



**Ouma & 3 others v Okumu (Environment and Land Appeal
25 of 2022) [2024] KEELC 330 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 330 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL 25 OF 2022**

E ASATI, J

FEBRUARY 1, 2024

BETWEEN

**JOSHUA OUMA 1ST APPELLANT
JAMES OTIENO 2ND APPELLANT
CAREN OMWARE 3RD APPELLANT
SAMSON GUYA 4TH APPELLANT**

AND

HEZEKIAH ONGÚNDI OKUMU RESPONDENT

*(Being an appeal from the judgement of the Principal Magistrate's Court at Maseno delivered
by Honourable C. L. Yalwala on 22nd May 2020 in the Maseno PMC E LC No. 23 of 2018)*

RULING

1. This ruling is in respect of the Notice of Motion dated 22nd May 2023 brought by the Respondent pursuant to the provisions of sections 1A, 1B, 3A and 79G of the *Civil Procedure Act*, Order 42 Rules 6 and 7 and Order 51 Rule 1 *Civil Procedure Rules* 2010. The substantive order sought in the application is an order of stay of execution of the judgement herein pending appeal to the Court of Appeal.
2. The grounds upon which the application was brought are that the applicant was aggrieved by the judgement delivered herein on 23/2/2023 and preferred an appeal to the Court of appeal. That the appeal raises very serious and weighty legal issues that if the execution of the judgement proceeds the applicant stands to suffer substantial loss that cannot be monetarily compensated and the appeal may be rendered nugatory. That the application has been brought timely and in good faith. That no party will be prejudiced if the orders sought are granted and that the court has powers to grant the orders sought.



3. The application was supported by the averments in the Supporting Affidavit sworn by the applicant on 22/5/2023.
4. The application was opposed *vide* the contents of the Replying Affidavit sworn by Samson Guya the 4th Appellant on 2nd October 2023. The appellants' case is that the applicant has not met the conditions for grant of an order of stay of execution under Order 42 Rule 6 [Civil Procedure Rules](#). That the application was made after an unexplained delay of 90 days after the judgement was delivered. That no loss will be suffered by the applicant if the orders sought are not granted and that the applicant has not furnished security at all for the due performance of the decree. That it is the appellants who are undergoing loss seeing that the applicant is yet to comply with the decree.
5. The application was argued on 31/10/2023.
6. The Application is brought pursuant to the provisions of order 42 Rule 6(1) [Civil Procedure Rules](#) 2021 which provides that:

“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 of execution 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.”
7. The grounds for grant of orders of stay of execution of Judgements, decrees or orders are provided for in Order 42 Rule 6(2) of the [Civil Procedure Rules](#) 2010 provides as follows:

“No order for stay of execution may 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
 - 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.”
8. Firstly, the court must be satisfied that the Applicant will suffer substantial loss if the order of stay of execution is not granted. Substantial loss has been described in [Dr. Daniel Chebutuk Rotich v Morgan Kimaset Chebutuk](#) Nakuru H.C.C.C No.368 of 2001 thus:

“Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an Applicant is likely to suffer if stay of execution is not granted and the Applicant is therefore forced to pay the decretal sum.”
9. The burden of proof lies with the Applicant to prove that substantial loss will result to him if the order sought is not granted. The applicant's case herein is that if the execution of the judgement proceeds, he will suffer substantial loss. The effect of the decree is that the suit land is to be transferred to the appellants.
10. In the case of *Rhoda Mukuma v John Abuoga* [1988] eKLR the court held that the issue of substantial loss is the cornerstone of both the jurisdiction under order 42 rule 6 [Civil Procedure Rules](#) and Rule 5



of the Court of Appeal of Appeal Rules. That substantial loss is what has to be prevented by preserving the *status quo* because such loss would render the appeal nugatory.

11. In the case of Shell Kenya Ltd v Benjamin Karuga Kibiru & another [1986] eKLR 410 the court stated that

“if it is shown that execution would render a proposed appeal nugatory then a stay can properly be granted.”

12. The applicant has demonstrated that he has filed a notice of appeal. To the Supporting Affidavit was annexed a copy of the Notice of Appeal lodged on 7/3/2023. The applicant is therefore deemed to have filed the appeal pursuant to the provisions of Order 42 Rule 6(4) which provides that

“For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of Appeal has been given.”

13. On the facts presented to the court, it is in the interest of justice that the *status quo* needs to be preserved pending the determination of the Appeal.

14. The law requires that such security as the court orders for the due performance of such decree or order as may ultimately be binding on him be given by the Applicant. No offer for such security has been given by the Applicant in this case. The purpose of the requirement for security as stated in the case of Aron C. Sharma v Ashana Raikundalia t/a Raikundaria & Co Advocates & 2 others [2014]eKLR is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. In Focin Motorcycle Co. Ltd v Ann Wambui wangui & another [2018] eKLR the court held that it is a mark of good faith and commitment when an Applicant undertakes to provide security as the court will order or even proposes the kind of security he offers. The court stated that:

“My view is that it is sufficient for the Applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security.”

In the case of HGE v SM [2020] eKLR the court held that the issue of security is discretionary and that it is upon the court to determine the same. Guided accordingly, it is my view that the court can determine and order the security to be given by the applicant even in the absence of an undertaking by the applicant to furnish the same

15. In the case of Butt v Rent Restriction Tribunal [1982]KLR 417 the court held, *inter alia*, that:
- a.) 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
 - b.) The general principle in granting or refusing a stay is: if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory...”
16. Having considered the application, the opposition thereto and guided by the authorities cited, the court finds that the same is merited and allow it as follows
- i. An order of stay of execution of the judgement dated 23/2/2023 is hereby granted pending hearing and determination of the appeal to the Court of Appeal on condition that the applicant deposits Kshs.100, 000/= as security in a joint interest earning account in the names of the applicant and Counsel for the Appellants within 30 days hereof failing which the order of stay granted herein shall lapse.



ii. Costs of the Application to the appellants.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 1ST DAY OF FEBRUARY 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

Okiro for the Appellants.

Applicant in person

