



REPUBLIC OF KENYA



KENYA LAW
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**Kasoli v Mbithi (Environment and Land Appeal E004 of 2022)
[2022] KEELC 15310 (KLR) (7 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15310 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E004 OF 2022
TW MURIGI, J
DECEMBER 7, 2022**

BETWEEN

NGEMI KASOLI APPELLANT

AND

VERONICAH MBUU MBITHI RESPONDENT

RULING

1. By a Notice of Motion dated 22nd of March, 2022 brought pursuant to the provisions of Order 42 Rule 6 of the *Civil Procedure Rules 2010*, Section 1A, 1B and 3A of the *Civil Procedure Act* and all other enabling provisions of the law the Applicant seeks the following orders:-
 1. Spent.
 2. That the Honourable Court be pleased to grant a stay of execution of the ex-parte judgment delivered on 15th of February, 2022 in Makindu M.ELC No. 1 of 2018 pending the hearing and determination of the application inter partes.
 3. That pending the hearing and determination of this Appeal, the Honourable Court do grant a stay of execution of the *ex parte* judgment in Makindu M.ELC No. 1 of 2018 delivered on 15th of February, 2022 and all consequential orders therein.
 4. That the costs of the application be borne by the Respondent.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of the Applicant sworn on the even date.

The Applicant's Case

3. It is the Applicant's case that the Respondent filed Makindu M.ELC Case No 1 of 2018 against her on 12th of February, 2018. The Applicant averred that in response to the suit, her Advocates on record filed



a Defence and Counter Claim. That despite being served with a hearing notice, her Advocates ignored or neglected to appraise her of the proceedings therein. She further averred that the Respondent did not effect personal service upon her after her Advocates on record failed to appear before the Court. That the case proceeded undefended and an ex parte judgment was entered in favour of the Respondent on 15th of February, 2022. She argued that she was in possession of the suit property and risks being evicted from her land which will render the appeal nugatory. She argued that she should not be made to suffer due to the mistake of her former Counsel. She urged the Court to allow the application.

The Respondent's Case

4. In opposing the application, the Respondent vide the replying affidavit sworn by Paul Wambua Muia on 9th of June, 2022 averred that the Respondent initially filed his suit vide Makueni Case Number 454 of 2017. That on November 23, 2017 the Applicant entered appearance in person and thereafter on December 6, 2017, she filed her statement of Defence, list of documents and witness statement. That on 3rd of May, 2018 the suit was transferred from Makueni Law Courts to Makindu Law Courts and registered as Makindu ELC No. 1 of 2018. He went on to state that on 04/09/2019 the Applicant appointed the firm of Mwangangi and Associates to represent her in Makindu ELC No. 1 of 2018. That on September 29, 2020 the firm of Mwangangi and Associates was granted leave to cease acting for her in the matter.
5. That on January 25, 2021 the Applicant appointed the firm of Gikandi & Co Advocates to act for her in the matter. That on September 24, 2021 the firm of Gikandi & Co Advocates were served with the hearing notice for October 12, 2022. That on October 12, 2022 the suit proceeded for hearing in the absence of the Defendant and his Advocate after the Court satisfied itself that they had been duly served.
6. The Court directed the parties to canvass the application by way of written submissions.
7. The Respondent opted not to file submissions and chose to rely on the replying affidavit.

The Applicant's Submissions

8. The Applicant's submissions were filed on 30th of June, 2022.
9. Counsel for the Applicant raised the following issues for the Court's determination:-
 - i. Whether an order of stay of execution pending the hearing and determination of Appeal should be granted.
 - ii. Who should bear the costs of the application.
10. Counsel submitted that Order 42 Rule 6 sets out the conditions to be satisfied before a stay of execution pending appeal can be granted. Counsel submitted that the Applicant has satisfied the conditions for the grant of stay of execution pending appeal.
11. On the issue of whether an order of stay of execution pending the hearing and determination of the appeal should be granted, Counsel submitted that the Court in its judgment ordered the Applicant to demolish the building constructed on the suit property. Counsel submitted that the Applicant will suffer irreparable loss since she is in possession of the suit property. Counsel argued that the Applicant will suffer irreparable loss which cannot be compensated by an award of damages if she is evicted from the suit property. Counsel further submitted that the application was filed within the timelines provided by the law. As regards security for costs, Counsel submitted that the Applicant is ready and willing to abide with any conditions granted by the court.



Analysis and Determination

12. Having considered the application, affidavits and the submissions by the Applicant, I find that the only issue that arises for determination is whether the Applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for the grant of stay of execution pending Appeal.
13. Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules* outlines the guiding principles to be met for the grant of stay and provides that;
 - 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.
 - 6(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 such security of costs for the performance of such decree or order as may ultimately be binding on him has been given by Applicant.
14. Going by the above provisions of the law, it is clear that in an application for stay of execution pending Appeal, the Applicant must satisfy the following three conditions: -
 1. The Court is satisfied that substantial loss may result to the Applicant unless the order is made.
 2. The application has been made without unreasonable delay.
 3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the Applicant has been given by the Applicant.
15. In considering an application for stay of execution, I am guided by the case of *Butt vs Rent Restriction Tribunal* (1982) KLR 417 where the Court of Appeal gave the following guidelines;

“The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicants at the end of the proceedings. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”
16. The grant of an order of stay of execution is a discretionary one. In the case of *RWW vs EKW* (2019) eKLR the Court held that;

“...the purpose of an application for stay of execution pending an appeal is to preserve the subject 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. However, in doing so the court should weigh the right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of damages.”

17. The Court is therefore called upon to balance both the rights of the successful party so as not to hinder him from his fruits of judgment and those of the Appellant whose Appeal may succeed and be rendered nugatory if stay of execution is not granted.
18. The purpose of stay of execution is to preserve the substratum of the case. In the case of *Consolidated Marine vs Nampijja & Another* Civil App No. 93 of 1989 (Nairobi) 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.”
19. The issue for determination is whether the Applicant has satisfactorily discharged the conditions for the grant of stay of execution pending Appeal.
20. The Applicant is seeking for a stay of execution of the judgment delivered on 15th of February, 2022 in Makindu M.ELC No. 1 of 2018 pending the hearing and determination of the Appeal.
21. The Court will now determine whether the Applicant has satisfied the conditions upon which the orders can be granted.
22. On the first condition of proving that substantial loss may result unless stay orders are granted, the Applicant should not only state that he is likely to suffer substantial loss, he must prove that he will suffer substantial loss if stay orders are not granted. In so finding, I am persuaded by the Court of Appeal decision in the case of *Charles Wabome Getbi vs Angela Wairimu Getbi* (2008) eKLR where the Court held that;

“...it is not enough for the Applicants to say that they live or reside on the suit land and they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”
23. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma vs Abuoga* (1988) KLR where the Court held that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.
24. In *Tropical Commodities Suppliers Ltd and Others vs International Credit Bank Ltd (in Liquidation)* (2004) 2EA 331 the court defined substantial loss as follows;

“substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”
25. The Applicant averred that the trial Court in its judgment ordered her to demolish the building erected on the suit property and awarded the Respondent general damages of Kshs 400,000/- The Applicant further averred that she is in possession of the suit property and is apprehensive that she may be evicted



by the Respondents before the Appeal is heard and determined. She argued that this would render the appeal nugatory.

26. The Respondents on the other hand argued that the Applicant and her Advocate failed to attend Court on the hearing date despite being duly served and hence the matter proceeded as undefended.
27. It is not in dispute that the Applicant has filed an Appeal against the Judgment delivered on 15th of February, 2022. In this regard the applicant produced the memorandum of Appeal and a copy of the judgment as (annexures NK1 and NK2) respectively. I have read the judgment of Hon. J.O. Magori SPM in Makueni ELC No. 1 of 2018 delivered on 15th of February, 2022. The Court in its findings stated as follows in part:-

“The plaintiff has proved her claim on a balance of probabilities as required.

Accordingly I enter judgment in favour of the plaintiff against the Defendant as follows:-

1. The defendant is ordered to demolish the building erected on the land title No Makindu/Kisingo/2187
 2. The plaintiff is awarded general damages of Kshs 400,000/- for trespass.
 3. The plaintiff is awarded costs of this suit plus interest at Court rates.
 4. The defendant’s Counter Claim is dismissed with costs to the Plaintiff.”
28. From the judgment of Hon J.O. Magori, it is clear that the Applicant was ordered to demolish the building erected on title number Makindu/Kisingo/2187 amongst other orders. The Applicant has expressed the fear that she will be evicted from the suit premises where she is in occupation. The Applicant averred that she is in occupation of the suit property and that she will suffer immensely if she is evicted from the suit premises.
29. Going by the judgment delivered on 8th of September, 2021, it is evident that the applicant was ordered to demolish the structure on the suit property. That being the case, I find that the Applicant’s fear that the Respondent may evict her from the suit land is not baseless.
30. It is not in dispute that the trial court in its judgment ordered the applicant to demolish the structure on the suit property. In my view since the applicant was in possession of the suit property and can be evicted, she has demonstrated that she will suffer substantial loss if the orders sought are not granted.
31. I find that the applicant has satisfied this court that he is likely to suffer substantial loss if she is evicted from the substratum of the appeal.
32. As regards the second requirement which requires that the application be made without unreasonable delay, it is not in dispute that the judgment was delivered on 15th of February, 2022. The present application was filed on 28th of March, 2022. I find that the application was brought without undue delay.
33. On the last condition as to the provision of security for costs, Order 42 Rule 6 (2) (b) of the [*Civil Procedure Rules*](#) is couched in mandatory terms to the effect that the Applicant must furnish security for the performance of the order or decree. In the case of [*Arun C.Sharma vs Ashana Rakundalia t/a Raikundalia & Co. Advocates & 2 others*](#) (2014) eKLR, the Court held that;

“The purpose of the security under Order 42 is to guarantee due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment



debtor....civil process is quite different because in civil process the judgment is like a debt hence the applicant become and are judgment debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the civil procedure rules acts as a security for the performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

34. The applicant has expressed his willingness to provide security as directed by the court.
35. In the end I find that the applicant has satisfied the conditions required for the grant of an order of stay of execution pending appeal.
36. The upshot of the foregoing is that the application dated 6th of October, 2021 is allowed in the following terms;
 - i. Stay of execution of the judgment/decree herein is granted pending the hearing and determination of the Applicant’s Appeal.
 - ii. The Applicant shall deposit Kshs 200,000/= as security for costs in Court within 30 days from the date of delivery of this ruling in default the stay orders shall automatically lapse.
 - iii. Each party to bear its own costs.

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HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 7TH DAY OF DECEMBER, 2022.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi

Muthiani for the Appellant.

