



**Ngeny v Saina & 2 others (Environment and Land Appeal
9 of 2021) [2022] KEELC 15325 (KLR) (8 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15325 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND APPEAL 9 OF 2021
MN MWANYALE, J
DECEMBER 8, 2022**

BETWEEN

DAVID NGENY APPELLANT

AND

JEMIMA CHEPCHUMBA SAINA 1ST RESPONDENT

NIMROD KIPROTICH SAINA 2ND RESPONDENT

RODAH JEPTEPKENY SAINA 3RD RESPONDENT

RULING

1. The Respondent filed a Notice of Motion Application dated October 4, 2022 seeking the following orders;
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That there be a stay of execution and/or further execution of the decree herein pending the hearing and determination of the intended appeal to the Court of Appeal.
 - e. That there be stay of proceedings and/or further proceedings and/or hearing and/or taking any action in Kapsabet SMCC NO 25 of 2017 pending the hearing and determination of the appeal to the Court of Appeal.
 - f. That costs of the application be in the cause.
2. The application rests on the grounds on the face of it and supporting affidavit avers that they were aggrieved by the judgment of the Court delivered on September 22, 2022 hence preferring an appeal



to the Court of Appeal. That the appeal is meritorious as it raises very serious and weighty legal issues. That the Appellant/Respondent has taken steps to give effect to Kapsabet SPMCC NO 25 of 2017. The Applicants fear that the suit property may be transferred to third parties or dealt with adversely to their detriment. Therefore they applied for stay of execution of the decree of this Court as well as stay of proceedings in Kapsabet SPMCC NO 25 of 2017.

3. The Respondent/Appellant's opposed the application via a Replying Affidavit sworn by David Ngeny and deponed on October 13, 2022. He deposed that the judgment of this Court delivered on September 22, 2022 ordered for a retrial thereby reverting the parties to a position they were in the original suit hence it cannot be executed. That the Applicant has failed to prove the conditions precedent for grant of an order for stay of proceedings. Further that there is no arguable appeal with high chances of success in this case and finally that the cons of granting an order for stay of proceedings outweigh the pros. Therefore the application ought to be dismissed with costs.
4. On October 18, 2022, parties argued the application orally in Court through their respective Counsels.
5. Counsel for the Respondent/Applicant, Ms Odwa submitted that her client will suffer substantial loss of orders sought are not granted since the status prevailing will lead to eviction of Applicants rendering them homeless. That the property ought to be preserved pending determination of the appeal. Counsel relied in the case of *Francis Njoroge and 2 others vs Willy Mwangi Ndegwa (2019) eKLR* to buttress this position.
6. It was further submitted that there was no delay in filing the instant application since judgment was delivered on September 22, 2022, Notice of Appeal filed on October 3, 2022 and the application herein filed on October 4, 2022 making a total of 12 days within which all these was done after delivery of judgment.
7. As regards security pending appeal, counsel submitted that the decree in this suit was not monetary to warrant deposit of security for due performance of decree. Same position was held in the case of *David Oyiare Ntanguni vs Matuiya Ole Naisauaku Orket (2017) eKLR*.
8. Counsel for the Applicant also submitted that they have an arguable appeal which will be rendered nugatory if the suit is heard afresh. That the Respondent /Appellant has not demonstrated any prejudice they will suffer if the application is allowed. It was finally submitted that based on the above the application be allowed.
9. On the other hand, the Respondent's Counsel Mr Wambua relied on the Replying Affidavit filed and submitted that the order to this Court vide its judgment delivered on September 22, 2022 was one for retrial hence not capable of being executed.
10. On stay of proceedings counsel submitted that the conditions precedent for granting such an order had not been demonstrated. He stated that no justification had been put forth since they will still be heard. Counsel finally submitted that his client will be prejudiced since purchase price had already been paid out. In the circumstances he urged the Court to dismiss the application.
11. In response to submissions by the Respondent's Counsel Ms Odwa, Counsel for the Applicant submitted that there was no requirement that a draft Memorandum of Appeal be annexed since the Court needed not to probe as to the merits of the appeal. Thus the application was merited and ought to be allowed.



Analysis And Determination:

12. Upon consideration of the application, the supporting and replying affidavits filed as well as submissions by Counsels, the issues that emanate for consideration and determination are;
 - i. Whether the Applicant is entitled to an order for stay of execution of the decree pending appeal.
 - ii. Whether the Applicant is entitled to an order for stay of proceedings in Kapsabet SPMCC NO 25 of 2017 pending appeal.
 - iii. Whether the Applicant is entitled to an order for stay of execution of the decree pending appeal.
13. The principles guiding grant of an order for stay of execution pending appeal are provided under Order 42 Rule 6 (2) of the [Civil Procedure Rules](#) which states that;

' No order for stay of execution shall be made under sub-rule (i) 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 delays;
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.'
14. Grant for such an order is discretionary and Courts must balance the interest of both parties as was held by the Court of Appeal in the case of *Butt vs Rent Restriction Tribunal (1982) KLR 417*.
15. Apart from balancing interests of both parties, Courts have to endeavour to preserve the substratum of the case. This was the position in the case of *Consolidated Marine vs Nampijja and Another Civil App No 93 of 1989* 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.'
16. That said, the conditions the Applicant ought to satisfy as stated in Order 42 Rule 6 (2) are;
 - i. Substantial loss
 - ii. No unreasonable delay
 - iii. Security for performance
17. I will address each condition in relation to the instant application as follows;
18. First, on substantial loss, the Applicant submitted that the effect of the judgment/decree of this Court would revert the parties to the position they were before the original suit. Status quo according to the Applicant was that they are/herein possession of the suit property while the Respondent was the alleged registered owner.

Therefore this would lead to their eviction from the suit property by the Respondent and even transfers to third parties by the said Respondent. In my view, since the Applicant was in occupation of the suit property and risked being removed if the Respondent proceeds with eviction, she has demonstrated substantial loss they would suffer if stay of execution is not granted.



19. In regard to the issue of no unreasonable delay, this Court has noted that judgement was delivered on September 22, 2022, Notice of Appeal filed on October 3, 2022 and the instant application filed on October 4, 2022. This translates to a period of not more than 12 days as submitted by the Applicant. I am of the opinion that this period is definitely not inordinate delay.
20. Lastly on the conditions, precedent for grant of stay of execution pending appeal which is security for due performance of the decree, the Applicant submitted that this was not a monetary decree hence security was not necessary. However the said Applicant has also expressed in their grounds in support of the application that they are willing to abide by any conditions set by this Court. That said, this Court agrees with the Applicant that indeed this is not a monetary decree, therefore in exercising this Court's discretion, I will not direct for payment of any security pending appeal in view of the above.
21. From the foregoing, the Court finds that the Applicant has met all the conditions precedent for grant of an order for stay of execution pending appeal.
 - ii) Whether the Applicant is entitled to an order for stay of proceedings in Kapsabet SPMCC No 25 of 2017.
22. It is no doubt that his Court has powers to stay proceedings pending appeal which is derived from Order 42 rule 6 (1) of the Civil procedure Rules. It provides that;

' 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 orders, 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 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.'
23. The test for stay of proceedings was explained by Ringera J (as he was then) in the case of *Global Tours and Travels Limited; Nairobi High Court Winding up Cause No 43 of 2000* as follows;

' As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice. The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted.

In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether is it an arguable one, the scarcity and optimum utilization of judicial time and whether the application had been brought expeditiously.'
24. In the instant case, it is my considered opinion that it would be in the interest of justice to exercise Court's discretion and grant stay of proceedings in Kapsabet SPMCC No 25 of 2017 to avoid a scenario where parallel proceedings are ongoing in both the trial Court and the Court of Appeal over same parties and same subject matter. It will also prevent a possibility of contradictory verdicts by these two Courts. To avoid wastage of judicial time and resources, the proceedings in the trial Court ought to be put on hold.



25. In view of the above, I find that the Notice of Motion application dated October 4, 2022 is merited and is hereby allowed.

26. Each party to bear its own costs of the application.

Dated at Kapsabet this 8th day of December 2022.

Hon. M. N. Mwanyale,

JUDGE.

In the presence of;

Ms. Wahome for Applicant

Mr. Kigamwa for Respondent

