiff was required to make a full disclosure and approach the court with clean hands. In his application, he has stated in paragraph (1) that:

1. “The Respondent has threatened to sell the Applicant’s land vide LR South Teso/Angoromo/2299, 2296, 2538 & 2900 which are the subject of the suit in the High Court and the appeal in the Court of Appeal.”

However as is now clear from the Statutory Notice annexed to his own application, it only relates to the land parcel No Teso/Angoromo/2538. In any event, there is nothing to suggest that should his appeal succeed, the defendant which is a financial institution will be incapable of making good his loss of Kshs 3,728,765.30 or indeed the sum of Kshs 16million which he appears to have picked from the air as it is not quantified. It is also not lost to this court that in paragraph 6 of the same supporting affidavit, the Plaintiff quotes another figure of Kshs 8,656,900.40. And although the Plaintiff in paragraph 9 of his supporting affidavit refers to the defendant as not having “sought an audience for taking of accounts to ascertain what is due and owing”, he has not himself made any offer of what he feels is the proper sum owing from him to the defendant. As was stated in *Wycliffe Sikuku Walusaka v Philip Kaita Wekesa 2020 eKLR*:

“The offer for security must of course come from the Applicant himself as a sign of good faith to demonstrate that the application for stay of execution pending appeal is being pursued in the interest of justice and not merely as a decoy to obstruct and delay the Respondent’s right to enjoy the fruits of his judgment.”

20. What is clear from the application is that the Plaintiff is not really disputing his indebtedness to the Defendant. He seems to suggest that the sum owed is colossal. That may be so. But as a sign of good faith, it would have been better to make an offer of what he thinks he owes the defendant even as his appeal is prosecuted. By failing to do so, the inevitable conclusion is that this application is meant to scuttle the Defendant’s process of ensuring that the Plaintiff meets his obligation under the charge. I did not, for example, see any averment that the Plaintiff is likely to be rendered homeless or destitute should the land charged be sold.
21. This application has also not been filed without unreasonable delay. The judgment whose execution this application seeks to stay was delivered on June 8, 2022 while this application was filed on November 11, 2022 some five (5) months later. The judgment having been delivered in the presence of counsel for the parties, I consider a delay of five (5) months to be unreasonable. The same has also not been explained at all.
22. Finally, the Court simply dismissed the Plaintiff’s suit with costs. The Defendant did not file any counter-claim and so essentially, there is only a negative order dismissing the Plaintiff’s suit. That order



is incapable of execution – see *Western College of Arts And Applied Sciences v Oranga and Others* 1976 KLR 63.

23. Ultimately therefore, the Notice of Motion dated November 11, 2022 and filed on November 15, 2022 is devoid of merit. It is accordingly dismissed with costs.

BOAZ N. OLAO

JUDGE

19TH DECEMBER 2022

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 19TH DAY OF DECEMBER 2022 IN KEEPING WITH THE COVID-19 PROTOCOLS.

BOAZ N. OLAO

JUDGE

19TH DECEMBER 2022

