



**Muthaiga North Resident’s Association v Nyari House Limited; National Land Commission & another (Interested Parties) (Environment & Land Case 115 of 2015) [2022] KEELC 15334 (KLR) (13 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15334 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 115 OF 2015  
MD MWANGI, J  
DECEMBER 13, 2022**

**BETWEEN**

**MUTHAIGA NORTH RESIDENT’S ASSOCIATION ..... PETITIONER**

**AND**

**NYARI HOUSE LIMITED ..... RESPONDENT**

**AND**

**THE NATIONAL LAND COMMISSION ..... INTERESTED PARTY**

**THE NATIONAL ENVIRONMENTAL MANAGEMENT  
AUTHORITY ..... INTERESTED PARTY**

**RULING**

**Background**

1. The matter for determination is the Notice of Motion Application dated 30th August, 2022, by the Respondent/Applicant. The application is expressed to be brought under the provisions of order 42 rule 6 (1) and order 51 rule 1 of the *Civil Procedure Rules*, 2010 seeking for orders that;
  - a. This Honourable Court be pleased to issue an order staying execution of the decree made on the 12th July, 2022 pending the hearing and final determination of the Applicant’s intended Appeal; and
  - b. Costs of this Application be provided for.
2. The Application is premised on the grounds that Judgment was delivered on the 12th July, 2022, in favour of the Petitioner herein. The Applicant being dissatisfied with the Judgement intends to lodge an appeal to the Court of Appeal. The Applicant is afraid that the Petitioner may execute the



decree passed by the court and the Applicant faces imminent risk of losing its property if the Petitioner proceeds with execution of the decree.

3. The Applicant argues that the Appeal has high chances of success and in the event the intended appeal is successful, it shall be rendered nugatory if the orders sought herein are not granted. That the Petitioner will not suffer any prejudice if the application by the Respondent is allowed. Further that it is in the interest of Justice that the Application be allowed because failure to do so, the appeal if successful will be rendered nugatory.
4. In his Supporting Affidavit sworn on 30th August, 2022, Daniel Kamita Gichuhi, the director of the Respondent/Applicant herein reiterated the grounds on the face of the Application save for adding the annexures thereto. The deponent annexed a Notice of Appeal dated 13th July, 2022 marked as “DKG 1” and a Draft of the Memorandum of Appeal marked as “DKG 2” to be lodged at the Court of Appeal.
5. The Application is opposed by Petitioner who filed Grounds of opposition dated 14th September, 2022. Its response was that the application has no merit and warrants dismissal as the Applicant has not demonstrated that it will suffer irreparable loss in the event the stay of execution is not granted.
6. The Petitioner averred that the Order canceling the subject Grant and Title to the land subject of this Petition is directed to a Statutory office and thereby capable of being reversed in the event of success of the intended appeal. The grant of stay would be tantamount to aiding an illegality which is not in the best interest of the public.

#### **Court’s direction**

7. Both parties filed submissions to the application as directed by the Court on the 11th October, 2022. The Applicant filed its submissions dated 11th October, 2022 whereas the Petitioner’s submissions are dated 21st October, 2022.

#### **Applicant/Respondent’s submission**

8. The Applicant identified the issues for determination as;
  - a. Whether the application dated 30th August, 2022 meets the threshold for grant of orders of stay of execution and
  - b. Who bears the costs of the application?
9. On the first issue, the Applicant cites the provisions of order 42 rule 6 of the *Civil Procedure Rules*. The Applicant submits that there is sufficient cause for an order of stay of execution of the decree made on 12th July, 2022 to be granted. That it stands to suffer substantial loss unless an order of stay of execution of the decree is granted.
10. The Applicant cited the case of *RWW v EKW* (2019) eKLR where the court stated that the purpose of an order of stay pending appeal “...is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory.” The Applicant further cites the case of *Butt v Rent Restriction Tribunal* (1979) eKLR and the conditions set thereunder.
11. The Applicant argues that it has an arguable appeal with high chances of success based on the draft Memorandum of Appeal. That it seeks to prove to the Court of Appeal that its title over the suit property LR 28181 is lawful and was acquired in a procedural manner. Therefore, if the stay is not



granted and the appeal succeeds, then the appeal will be rendered nugatory since the title will have been canceled and/or revoked pursuant to the orders of this court.

12. On substantial loss, the Applicant cites the case of *James Wangalwa & another v Agnes Naliaka Cheseto* (2012) eKLR. The applicant submits that it will incur substantial loss if an order of stay of execution pending appeal is not granted. That if the Appeal succeeds and the title is already canceled pursuant to the order of this Court, the Applicant will be forced to start afresh the process of registering the title in its name expending costs and time in the process. That it is in the interest of justice for an order of stay of execution to be granted in order to preserve the subject matter of the appeal pending the hearing and determination of its appeal. The Applicant further asserts that it has made the application timeously having filed it within the six days allowed by this court.
13. On costs, the applicant submits that costs follow the event. The applicant's application against the Respondents being meritorious, the application be allowed with costs being borne the by the Respondents.

#### **Petitioner/ Respondent's submission**

14. The Petitioner on its part likewise submits that the issues for determination are: whether the Applicant has met the criteria for grant for orders of stay pending appeal and who should bear the costs of this application.
15. As to whether the Respondent/Applicant has met the criteria for the grant of orders of stay of execution pending appeal, the Petitioner submits that the said order is a statutory edict and a discretionary exercise. It cites order 42 rule 6(2) of the *Civil Procedure Rules* on conditions for grant of such orders. On the condition of satisfaction of substantial loss if orders sought are not granted, the Petitioner submits that the Applicant has failed to demonstrate the loss, if any, that it stands to suffer, if the order of stay is not granted.
16. That the substantive order of execution is in relation to a decree ordering the cancellation of the grant registered as I R 140342. If the appeal succeeds, the appellate court can still reinstate the said grant. That what ought to be prevented in the present case is the threat of transfer/sale of the suit property by the Applicant which will render the appeal nugatory as the subject matter of the appeal shall be lost.
17. It is the Petitioner's further submission that the Applicant has not shown how the execution will create a state of affairs that will irreparably affect it. In addition, the Applicant has not furnished the court with security for the due performance of the Decree. Neither has it intimated that it intends to do so. The Petitioner submits that the Applicant be directed to furnish security in the sum equivalent to the current value of the grant registered as I R 140342.
18. The application is therefore not merited and should be dismissed with costs to the Petitioner.

#### **Issues for Determination**

19. I agree with the parties that the two issues for determination in this matter are:
  - a. Whether the order for stay of execution pending appeal should issue;
  - b) Who should bear the costs of this Application?



## Analysis and determination

20. The relevant law governing applications for stay of execution pending appeal is order 42 rule 6 (2) of the *Civil Procedure Rules*. The Rule sets out the principles that the court should consider while deciding whether to grant Stay of Execution Pending Appeal. These are: -

- “(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.”

21. There is a plethora of decisions on the grant of stay of execution pending appeal. In the case of *Halal & Another v Thornton & Turpin [1963] Ltd* [1990] eKLR, the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag, JA) held that:

“...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.”

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in the case of *Hassan Guyo Wakalo v Straman EA Ltd* (2013) as follows:

“In addition the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory.”

These two principles go hand in hand and failure to prove one dislodges the other.”

22. Further in the case of *Stephen Wanjohi v Central Glass Industries Ltd*, Nairobi HCC No.6726 of 1991, the Court held that: -

“For the court to order a stay of execution there must be: -

- i. Sufficient cause
- ii. Substantial loss
- iii. No unreasonable delay
- iv. Security and the grant of stay is discretionary.”

23. It is evident from the above provisions of law that the Court has the discretion to issue an Order of stay of execution. However, the said discretion must be exercised judicially. See the case of *Canvass*



*Manufacturers Ltd v Stephen Reuben Karunditu*, Civil Application No.158 of 1994, (1994) LLR 4853, where the Court held that: -

“Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised”.

24. The Court will take into account that the main consideration of stay of execution pending appeal is to preserve the subject matter. See the case of *Consolidated Marine v Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi), where the Court held that: -

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.

25. The Applicant avers that if the appeal succeeds and the title is already canceled pursuant to the orders of this Court, the Applicant will be forced to start afresh the process of registering the title in its name incurring costs and time in the process. The Petitioner on the other hand contends that the order for cancellation of the grant can be reversed. The Petitioner avers that the court should instead address the threat of transfer/sale of the suit property by the Applicant which will render the appeal nugatory as the subject matter of the appeal shall be lost.

26. The Applicant has a right of appeal. The Applicant’s concern that it will suffer substantial loss and that its appeal might be rendered nugatory if stay of execution is not granted cannot be termed as outrageous or without basis in the circumstances of this case.

27. The Court of Appeal in the case of *James Thomas Andafu v Joseph Makokha Akbulunya* [2018] eKLR while preserving the status quo by staying the cancellation of the Title Deed during the pendency of the appeal, addressed the nugatory aspect. The Court cited the case of *Reliance Bank Ltd v Norlake Investments Ltd* [2002] I EA 227, where the court had stated that;

“the factors which could render an appeal nugatory are to be considered within the circumstances of each particular case and that in doing so, the Court is bound to consider the conflicting claims of both sides.”

28. The application was filed timeously having been filed within the 30 days granted on 12th July, 2022 when the judgment was delivered.

29. In order to preserve the subject matter and considering the Petitioner’s apprehension that the Applicant may sell and/transfer the suit property for commercial purposes, the court will grant a conditional stay of execution.

30. Accordingly, I allow the application in the following terms: -

- a. A conditional stay of execution of the Judgment and Orders of 12th July, 2022 is granted pending the hearing and determination of the intended appeal by the Court of Appeal.
- b. A restriction be registered against the title to the suit property prohibiting any dealings with the title i.e. charging, leasing, selling, transferring and/or in any other way interfering with the status of the title to the suit property pending the hearing and determination of the intended appeal.



- c. The original title documents to the suit property shall be deposited with the Deputy Registrar of this court in the next seven (7) days for safe keeping awaiting the hearing and determination of the appeal.
- d. Costs of this application to abide the outcome of the appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF DECEMBER, 2022.**

**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

Ms. Swaka holding brief for Mr. Njenga for the Petitioner/Respondent

Mr. Muriithi for the Applicant.

Court Assistant – Hilda/Yvette.

M.D. Mwangi

Judge

