



**Nderu v Ng'ang'a (Environment and Land Appeal 65 of 2023)
[2024] KEELC 3659 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3659 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL 65 OF 2023**

YM ANGIMA, J

MAY 2, 2024

BETWEEN

MARY NJERI NDERU APPELLANT

AND

TABITHA WAITHIRA NG'ANG'A RESPONDENT

RULING

A. Introduction and Background

1. The material on record shows that vide a plaint dated 02.12.2021 the Respondent sued the Appellant seeking various amounts of money on account of an abortive sale agreement between the parties for the sale of Title No. Nyandarua/Mbuyu/17 (the suit property). The Respondent pleaded that the Appellant had breached the sale agreement by re-selling the suit property to a third party after receipt of a deposit of Kshs.100,000/=.
2. The Respondent claimed reimbursement of the expenses he had allegedly incurred in cultivating maize on the suit property which maize was said to have been harvested and sold by the Appellant. The respondent also claimed Kshs.90,000/= on account of liquidated damages together with costs and interest.
3. The record shows that the Appellant entered appearance through a law firm but failed to file a defence to the action in consequence whereof default judgment was entered against her. The record further shows that the suit proceeded to formal proof whereby the trial court entered judgment against the Appellant on 02.05.2023 for a sum of Kshs.196,000/= together with costs and interest. Although the trial court did not give a clear breakdown of the award, it would appear that Kshs.100,000/= was for a refund of the deposit whereas Kshs.96,000/= was compensation for the maize crop.
4. The Appellant later on filed an application dated 24.07.2023 seeking the setting aside of the ex parte judgment. The application was canvassed through written submissions and the trial court rendered



a ruling dated 05.09.2023 dismissing the same with costs. Being aggrieved by the said ruling, the Appellant filed the instant appeal against it.

B. Appellant's Application

5. Vide a notice of motion dated 04.12.2023 expressed to be based upon Sections 3A, 79G, & 95 of the Civil Procedure Act (Cap.21) and Order 42 Rule 6(1) of the Civil Procedure Rules (the Rules) and all other enabling provisions of the law the Appellant sought a stay of execution of the ex parte decree of the trial court and all consequential proceedings pending the hearing and determination of the appeal.
6. The application was based upon the grounds set out in the body of the supporting affidavit sworn by the Appellant on 04.12.2023 and the annexures thereto. The Appellant contended that she had been condemned unheard by the trial court in violation of Articles 25 and 50 of the Constitution of Kenya, 2010 and that the award of Kshs.196,000/= made by the trial court was illegal and unsupported by the pleadings and evidence before the trial court.
7. The Appellant further contended that the decretal amount as computed in the notice to show cause was excessive and exaggerated and that unless a stay of execution was granted she stood to suffer irreparable harm and damage. She did not, however, contend that she was unable to raise the decretal amount or that the Respondent would not be in a position to refund the same should her appeal be ultimately successful.

C. Respondent's Response

8. The Respondent filed grounds of opposition dated 22.01.2024 opposing the said application on the following grounds:
 - a. That the Applicant has not brought herself within Order 42 rule (6), sub rule (1) and is therefore underserving of the prayers for stay of execution, in that, the applicant has not demonstrated any substantial loss that may result unless the order of stay is granted.
 - b. That the applicant has not brought herself within Order 42 rule (6), sub rule (2) and is therefore underserving of the prayers for stay of execution, in that, she has not offered such security for performance of the decree.
 - c. That the applicant should deposit the decretal sum certified on 19th September, 2023 at Kes.306,191/= (less interest to date) in a joint interest-bearing account in the names of both counsels if she is serious about pursuing the appeal and not a ploy to evade payment of the decretal sum.

D. Directions on Submissions

9. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant filed written submissions dated 29.01.2024 whereas the Respondent filed submissions dated 20.02.2024.

E. Issues for Determination

10. The court has perused the Appellant's notice of motion dated 04.12.2023, the Respondent's grounds of opposition as well as the material on record. The court is of the view that the following are the key issues which arise for determination herein:
 - a. Whether the Appellant has satisfied the requirements for the grant of a stay pending appeal.



- b. Who shall bear costs of the application.

F. Analysis and Determination

a. Whether the Appellant has satisfied the requirements for the grant of a stay pending appeal

11. The court has considered the material and submissions on record on this issue. The court has noted that the Appellant has argued her application as if we are dealing with the substantive appeal. She has attacked the judgment and ruling of the trial court on merit as if she was prosecuting the appeal itself. The court shall, however, confine itself to the merits of the application for stay pending appeal as stipulated under Order 42 rule 6 of the Rules.
12. Order 42 rule 6(2) of the Rules on the requirements for a stay pending appeal stipulates as follows:
- “(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.”
13. The court has noted that although the ruling of the trial court dismissing the Appellant’s application for setting aside the ex parte judgment was delivered on 05.09.2023, the instant application for stay was not filed until 05.12.2023. The Appellant did not render any explanation for the delay of 3 months in her supporting affidavit or elsewhere in her application.
14. It is evident from the application that the Appellant did not contend that she stood to suffer substantial loss unless the stay sought was granted. She did not even contend that the decretal amount was colossal or that she would not be able to raise or pay the amount. She did not contend that the Respondent would have no ability to refund the decretal amount in the event of the appeal ultimately being successful.
15. In a nutshell, the Appellant has not demonstrated that she stands to suffer substantial loss in the absence of a stay. Her contention was that she stood to suffer irreparable injury and damage. However, the nature and extent of the alleged irreparable injury was not disclosed. It has been held that it is not usual for an appeal in a monetary decree to be rendered nugatory unless there are special circumstances from which such loss may be inferred such as inability of the decree holder to refund the amount or the decretal amount being so huge and colossal as to be beyond the means of the Appellant to raise.
16. In the case of Kenya Shell Ltd -vs- Karuga & Another [1986] eKLR it was held, inter alia, 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 cornerstone 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.”



b. Who shall bear costs of the application

17. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the Respondent shall be awarded costs of the application.

G. Conclusion and Disposal Order

18. The upshot of the foregoing is that the court finds no merit in the Appellant’s application for stay pending appeal. As a consequence, the notice of motion dated 04.12.2023 is hereby dismissed in its entirety with costs to the Respondent.

Orders accordingly.

RULING DATED AND SIGNED AT NYANDARUA THIS 2ND DAY OF MAY, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

N/A for the Appellant

Mr. D.W. Mbugua for the Respondent

C/A - Carol

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Y. M. ANGIMA

JUDGE

