



Nyangaga v County Government of Mombasa (Environment & Land Case 284 of 2018) [2024] KEELC 1718 (KLR) (8 April 2024) (Ruling)

Neutral citation: [2024] KEELC 1718 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 284 OF 2018**

LL NAIKUNI, J

APRIL 8, 2024

BETWEEN

JOSEPH OBURA NYANGAGA PLAINTIFF

AND

COUNTY GOVERNMENT OF MOMBASA DEFENDANT

RULING

I. Introduction

1. This ruling is in respect to Notice of Motion application dated 19th August, 2023 filed by Joseph Obura Nyangaga, the Plaintiff/ Applicant herein against the Defendant/Respondent herein. It was brought under the dint of the provision of Order 42 Rule 6 (1) of the *Civil Procedure Rules*, 2010 and Section 3A of the *Civil Procedure Act*.
2. Upon service of the application to the Defendant/ Respondent filed and served their Replying Affidavit accordingly. The Honourable Court will deal with the details of it at a later stage.

II. The Plaintiff/Applicant's case

3. The Plaintiff/Applicant sought for the following orders:-
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That there be a stay of execution of the Judgment/decree pending the hearing and determination of the Appeal.
 - e. That costs of this application be provided for.



4. The application by the Plaintiff/Applicant herein was premised on the grounds, testimonial facts and averments made out under the 8th Paragraphed Supporting Affidavit of –Joseph Obura Nyangaga, the Plaintiff/Applicant herein sworn and dated 19th August, 2023 with two (2) annexures marked as ‘JON – 1 to 2’. The Plaintiff/Applicant averred that:
- a. The Deponent herein was the Plaintiff/Applicant herein and hence with due authority and competence to swear this affidavit on his own behalf herein.
 - b. The Honourable Court delivered Judgment on 19th June, 2023 in which it dismissed his suit/case and ordered that he removes all the structures from the plot within days if not the Defendant/Respondent to do so at his own cost .
 - c. Not being satisfied with the said Court’s decision/Judgment, he filed a Notice of Appeal. Annexed in the affidavit and marked as “JON -1” was a copy of the notice of appeal.
 - d. His Advocates had requested for certified copies of proceedings and Judgment which was yet to be given to him. Annexed in the affidavit and marked as “JON – 2” as a copy of the letter.
 - e. He had a building on the plot which the Defendant/Respondent was likely to demolish in execution of the Judgment before the appeal was heard and determined.
 - f. His appeal and the application would be rendered nugatory and an academic exercise if this Court never granted the orders prayed for herein.
 - g. Therefore, his prayer that this Honourable Court do certify his application herein as urgent and be heard expeditiously.

III. The Replying Affidavit by the Defendant/Respondent.

5. While opposing the application, the Defendant/Respondent filed an 18 Paragraphed Replying Affidavit sworn Mr. Jimmy Waliaula dated 6th November, 2023 and one (1) annexure marked as “JW – 1” annexed thereto. He deponed as follows:-
- a. He was the County Attorney at the County Government of Mombasa well conversant with the facts of this case and therefore competent to swear this affidavit.
 - b. He had the had an opportunity to read the Notice of Motion Application dated 19th August 2023 filed by the Plaintiff/Applicant herein seeking several orders of stay of execution of the Judgement/Decree in this matter. He was explained and advised on the same by his Counsel on record hereof.
 - c. He was advised by his Advocate on record that the Notice of Appeal lodged by the Plaintiff/Applicant herein was improper and was filed out of time.
 - d. The Judgement in this matter was entered on 19th day of June 2023 and the Plaintiff/Applicant herein lodged the notice of appeal on 10th July 2023 beyond the fourteen (14) days period as required by the law.
 - e. Bearing in mind the Notice of Appeal lodged by the Plaintiff/Applicant was not proper and was filed out of time, there was thus no appeal and as such the stay of execution sought by the Plaintiff/Applicant herein could not be granted in limbo.



- f. Additionally, the averments under Paragraphs 3, 4 and 5 of the Supporting Affidavit by the Plaintiff/Applicant, clearly he as had since not lodged any record of appeal since this Honourable Court granted orders on 22nd August 2023.
- g. The time meant to lodge an appeal had also since lapsed as since the lodging of the Notice of Appeal to the current date (6th November 2023). It was an accumulative of one hundred and fourteen (114)days.
- h. There being no record of appeal lodged there was basically no appeal in this matter.
- i. The there was no proof that the Plaintiff/Applicant had been following up on the Appeal process. It was clear that the Plaintiff/Applicant had gone to sleep after orders were issued “Ex - Parte” and this Honourable Court with due respect should not aid an indolent party.
- j. Further to the above averments, the Plaintiff/Applicant had not lodged any Application before the Court of Appeal seeking for an extension of time to file the notice of appeal out of time as such the notice of appeal lodged or used to support this Application was premature and bad in law.
- k. It had also come to their attention that the Plaintiff/Applicant was not the owner of the suit property upon which he had constructed the illegal building.
- l. There was a Civil case “Environment and Land Case No. 265 of 2008 - Amirali Hassanali Mohamed & Ano - Versus - John Odera Nyagaga” wherein the suit property herein was in dispute and the court rendered a decision in favour of the Plaintiff in that matter on 1st November 2017.
- m. The Honourable Court in the above cited matter further issued eviction orders on 28th September 2023 as against the Plaintiff/Applicant in this instant suit and attached and marked as “JW – 1” was a copy of the court order dated 28th September 2023.
- n. In view of the above it was their observation that the Plaintiff/Applicant had nothing to salvage and/or to preserve in this matter or an alleged appeal that he was yet to file.
- o. Litigation has to come to an end and considering neither the property at the right to be in possession was in favour of the Plaintiff the justice hammer should fall and close that matter once and for all.
- p. He was advised by their Counsel that the Plaintiff/Applicant had not fulfilled the ingredients to be granted the orders in the manner as sought in the Application. Thus, the Application herein never met the threshold test for the prayers sought herein to be granted and consequently the Application herein ought to be dismissed with costs to the Defendant.
- q. What was deponed herein above was true and within the best of his knowledge save as to matters deponed to on information sources whereof have been disclosed and matters deponed to on belief whereupon the grounds have been given.

IV. Submissions

6. On 7th November, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 19th August, 2023 be disposed of by way of written submissions and all the parties complied. On the material date, the Defendant/Respondent indicated to waive their right on filing a written submission and instead rely on the replies and have the matter be determined



on its own merit. Unfortunately, dispute of being accorded an extension, the Plaintiff/Applicant never obliged. Thus, on 13th February, 2024 a ruling date was reserved on 8th April, 2024 by Court accordingly.

V. Analysis & Determination.

7. I have carefully read and considered the pleadings herein by the Plaintiff/Applicant, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
8. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has two (2) framed issues for its determination. These are:-
 - a. Whether the Notice of Motion application dated 19th August, 2023 seeking to stay execution of the Judgment and Decree made by Justice Hon. L. L. Naikuni on 19th June, 2023 pending Appeal is merited?
 - b. Who will bear the Costs of Notice of Motion application dated 19th August, 2023.

ISSUE No. a). Whether the Notice of Motion application dated 19th August, 2023 seeking to stay execution of the Judgment and Decree made by Justice Hon. L. L. Naikuni on 19th June, 2023 pending Appeal is merited

9. Under this Sub – heading, the Honourable Court deciphers that the main substratum in the matter is on whether or not to grant stay of execution upon the trial Court delivering its Judgement in favour of the Plaintiff/Respondent and against the Defendant/Applicant herein pending the hearing and final determination of the filed appeal before the Court of Appeal. The law governing the Stay of execution pending Appeal is found under the provision of Order 42 Rule 6 of the *Civil Procedure Rules*, 2010 which stipulates as follows:-

“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.

(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
- (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.

10. It is trite law that Stay of execution pending appeal is a discretionary power bestowed upon this court by the law. In the very initial stages of building jurisprudence on this legal issue, the Court of Appeal in



the case of “*Butt –Versus- Rent Restriction Tribunal* {1982} KLR 417” gave guidance on how a court should exercise the said discretion and 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.”
11. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in the provision of Sections 1A and 1B of the [Civil Procedure Act](#), Cap. 21 and Sections 3 and 13 of the Environment & land Court Act. No. 19 of 2011 the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the Overriding Objective in the exercise of its powers under these statutes or in the interpretation of any of its provisions.
12. Section 1A(2) of the [Civil Procedure Act](#) provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under Section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
13. While the provision of Section 3 and 13 of the ELC Act, No. 19 of 2011, Sections 101 of the [Land Registration Act](#), No. 3 of 2012 and Section 150 of the [Land Act](#), No. 6 of 2012 provide the Overriding Objectives and the Jurisdiction of the Court. Be that as it may, there are three (3) conditions for granting of stay order pending Appeal under the provision of Order 42 Rule 6 (2) of the [Civil Procedure Rules](#), 2010 to which:
- i. The Court is satisfied that Substantial loss may result to the Applicant unless stay of execution is ordered;
 - ii. The application is brought without undue delay and
 - iii. 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.



14. First and foremost, I dare say that these afore stated three (3) legal conditions would only be considered if there was an appeal already preferred at the Court of Appeal. If not the application collapses like a doddle. Further, as already demonstrated in “*James Wangalwa & Another – Versus - Agnes Naliaka Cheseto (supra)*” the three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive and not disjunctive. I find issues for determination arising therein namely:
- i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
 - ii. What orders this Court should make
15. The purpose of stay of execution is to preserve the substratum of the case. There have been myriad of cases on this subject matter and the conditions stipulated herein. In the case of “*Consolidated Marine – Versus - 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”.
16. As such, for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.
17. As for the applicant having to suffer substantial loss, in the case of “*Kenya Shell Limited – Versus - Benjamin Karuga Kigibu & Ruth Wairimu Karuga* (1982-1988) KAR 1018” the Court of Appeal pronounced itself to the effect 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 rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”
18. The Court of Appeal in the case of “*Mukuma – Versus - Abuoga* (1988) KLR 645” where their Lordships stated that;
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
19. The Applicant has a burden to show the substantial loss they are likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Applicant to the 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. {See the case of “*Absalom Dora – Versus - Turbo Transporters* (2013) (eKLR)”}.



20. As F. Gikonyo J stated in the case of: “*Geoffery Muriungi & another – Versus - John Rukunga M’imonyo suing as Legal representative of the estate of Kinoti Simon Rukunga (Deceased)* [2016] eKLR” and which wisdom I am persuaded with; -

“...the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or “rendering the appeal nugatory” within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal...”

21. Having stated the legal principles, it now the turn to apply them to the instant case. The Plaintiff/Applicant herein filed an application dated 19th August, 2023 seeking orders to stay the Judgment in this matter delivered by this Honourable Court on 19th June, 2023. According to the Honourable Court delivered Judgment on 19th June, 2023 in which it dismissed his suit/case and ordered that he removed the structures from the plot within days if not the Defendant/Respondent to do so at his own cost. Being aggrieved by the said decision, he filed a notice of appeal at the Court of Appeal annexed in the affidavit and marked as “JON – 1” is a copy of the said notice of appeal. Accordingly, his advocates have requested for certified and true copies of proceedings and Judgment which are yet to be supplied to him by Court, at least by the time he filed this application I believe to enable him compile a Record of appeal. Annexed in the affidavit and marked as “JON – 2” is a copy of the said letter. He had a building on the plot which the Defendant/Respondent is likely to demolish in execution of the judgment before the appeal is heard and determined.
22. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under Order 42 Rule 6, 2010. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicants unless stay of execution is granted; and thirdly such security as the court orders for the due performance of such decree or order as may ultimately be binding on them has been given by the Applicant.
23. Regarding the pre-requisite in Order 42 Rule 6, that is substantial loss occurring to the Applicant. The Plaintiff/Applicant has indicated to Court that he was apprehensive that the Defendant was likely to proceed on with the demolition of the structure. The Honourable Court fails to be persuaded that the Plaintiff/Applicant will suffer any substantial loss if the orders are not granted at all. In saying so, the Court basis its position from two front aspects. Firstly, there has been no empirical documentary evidence placed before the Court to indicate that the Defendant/Respondent is likely to proceed on with the execution of the orders of the Court such as a Decree from the date of the delivery of the Judgment, on 19th June, 2023 close to 60 days to the time of filing the application. Secondly, the court has already referred the consideration to be made in the case of “Kenya Shell Limited –Versus - Benjamin Karuga Kigibu & Ruth Wairimu (Supra)”. The Plaintiff/Applicant has failed proved that he will suffer substantially if the orders for stay of the execution are not granted as prayed. For these reasons, the application should not succeed.
24. The second issue to determine is where the application for stay of execution was made without inordinate delay. From the record, the Judgment being appealed against was delivered on 19th June, 2023 and the application herein was filed on 19th August, 2023, the Applicant also filed a Notice of Appeal on 26th June, 2023. This application was filed after about 60 days – two months of the delivery of Judgment. With all due respect to the Plaintiff/Applicant, in this Honourable Court’s opinion,



the application was made timeously without any delay. The application was therefore made and filed expeditiously and without undue delay.

25. Finally, on the last condition as to provision of security, I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules, 2010 stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. Graphically, from the filed applications or otherwise submissions, the Plaintiff/Applicant has made no provisions for security in his application. However, this court can make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal.

26. In the case of “Aron C. Sharma – Versus - Ashana Raikundalia T/A Rairundalia & Co. Advocates” the court held that:

“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.”

27. Stay of execution is exactly what it states; it is an order of the court barring a decree holder from enjoying the fruits of his judgment pending the determination of some issue in contention. It matters not whether the issue in contention is the amount awarded in the judgment debt, or liability or legality of the extracted warrants as in this case. Where a party seeks to stay execution, the Court must be guided by the parameters set out in Order 42 Rule 6. This Court observes that in this matter there was no decretal sum but he Court in its Judgment dated 19th June, 2023 ordered the Plaintiff within the next ninety (90) days to remove any structures and/or properties development on the suit property pursuant to the Provisions of Section 152 E of the Land Act.

28. The Court observed in the case of:- “Gianfranco Manenthi & Another – Versus - Africa Merchant Assurance Company Ltd [2019] eKLR”, thus:-

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the Plaintiff to initiate execution proceedings where the Judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants



to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the Applicant but for the court to determine. Counsel for the Applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree. (Underlining mine for emphasis).

29. Suffice it to say, it is my own opinion that the Plaintiff/Applicant herein has to date failed to file a Memorandum of Appeal against the Judgement delivered by this Court within the 60 days from the date of filing the application. Filing of a Notice of Appeal is mere intention as there would be filed a Memorandum of Appeal as founded under the provision of Rule 82 of the Court of Appeal Rules, 2010 of Appellant Jurisdiction Act, Cap. 9 and whether the appeal was arguable. Certainly, this would only require a copy of the Judgement which was with the Plaintiff/Applicant and not certified and true Copies of the proceedings as envisaged from the letter by the Plaintiff/Applicant to Court and marked as "JON – 2". The said proceedings would aid in compiling a Record of Appeal but not lodging of an appeal as the Plaintiff/Applicant wanted the Court to imagine.
30. Further, the Plaintiff/Applicant has not fully fulfilled the three (3) requirements as expected by law and demonstrated from the decision of "James Wangalwa & Another – Versus - Agnes Naliaka Cheseto (supra)", where it held all the three conditions must be fulfilled simultaneously. I say so in that although he brought this Application without undue delay, but failed to adequately demonstrate the substantial loss that he would suffer and he failed to furnish security as stipulated by sub-rule 2b. In the result, the application must not succeed.

ISSUE No. b). Who will bear the Costs of Notice of Motion application dated 19th August, 2023.

31. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court "*Jasbir Rai Singh – Versus - Tarchalan Singh*" eKLR (2014) and "*Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited*", eKLR (2014).
32. In the case of "Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
33. In this case, this Honourable Court in the interest of natural Justice, Equity and Conscience has reserved its discretion in not awarding costs.

VI. Conclusion & Disposition

34. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order:-
 - a. That the Notice of Motion application dated 19th August, 2023 be and is hereby found to lack merit hence hereby dismissed.
 - b. That there shall be no orders as to costs.It is so ordered accordingly.



RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 8TH DAY OF APRIL 2024.

**HON. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Odhiambo Advocate for the Plaintiff/Applicant
- c. Mr. Tajbhai Advocate for the Defendant/Respondent

