



**Ngoge v Isanda & 2 others (Environment & Land Case 99 & 6 of 2016
(Consolidated)) [2024] KEELC 578 (KLR) (6 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 578 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 99 & 6 OF 2016 (CONSOLIDATED)
OA ANGOTE, J
FEBRUARY 6, 2024**

BETWEEN

GRACE AKINYI NGOGE PLAINTIFF

AND

JOHN ABUYA ISANDA 1ST DEFENDANT

MARY NJOKI FUNDI 2ND DEFENDANT

NAIROBI CITY COUNCIL 3RD DEFENDANT

RULING

1. The 1st Defendant/Applicant has filed a Notice of Motion dated 16th June 2023 in which he seeks the following orders:
 - a. That there be a stay of execution of the judgement/decree of this Honourable court issued and/or delivered on 4th May 2023 pending the hearing and determination of an appeal which is being lodged at the Court of Appeal.
 - b. That the status quo prevailing as regards the suit property be maintained.
 - c. That the suit property as it stands be preserved pending the hearing and determination of the appeal.
 - d. That costs of this application be provided for.
2. The application is premised on the grounds that the Plaintiff/ Respondent has obtained a judgement in her favour against the 1st and 2nd Defendants; that the 1st and 2nd Defendants have moved to the Court of Appeal and filed a Notice of Appeal and are keen to pursue this matter at the Court of Appeal; and that the Respondent is in the process of extracting a decree with a view to executing the judgement of this court.



3. The 1st Defendant avers that in the event that the execution occurs and the Defendants evicted, they will suffer irreparable loss and damage since they have invested millions of shillings on the suit property and that the Plaintiff/ Respondent has already visited the suit property with unknown people who surveyed the property with a view to dispose of it.
4. It was deponed that the applicants have an arguable appeal with a high chance of success; that unless a stay of execution is granted, the impending appeal will be rendered nugatory; and that such stay of execution is necessary to preserve the suit property pending and determination of the impending appeal.
5. The Plaintiff/ Respondent, in her Replying Affidavit dated 13th July 2023, deponed that the application is misconceived, an abuse of court process and should be struck out and dismissed with costs. The Plaintiff deponed that this court is functus officio in this matter and should not heed the invitation to reopen the matter afresh having rendered its judgement in the proceedings.
6. Ms. Ngoge deponed that this court issued a thirty-day stay of execution, within which the Applicant ought to have sought alternative remedies before the Court of Appeal and that it would be unjust to deny the Plaintiff an opportunity to enjoy the fruits of her litigation by seeking an inordinate, undefined and unlimited stay of execution.
7. Ms. Ngoge averred that the prevailing status quo is that she has always had possession of the subject property and the court had previously issued an injunction on 29th July 2016 against the Defendants from further trespassing onto the property.
8. She stated that the final determination of the dispute requires the Defendants to remove any of their belongings that may be on the suit property; that the Defendants cannot expect their items to be on the property awaiting hearing of the appeal; and that she is the rightful and registered owner of the suit property and the Applicants are trespassers.
9. In a Further Affidavit sworn on 7th August 2023, the 1st Defendant/ Applicant deponed that the ownership and registration documents of the Plaintiff/Respondent are contradictory and irregular since a certificate of lease dated 27th October 2001, was issued before the land lease which was issued on 27th December 2001.
10. The Applicant deponed that this court is not functus officio as it has the original jurisdiction to deal with this matter; that he has constructed 2 units of apartments constituting 6 stories which are complete and awaiting final fittings and that there are several construction materials lying on the ground which were to be used in the finishing of the building, including cement and windows, which are going to waste.
11. The parties filed submissions and authorities which I have considered.

Analysis and Determination

12. The issue for determination in this matter is whether this court should grant the Applicant orders of stay of execution of judgement pending hearing of an intended appeal. Before delving into the application, the Plaintiff objected to this application on grounds that this court is functus officio and has no jurisdiction to determine the application.
13. The doctrine of functus officio does not however preclude a court from dealing with post-judgement applications, which naturally arise as a consequence of the final judgement of the court, such as execution proceedings, or applications such as the one before this court, seeking stay of execution of



judgement pending appeal. This was held by the court in *Bellevue Development Company Limited v Vinayak Builders Limited & another* [2014] eKLR as follows:

“Properly understood, whereas the court becomes *functus officio* when it has exercised its authority over a matter and has completely determined the real issues in controversy, nevertheless, care should be taken not to inadvertently or otherwise overstretch the application of the concept of *functus officio*; for, in all senses of the law, it does not foreclose proceedings which are incidental to or natural consequence of the final decision of the court such as the execution proceedings including contempt of court proceedings, or any other matter on which the court could exercise supplemental jurisdiction. Therefore, in determining whether the court is *functus officio* one should look at the order or relief which is being sought in the case despite that judgment has already been rendered by the court.”

14. The application herein for stay of execution pending appeal is indeed a natural consequence of the judgement of this court, as the Applicants/Defendants have sought to appeal against the decision of this court. The remedy of stay of execution pending appeal is provided for under Order 42 rule 6(1) and (2) of the *Civil Procedure Rules* as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.

(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.”

15. In *RWW v EKW* [2019] eKLR, the court considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter 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 this 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 costs. Indeed, to grant or refuse an application for stay of execution pending appeal is



discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

16. The Court of Appeal in *Vishram Ravji Halai v Thornton & Turpin* Civil Application No. Nairobi 15 of 1990 [1990] KLR 365, outlined the requirements for granting stay of execution pending appeal. It held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 Rule 6 (as it then was) of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.

17. As to the definition of substantial loss, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

18. In considering an application for stay of execution pending appeal, the court must also consider the rights of a successful litigant to enjoy the fruits of judgement. The court thereby undertakes a balancing exercise in seeking to preserve the subject matter, preventing substantial loss and the prima facie entitlement of a successful party to the fruits of judgement. This was articulated in *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR as hereunder:

“I appreciate and understand that the court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement, hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant.

It is my humble view that for the applicant to obtain a stay of execution, it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss. ... At this stage we must as a court ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interest of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other party. The court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrives within the corridors of the court.”



19. On this basis, the Applicant ought to have satisfied this court of three things: that it stands to suffer substantial loss unless the orders of stay of execution are made, that this application has been made without unreasonable delay, and such security as this court orders for the due performance of such decree.
20. The Defendants have pleaded that that they have moved to the Court of Appeal and filed a notice of appeal and are keen to pursue this matter at the Court of Appeal. The 1st Defendant avers that in the event that the execution occurs and the Defendants evicted, they will suffer irreparable loss and damage since they have invested millions of shillings in the suit property.
21. First, this court is satisfied that this application was brought without unreasonable delay, the Judgement having been delivered on 4th May 2023, and the application filed about a month later, on 16th June 2023.
22. The second issue concerns whether the Applicant stands to suffer substantial loss. In this case, the Defendants aver that they have invested millions of shillings into the suit property by constructing two apartment buildings, and that if this application is not granted, the substratum of their appeal will be rendered nugatory.
23. To substantiate their claims, the Defendants annexed to the Further Affidavit sworn by John Abuya Isanda photographs of the said construction marked “JAI 21”. The Photographs are dated 27th September 2021 and 15th July 2023.
24. Indeed, should the court decline to grant the orders of stay of execution sought, the Defendants will be evicted and their construction will be subject to demolition, rendering the Defendants’ appeal nugatory and causing substantial loss to the Defendants. That being the case, the court is satisfied that the Defendants will suffer substantial loss unless the orders of stay are granted.
25. The final matter regards the issuance of security. The rationale for security under Order 42 of the [*Civil Procedure Rules*](#) is to guarantee the due performance of the decree which may ultimately be binding on the applicant. This was held by Gikonyo J in the case of [*Arun C Sharma v Ashana Raikundalia T/ A Raikundalia & Co. Advocates & 2 Others*](#) [2014] eKLR as follows:

“The purpose of the security needed under Order 42 is to guarantee the 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 applicants 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 security for due 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.”
26. While the Defendant does not indicate a willingness to pay security for costs, Order 42 Rule 6(2) of the [*Civil Procedure Rules*](#) empowers this court to order that the applicant pay such security as it deems necessary for the due performance of the decree. However, considering that the suit property is a piece of land, which will remain intact pending the hearing and determination of the appeal, I decline to order for security.
27. The upshot of the forgoing is that the Applicant has satisfactorily established the basis for this court to grant orders of stay of execution pending hearing and determination of the Appeal filed before the Court of Appeal.



28. The following orders do issue:

- a. That there be a stay of execution of the judgement/decree of this honourable court issued and/or delivered on 4th May 2023 pending the hearing and determination of an appeal which is being lodged at the court of appeal.
- b. That the Defendants shall cease all construction works that are ongoing on the suit property and the status quo prevailing on the suit property as at the time of this Ruling be maintained pending the hearing of the Appeal.
- c. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 6TH DAY OF FEBRUARY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mrs Mogire for 3rd Defendant

Ms Leah Ezekiel for Willis Otieno for Plaintiff

Mr. Gituma holding brief for Morara for 1st & 2nd Defendant/Applicant

Ms Maina for Githua

Court Assistant - Tracy

