



REPUBLIC OF KENYA



**Ndivo & 2 others v Kivuva (Personal representative of Kivuva Nzekali Deceased) (Environment and Land Appeal E005 of 2022) [2022] KEELC 15287 (KLR) (7 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15287 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT AND LAND APPEAL E005 OF 2022  
TW MURIGI, J  
DECEMBER 7, 2022**

**BETWEEN**

**DANIEL MWATU NDIVO ..... 1<sup>ST</sup> APPLICANT  
JOSEPH KING'OO ..... 2<sup>ND</sup> APPLICANT  
BENARD MUTURU NDIVO ..... 3<sup>RD</sup> APPLICANT**

**AND**

**DANSON KIOKO KIVUVA ..... RESPONDENT  
PERSONAL REPRESENTATIVE OF KIVUVA NZEKALI DECEASED**

**RULING**

1. By a notice of motion dated March 28, 2022 pursuant to order 42 rule 6(1), (2), (3), order 51 rule 1 of the *Civil Procedure Rules*, section 1A, 1B and 3A of the *Civil Procedure Code* and all other enabling provisions of the law the applicant seeks the following orders:-
  1. Spent.
  2. There be a stay of execution of the court's ruling in Makindu PMC ELC No 52 of 2013 Danson Kioro Kivyuva (suing as the representative of Kivuva Nzikali Deceased) v Daniel Mwatu Ndivo and 3 others until the application herein is heard and determined.
  3. There be a stay of execution of the court ruling in Makindu PMC ELC No 52 of 2013 Danson Kioro Kivuva (suing as the representative of Kivuva Nzikali Deceased) v Daniel Mwatu Ndivo and 3 others until the appeal herein is heard and determined.
  4. That the costs of this application be awarded to the applicants.
2. The application is premised on the grounds on its face together with the supporting affidavit of the applicants sworn on the evendate.



### **The Applicants' Case**

3. A summary of the grounds and the averments is that *vide* its ruling delivered on February 14, 2022 in Makindu PMCC No 52 of 2013, the trial court allowed the respondent's preliminary objection with costs to the respondents. The applicant averred that the respondent is in the process of submitting the costs awarded in the objection for assessments by the executive officer. The applicants contended that they have filed a memorandum of appeal dated March 7, 2022 against the said ruling. The applicants argued that if the orders sought are not granted, the respondent will have his costs assessed and execute against them which will render the appeal nugatory. He went on to argue that the application was made without delay.

### **The Respondent's Case**

4. In opposing the application, the respondent *vide* his replying affidavit sworn on June 23, 2022 averred that he is the administrator of the estate of his late father. He averred that after the completion of the adjudication process, his late father filed a suit against the applicants father with the land adjudication committee and that upon being heard and determined, the adjudication committee shared land No 908 into five portions. That Joel Ndivo remained with the original number and was registered as the owner of plot No Makindu/Kisingo/908 while his father's share was registered as the owner of plot No Makindu/Kisingo/1827.
5. That after the demise of Joel Ndivo, his eldest son took over the litigation and represented the entire family who appealed to the arbitration board.
6. He went on to state that the eldest son objected to the register of parcel No 1827. That the objection was heard by the Adjudication Officer who adopted the decision by the arbitration board with modification by adding a portion of land from 1827 and moving it to 908 to replace a portion left in the plaintiff's land.
7. That being dissatisfied with the decision, the applicant appealed to the Minister but his appeal was dismissed. That later on, the applicant applied to the ELC for an order of certiorari on the grounds that the respondent fraudulently acquired title to parcel No 1827. He averred that the court confirmed all the decisions of the quasi-judicial tribunals and held that the suit property was not fraudulently acquired.
8. He contended that the appeal has no chances of success and the same should be dismissed with costs to the respondent.

### **The Response**

9. The applicants averred that the respondent's replying affidavit is defective and devoid of merit since it addresses the merits and demerits of the appeal. It was argued that the respondent has not demonstrated how the application is bad in law or how the appeal has no chance of success.
10. The applicants reiterated the contents of their replying affidavit and maintained that the appeal has chances of success.
11. The application was canvassed by way of written submissions.

### **The Appellants/applicants Submissions**

12. The applicant's submissions were filed on September 19, 2022.



13. Counsel for the applicants raised the following issues for the court's determination:-
  - i. Whether stay of execution should be granted pending the hearing and determination of the appeal herein.
  - ii. Whether the appeal herein has chances of success.
  - iii. Whether there was inordinate delay in presenting this application.
14. Counsel submitted that the principles that guide a court in an application for stay for execution were set out in the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417. In answer to the first issue, counsel submitted that pursuant to the court's ruling in Makindu ELC No 52 of 2013, the respondent was in the process of having the costs awarded in the lower court assessed in order to execute against the applicants, a fact admitted by the respondent in paragraph 16 of his replying affidavit. Counsel argued that the grant of an order of stay of execution preserves the subject matter pending the hearing and determination of the appeal.
15. With regards to the issue of whether the appeal has chances of success, counsel submitted that the appeal raises triable issues which are founded in the memorandum of appeal together with the annexures in the supporting affidavit. Counsel argued that the respondent has not demonstrated that he will suffer any prejudice if the orders of stay are granted.
16. Lastly it was submitted that the application and the appeal were filed without inordinate delay.
17. To buttress his submissions, counsel relied on *Bashir Godana v Fatuma Godana Tupi* (2018) eKLR.

### **The Respondents Submissions**

18. The respondent filed his submissions on October 25, 2022.
19. Counsel submitted that the issues of ownership over the suit properties were heard and determined by the dispute resolution mechanisms provided under the *Land Adjudication Act* and finally by the court in the ELC Misc No 18 of 2015. Counsel argued that the application is res judicata to the decisions of the quasi judicial tribunals and to ELC Misc application No 18 of 2015. Counsel further submitted that the applicants have not satisfied the conditions spelt out in order 45 rule 6 of the *Civil Procedure Rules*.

### **Analysis And Determination**

20. Having considered the application, affidavits and the rival submissions, 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.
21. 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.

22. 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.

23. In considering an application for stay of execution, I am guided by the case of *Butt v 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.”

24. The grant of an order of stay of execution is a discretionary one. In the case of *RWW v 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.”

25. 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.

26. The purpose of stay of execution is to preserve the substratum of the case. In the case of *Consolidated Marine v 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.”



27. The issue for determination is whether the applicant has satisfactorily discharged the conditions for the grant of stay of execution pending appeal.
28. The applicant is seeking for a stay of execution of the ruling delivered on February 14, 2022 in Makindu ELC No 52 of 2013, pending the hearing and determination of the appeal.
29. The court will now determine whether the applicant has satisfied the conditions upon which the orders can be granted.
30. 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.
31. In so finding, I am persuaded by the Court of Appeal decision in the case of *Charles Wabome Gethi v Angela Wairimu Gethi* (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.”
32. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma v 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.
33. In *Tropical Commodities Suppliers Ltd and others v 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...”
34. The applicant averred that the respondent is in the process of submitting the costs awarded by the lower court for assessment by the Executive Officer. The applicants further averred that they will suffer irreparable loss if the respondent executes the ruling as their appeal will be rendered nugatory if the orders sought are not granted.
35. In addition, the applicants submitted that he was apprehensive that if the court does not grant the stay orders, the respondents would execute before the appeal is heard and determined.
36. The respondents on the other hand argued that the applicants have since 1974 been harassing him. That the issues raised had been dealt with by the tribunals and later confirmed by the court. He argued that the appeal has no chances of success and that the application was an abuse of the court process.
37. I have read the ruling of Hon B.N Ireri delivered on February 14, 2022 in PMCC ELC No 52 of 2013. The ruling relates to a notice of objection dated October 1, 2021 where the plaintiff's objected to the defence, counter claim, statements of witness, first documents, survey plans court plans on the grounds that they are res judicata. The court in its ruling upheld the objection dated October 1, 2021 and struck out the further amended defence and counter claim together with all the accompanying documents filed therein with costs to the plaintiff.



38. Going by the ruling delivered on February 14, 2021, it is crystal clear that the respondent was awarded costs of the objection. The respondent admitted in his replying affidavit that he was in the process of assessment of costs by the Executive Officer. The applicants fear that the respondent may execute the ruling before the appeal is heard and determined is not baseless.
39. Taking into account that the respondent is in the process of executing for his costs, this court is satisfied that the applicants have demonstrated that they will suffer irreparable loss if the execution for costs were to proceed.
40. In an application for stay of execution pending appeal, an applicant must also satisfy the court that the application has been made without unreasonable delay. It is not in dispute that the ruling was delivered on February 14, 2022. The present application was filed in court on April 26, 2022. I find that the application was filed without undue delay.
41. 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 v 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.”
42. The applicants have expressed their willingness to provide security as directed by the court.
43. 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.
44. The upshot of the foregoing is that the application dated March 28, 2022 is allowed in the following terms;
- i. Stay of execution of the ruling in Makindu PMC ELC No 52 of 2013 is granted pending the hearing and determination of the applicants appeal.
  - ii. The applicants shall deposit Kshs 100,000/= as security for costs in court within 21 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



Kilonzo present for the Appellant

