



**Kweri v Kamau (Environment & Land Case 100 of 2017)
[2025] KEELC 3577 (KLR) (5 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3577 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 100 OF 2017**

JA MOGENI, J

MAY 5, 2025

BETWEEN

JOSEPH KARIUKI KWERI APPLICANT

AND

RUTH MURUGI KAMAU RESPONDENT

RULING

1. This Ruling is in respect of the Plaintiff's Notice of Motion Application dated 11/10/2023 and the Defendant's Notice of Motion Application dated 23/05/2024.
2. In the Application dated 11/10/2023 the Plaintiff/Applicant has expressed and brought the Application under Sections 1A, 1B, 3A and 38 of the Civil Procedure Act. The Application seeks the following orders;
 - a. That, the Honorable Court do give leave to the Plaintiff/Applicant/Decree Holder to deposit the sum of Kesh 600,000 in Court in compliance with Order 1 of the Decree given by this Court on 27th April, 2023 as the Defendant/Judgment Debtor has refused to accept and receive the said payment
 - b. That, upon compliance with (1) above by the Plaintiff/Applicant/Decree Holder, the Deputy Registrar to proceed to effect order (2) in the said Decree
 - c. That costs of this Application be in the course.
3. The Application was premised on the grounds that this Court issued a Judgment dated 27/04/2023 and ordered that the Defendant transfers the suit property to the Plaintiff subject to the Plaintiff paying Kesh 600,000 to the Defendant. In default, the Deputy Registrar was ordered to execute all necessary documents to ensure the orders issued were respected and implemented. The Plaintiff was also awarded the costs of the suit.



4. Following the said order the Advocate for the Plaintiff/Applicant/Decree Holder presented bankers cheques to the Advocate for the Defendant/Judgment debtor who however stated that he had no instructions to receive the cheques and that they returned the said cheques as per the attached Affidavit of Service and annexures marked JKK3.
5. It is the Applicant's averment that the terms of the order cannot be fulfilled and are being frustrated by the Defendant/Judgment Debtor as there are no stay of execution orders in place. The Applicant therefore seeks to have decretal amounts deposited in Court so as to satisfy the terms of the Decree.
6. The Defendant filed a Replying Affidavit dated 8/04/2024 and averred that following the Judgment he was aggrieved and he instructed his Advocate to file an Appeal as per annexure RMK 1. He further contended that this Court cannot issue the orders sought since this shall be an abuse of the process of the Court. That the Applicant should be patient to await for speedy conclusion of the Appeal.
7. Directions were thereafter given on February, 2nd 2025 that the Application be canvassed by way of written submissions. I have scanned the CTS and the Court file it seems no party filed any submissions in relation to this Application.
8. I have nevertheless given due consideration to the averments set out in the parties' respective Affidavits. The background of the Application is manifest from the record, namely, that upon Judgment being entered in favour of the Plaintiff, the Defendant was to receive Kesh 600,000 and she was directed to transfer the suit property to the Plaintiff but this has not happened to date. This Application is therefore merited.
9. The second Application is dated 23/05/2024 and is brought under Section 3A of the [Civil Procedure Act](#) and Order 42 of the Civil Procedure Rules seeking the following:
 - a. Spent
 - b. This Court be pleased to stay execution of the Judgment delivered on 27.4.2023 in the lower Court by Hon. Lady Justice J.g Kemei (judge) In Thika E.L.C case no. 100 of 2017 and the order to transfer the suit land No. Thika Municipality Block 6/7XX to the Plaintiff subject to payment of Kshs.600,000/= be stayed pending the hearing and determination of appeal number E448 OF 2023 - NAIROBI to preserve the subject matter in dispute so that the right of the Applicant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.
 - c. The cost of this Application be provided for.
10. The Application is based on the annexed Affidavit of Ruth Murugi Kamau on the following grounds:
 - a. The Defendant was dissatisfied with the Judgment of this Honorable Court delivered on 27.4.2023 filed an appeal in Nairobi E.L.C.L.A NO. E448 OF 2023.
 - b. The appeal has high chances of success.
 - c. It would be prudent to stay the execution of Judgment pending the hearing and determination of the Appeal.
 - d. The Application has been brought without undue delay and will not prejudice the Respondent in any way.



11. The Application is opposed vide the Replying Affidavit filed by Joseph Kariuki Kweri and sworn on 4/06/2024. He avers that the Application has been brought after an inordinate and unexplained delay. Judgement intended to be stayed having been delivered on 27th April 2023 over a year ago.
12. Further that the Application is an afterthought as it was filed immediately after directions were given by this Court in respect of the Respondent's Application dated 11th October, 2023 in pursuance of execution of the decree.
13. That the Applicant herein is inviting this Court to sit in its appeal. This Court could only give a temporary stay pending filing a substantive Application in the Court of Appeal pursuant to Rule 5 of the Court of Appeal Rules. This Application is therefore incompetent and an abuse of the Court process.
14. It is the contention of the Respondent that this Court cannot determine whether or not an appeal will be rendered nugatory or not as requested by the Applicant in view of the foregoing. In any case the issue involves land which will still be in existence whatever time the Court of Appeal makes determination, if any.
15. The Respondent urged the Court to dismiss the Application with costs.
16. The parties were directed to file written submissions upon accepting to canvass the Application by way of written submissions. I have perused the Court record and I have not chanced on any submissions relating to this Application. That be as it may the Court will proceed to examine the Application and render a Ruling. In any case there are many cases decided without submissions.

Analysis and Determination.

17. I have carefully considered the Application, the affidavits tendered by both parties in support and in rebuttal of issues herein as well as the judicial precedence and the law of the subject of Application, I take the following view of the matter. The main issue for determination whether the Application has met the threshold for grant of the orders sought in the instant Application.
18. With respect of the prayer to stay execution of the Judgment issued in favour of the Respondent herein, the Applicant argue that there is need to preserve the suit property as the appeal has high chances of success. Further that the Application has been brought without undue delay and will not prejudice the Respondent in any way.
19. Order 42 Rule 6(2) of the Civil Procedure Rules upon which the Application is premised bars this Court from ordering stay of execution pending appeal unless—
 - a. The Application is brought without inordinate delay.
 - b. The Applicant demonstrates that he will suffer substantial loss unless stay is ordered, and
 - c. The Applicant is willing to give security as the Court may deem fit to order.
20. The principles for grant of stay of execution pending Appeal were set out in *Butt v Rent Restriction Tribunal* [1982] KLR 417, where the Court of Appeal held that: -
 1. The power of the Court to grant or refuse an Application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.



2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the judge's discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
 4. The Court in exercising its discretion whether to grant [or] refuse an Application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The Court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon Application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.
21. The Respondent argued that the Application was filed one (1) year after the Judgment and that the Applicant is guilty of inordinate delay in filing the Application.
 22. As I set forth to determine the main issue before me, I need to summarize some undisputed facts in relation to the instant Application. First, there is the agreement of sale dated 5/12/2014 entered into between the Plaintiff as the buyer and the Defendant and her deceased husband as the sellers. The suit property is described as Thika Municipality Block 6/703.
 23. The purchase price was Kesh 2.1 million out which a deposit of Kesh 1.5 million was paid and the balance of Kesh 600,000 was payable on or before the expiry of 90 days and subject to the vendors signing completion document in favor of the Plaintiff. The Plaintiff sued for specific performance and the Court in its Judgment dated 27/04/2023 ordered the transfer of the suit land to the Plaintiff after showing that he paid the balance of the purchase price to the Defendant vide cheque dated 12/05/2015 and he exhibited the supporting forwarding letter.
 24. The Court also directed and ordered that in default the Deputy Registrar will execute all necessary document to effectuate the transfer. The Applicant filed an Appeal which he is referring to as NAIROBI E.L.C.L.A NO. E448 OF 2023 and this Application seeking to stay the execution of the Judgment.
 25. That being the case, it means that he had already taken steps pursuant to Order 42 Rule 6(4) of the Civil Procedure Rules and Rule 82 (1) and (2) of the Court of Appeal Rules. It is not clear when he filed the appeal but this Application was filed on 23/05/2024. As to whether he served them or not as required by the Rules this Court is not privy to it, but it has not been raised by the Respondents. Therefore, this Court will not delve into the issue.
 26. Since the Applicant filed a Notice of Appeal as observed above, it means that in terms of Order 42 Rule 6(4) of the Civil Procedure Rules an appeal has already been filed against the Judgment herein. Thus, the applicable law is Order 42 Rule 6(1) and (2) of the Civil Procedure Rules.
 27. Paragraph 18 above has already set out the principles to be considered for grant of a stay where there is appeal pending. Sub-rule 1 of Rule 6 is to the effect that the filing of an appeal or second appeal does not operate as a stay of execution or proceedings. The Applicant must show sufficient cause for a stay to be granted. Sub-rule 2 of Order 42 Rule 6 cited above gives requirements to be met.
 28. Since these are settled principles of law where the Superior Courts have pronounced themselves I see not need of reinventing the wheel on the import and interpretation of the said provisions. Thus,



I would follow a number of decisions on the issue which expound on the conditions Civil Appeal No.107 of 2015, Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR, will suffice. In it the Court held that:-

“The Application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another v Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the Application must 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 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 have been rendered nugatory.”These twin principles go hand in hand and failure to prove one dislodges the other.”

29. It is my view that whereas the three conditions must be considered jointly, and whereas the one on substantial loss is the paramount one for that matter, the instant case I start with determining whether the Application was brought without undue delay: it is easy. Judgment was delivered herein on 27/04/2023, the current Application was brought one year later on 23/05/2024. This delay of one year is unexplained, but I am prepared to find it not undue or inordinate.
30. The next issue is whether or not the Applicant has shown that he will suffer substantial loss. The Applicant herein only stated that she has an arguable appeal and that the Application has been brought without undue delay. Further that the Respondent will suffer no prejudice. She also stated that the Plaintiff has applied for execution but did not support this claim by attaching any execution orders.
31. The Respondent on his part contended that the Applicant only filed the Application after he had filed for execution orders after he filed an Application seeking execution dated 11/10/2023. It therefore follows that there are execution orders being sought. The threat of execution alone does not portend substantial loss and the Applicant was bound to demonstrate the loss she would suffer. She failed to show this only urging the Court to consider it prudent to stay the Judgment!
32. On the last provision on security, the Applicant did not offer any security or even commit to be bound by any condition on security that would be set up by this Court.
33. The upshot is that the Application is wholly unmeritorious.
34. I now proceed to issue the following orders in relation to the Plaintiff’s Notice of Motion Application dated 11/10/2023 and the Defendant’s Notice of Motion Application dated 23/05/2024:
 - i. That the Notice of Motion Application dated 11/10/2023 is merited and the Plaintiff/Applicant is hereby awarded the costs of the Application.
 - ii. That the Notice of Motion Application dated 23/05/2024 is unmerited and is dismissed with costs awarded to the Respondent.
 - iii. For avoidance of doubt the costs relating to the Notice of Motion Application dated 11/10/2023 and 23/05/2024 are both awarded to the Plaintiff/Applicant in the first Application and the Plaintiff/Respondent in the 2nd Application.

Orders Accordingly.



DATED SIGNED AND DELIVERED VIRTUALLY AT THIKA VIA VIDEOLINK THIS 5TH DAY OF MAY, 2025.

MOGENI J

JUDGE

