



**Kianja v Ngaruro (Environment and Land Appeal 30 of 2023)
[2024] KEELC 510 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 510 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL 30 OF 2023
MAO ODENY, J
FEBRUARY 8, 2024**

BETWEEN

SAMUEL WAIRUMBI KIANJA APPELLANT

AND

CM GITAH NGARURO RESPONDENT

RULING

1. This ruling is in respect of a Notice of Motion dated 20th November, 2023 by the Appellant seeking the following orders:
 - a. Spent.
 - b. Spent.
 - c. That this Honourable court be pleased to order stay of execution of the judgment dated 31.10.2023 and the decree issued on 17/11/2023 pending the hearing and determination of Nakuru ELC Appeal No. 30 of 2023.
 - d. That costs of this Application be provided for.
2. The application is grounded on the supporting affidavit of Samuel Wairumbi Kianja the Appellant who deponed that he has filed an Appeal against the Judgment dated 31st October 2023 which ordered that he vacates the suit property within 21 days from the dated of the judgment.
3. It was the Appellants case that he has been in occupation of the suit property for over 23 years which he fenced and constructed a bungalow for his family. That his eviction would occasion him substantial loss and damage as the trial court had ordered that the 2nd – 5th Defendants to process the title in favour of the Plaintiff/Respondent. He further stated that he has filed the application immediately and is ready and willing to provide security for due performance of the decree.



Respondent's Case

4. The Respondent filed his replying affidavit dated 24th November, 2023 where he denied the Appellant occupation of the suit property for 23 years and stated that the Appellant moved to the suit property in 2011.
5. It was the respondent's case that the Appellant has not demonstrated the particulars of the alleged likely substantial loss and that he would be in a position to compensate the Appellant damages should the appeal succeed.

Appellant's Submissions

6. Counsel reiterated the contents of the supporting affidavit and submitted that the Appellant challenges the pecuniary jurisdiction of the lower court Counsel also relied on the provisions of Order 42 Rule 6 of the Civil Procedure Rules on stay of execution and submitted that the application was filed without delay.
7. Counsel submitted that the Respondent has not demonstrated that she is a person of means to reimburse the Applicants if any loss is incurred should the Appeal reverse the lower court decision and relied on the case of Nicholas Stephen Okaka & Another v Alfred Waga Wesonga [2022] eKLR on substantial loss.
8. On the issue security of the due performance of the decree, counsel relied on the case of Festus Nyambeka v Texco Spinning Mills [2014] eKLR and urged the court to allow the application as prayed.

Respondent's Submissions

9. Counsel urged the court to expunge paragraphs 12 and 13 of the Appellant's further affidavit as the annexed decree did not emanate from the court and that the same is not signed.
10. It was counsel's submission that the issue of jurisdiction raised by the Appellant had been settled in the Trial court where the court noted that the matter was transferred from the High court to the subordinate court which the Appellant assented to thus the court had jurisdiction. Counsel stated that the appeal has no chances of success on the claim of jurisdiction.
11. Counsel relied on the case of Francis K. Chabari & Another v Mwarania Gaichura Kairubi [2022] eKLR and submitted that it was incumbent upon the Appellant to prove the specific details and particulars of the substantial loss. He cited the case of Machira t/a Machira & Co. Advocates v East African Standard [2002] eKLR and urged the court to dismiss the application with costs.

Analysis and Determination

12. The main issue for determination is whether the Appellant has met the threshold for stay of execution pending the hearing and determination of appeal. Stay of execution pending appeal is anchored on order 42 rule 6 of the Civil Procedure Rules which provides as follows:
 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

2. 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.
13. An Applicant must satisfy the court that the application was made without inordinate delay, that he/she will suffer substantial loss if the order of stay is not granted and give security for the due performance of the decree. If a party meets these conditions, then the court has the discretion to grant the orders sought.
14. Proof of substantial loss is the cornerstone of applications for stay of execution. An Applicant must go a step further to prove such loss and not merely stating that he/she will suffer substantial loss or that he is in occupation of the suit land.
15. In the case of *Charles Wabome Getbi vs. Angela Wairimu Getbi* [2008] eKLR, the Court of Appeal held that:

-“... it is not enough for the Applicants to say that they live or reside on the suit land and that 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.”
16. Similarly in the case of *Kenya Shell Limited vs. Kibiru* [1986] KLR 410, the court held that:

“It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.
17. From the submissions, I note that the parties have gone into the merits of the appeal, which this court is not dealing with at this stage. The Appellant contends that he has been in occupation for over 23 years hence will suffer substantial loss if stay is not granted. If a party claims to be in occupation of a suit property and the judgment declared such occupation illegal or irregular, the court need not consider such as substantial loss if the party does not substantiate the loss that he will suffer if the order is not granted. The applicant is reasoning on the issue of occupation, which is disputed, does not persuade the court to grant the order of stay of execution. The applicant has not satisfied the court on this limb of the requirements.
18. On the issue of whether the application was filed within reasonable time, the impugned judgment was delivered on the 31st October, 2023 while the Appellant filed the instant application on 15th November, 2023. I find that this application was filed without undue delay.



19. In the case of *Jaber Mobsen Ali & Another...vs...Priscillah Boit & Another*, (2014) eKLR, the Court held that:

“The question that arises is whether the application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after the Judgement could be unreasonable depending on the Judgement of the court and any order given thereafter...”

20. On the issue of security for the due performance of the decree, the court held in the case of *Kenya Commercial Bank Limited =versus= Sun City Properties Limited & 5 Others* [2012] eKLR

“in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced in a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal. I do not see, why the same should not be applicable in this case.”

21. Similarly in the case of *Absalom Dova...vs...Tarbo Transporters* (2013) eKLR, the court held that:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage but administers the justice that the case deserved. This is in recognition that both parties have rights; the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination”.

22. I have considered the application, the submissions by counsel and find that in the interest of justice, it would be prudent to grant an order of stay with a condition that the Applicant deposits Kshs.200,000/ in a joint interest earning account of the advocates for the Appellant and the Respondent within the next 30 days failure to which the stay lapses.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 8TH DAY OF FEBRUARY 2024.

M. A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure.

