



**Ndiritu v Gicheru (Environment and Land Appeal 12 of 2018)  
[2022] KEELC 15193 (KLR) (8 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15193 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT AND LAND APPEAL 12 OF 2018  
YM ANGIMA, J  
DECEMBER 8, 2022**

**BETWEEN**

**JACKSON MWANGI NDIRITU ..... APPELLANT**

**AND**

**MARY WAMBUI GICHERU ..... RESPONDENT**

**RULING**

**A. The Respondent's application**

1. By a notice of motion dated 13.04.2022 brought under the provisions of Order 42 rule 6 of the Civil Procedure Rules, 2010 (the Rules) and all other enabling provisions of the law, the Respondent sought a stay of execution of the judgment and decree of this court dated 28.03.2022 pending the hearing and determination of an intended appeal to the Court of Appeal. She also sought for costs of the application to be provided for.
2. The application was based on the grounds set out in the body of the motion and the contents of the supporting affidavit sworn by the Respondent on 13.04.2022. The Respondent contended that being aggrieved by the said judgment and decree she had lodged a notice of appeal indicating her intention to appeal to the Court of Appeal. It was contended that if the suit property were to be transferred to the Appellant pursuant to the decree she would suffer substantial loss and her intended appeal may be rendered nugatory. The Respondent further contended that it was in the interest of justice to grant the application and that the Appellant shall not suffer any prejudice if the stay sought was granted.

**B. The Appellant's response**

3. The Appellant filed a replying affidavit sworn on 06.06.2022 in opposition to the application. It was contended that the application was filed in bad faith in order to unjustly enrich the Respondent by allowing her to retain both the suit property and the purchase price. It was contended that the



Respondent had not demonstrated that she stood to suffer substantial loss to warrant an order for stay of execution being granted.

4. The Appellant contended that he had no intention of alienating or disposing off the suit property and that in the unlikely event that the intended appeal to the Court of Appeal succeeded, the suit property may still be transferred back to the Respondent. It was further contended that the Respondent had not offered any security for due performance of the decree in the event that the intended appeal was eventually unsuccessful. The court was consequently urged to dismiss the application with costs.

### C. Direction on submissions

5. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. Consequently, the parties were given timelines within which to file and exchange their written submissions. The record shows that the Respondent's submissions were filed on 26.07.2022 whereas the Appellant's were filed on 26.09.2022.

### D. The Issue for determination

6. The court has considered the Respondent's notice of motion dated 13.04.2022, the replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the main question for determination is whether or not the Respondent has made out a case the grant of an order for stay of execution pending the hearing and determination of the intended appeal to the Court of Appeal.

### E. Analysis and determination

7. This application involves a conflict between two competing but legitimate interests. On the one hand, there is the right of the successful Appellant to enjoy the fruits of his judgment without undue delay after a long drawn out legal battle. On the other hand, there is the right of the unsuccessful Respondent to appeal against the judgment and decree of this court. The court is thus faced with the task of undertaking a delicate balance of these two interests.
8. The requirements for the grant of a stay of execution of a decree are stipulated in Order 42 rule 6(2) of the Rules as follows:

“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.”
9. The court has considered the material and submissions on record. The Respondent submitted that she had satisfied the requirements for the grant of stay pending appeal. In a nutshell, she contended that unless the order of stay sought was granted she was bound to suffer substantial loss and that the intended appeal might be rendered nugatory once successful. She cited the cases of *Fast Lane Developers Ltd -vs- Peter Gitau Njuguna* [2021] eKLR; *John Mark Wandolo -vs- Paul Nganga* [2021] eKLR; *Mugambi Wangombe & Another -vs- Biashara Sacco Society Ltd & 3 Others* [2022] eKLR; and *Cove Investments Ltd -vs- Johana Kiprotich Rono & Another* [2021] eKLR among others in support of the application.



10. The Appellant, on the other hand, submitted that the Respondent had failed to satisfy the requirements as to demonstration of substantial loss and provision of security for due performance of the decree should the intended appeal ultimately fail. It was further contended that the court had become functus officio upon delivery of judgment hence the Respondent should have sought a stay before the Court of Appeal. The Appellant relied upon the cases of James Wangalwa & Another –vs- Agnes Naliaka Cheseto [2012] eKLR, Sunsand Dunes Ltd –vs- Raiga Construction Ltd [2021] eKLR, Kenya Shell Limited –vs- Benjamin Kibiru & Another [1986] eKLR, Mwaura Karuga t/a Limit Enterprises –vs- Kenya Bus Services Ltd & 4 Others [2015] eKLR and Dickson Muricho Muriuki –vs- Timothy Kangondu Muriuki & 6 Others [2013] eKLR among others in opposition to the appeal.
11. The court is aware that the decree herein directed the Respondent to transfer the suit property to the Appellant within a specified period in default of which the Deputy Registrar was to sign all the necessary documents on behalf of the Respondent to facilitate the transfer of the property to the Appellant. The Respondent was apprehensive that in the absence of a stay, the Appellant may obtain registration and dispose of the suit property before the intended appeal is heard and determined in which event the outcome of the appeal may be rendered nugatory. Although the Appellant denied harbouring any such intention the court is alive to the risk of such disposal in the absence of a stay. The court is aware that a registered proprietor of property is always at liberty to deal with his property as he pleases in the absence of any legally binding constraints.
12. The court is thus satisfied that the risk of disposal of the suit property during the pendency of the appeal may constitute substantial loss within the meaning of Order 42 rule 6(2) of the Rules. There is no doubt from the material on record that the instant application was filed expeditiously and without undue delay as required by the Rules.
13. The next aspect for consideration is the issue of provision of security for due performance of the decree. Although the Respondent did not offer any security, the court is of the opinion that it is in the discretion of the court to make an order for provision of security for due performance of the decree with or without the Respondent’s concurrence. Although offering security by an applicant may be a sign of good faith, the court may nevertheless make an order for provision of security in the absence thereof.
14. In the case of Mwaura t/a Limit Enterprises –vs- Kenya Bus Services Ltd & 4 Others (supra), it was held, inter alia, that:

“...the security must be one which shall achieve due performance of the decree which might ultimately be binding on the Applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”
15. The court is thus satisfied that the Respondent has satisfied the requirements for the grant of stay pending the appeal. The court is thus inclined to grant the same subject to appropriate conditions and



provisions of security to enable the Respondent to exercise her undoubted right of appeal. As was held in the case of *Butt –vs- Rent Restriction Tribunal* [1979] eKLR:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:”

## **F. Conclusion and Disposal Order**

16. The upshot of the foregoing is that the court finds merit in the Respondent’s application for stay pending appeal. Accordingly, the notice of motion dated 13.04.2022 is hereby allowed in the following terms:
- a. There shall be a stay of execution of the decree of this court dated 28.03.2022 pending the hearing and determination of the intended appeal to the Court of Appeal or for a period of 2 years from the date hereof, whichever comes first.
  - b. The Respondent shall deposit the original title deed for Title No. Laikipia Kinamba Mithiga Block 1/682 (Njorua) in court within 14 days from the date hereof.
  - c. The Respondent shall deposit a sum of Kshs. 200,000/= as security for due performance of the decree to defray costs of the appeal before this court and the trial court within 30 days from the date hereof.
  - d. In the event of the Respondent defaulting on conditions (b) and (c) above the stay granted herein shall lapse automatically.
  - e. An order of inhibition be and is hereby granted under Section 68 of the *Land Registration Act, 2012* prohibiting any dealings with Title No. Laikipia Kinamba Mithiga Block 1/682 (Njorua) for a period of 2 years or until conclusion of the intended appeal to the Court of Appeal, whichever comes first.
  - f. The Appellant is hereby awarded costs of the application.
- 17 Orders accordingly.

**RULING DATED AND SIGNED AT NYAHURURU THIS 8<sup>TH</sup> DAY OF DECEMBER, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Ms. Wambui Nganga for the Appellant

Mr. Nderitu Komu for the Respondent

C/A - Carol

**Y. M. ANGIMA**

**JUDGE**

