



**Abdullahi & another v Mohamed & 2 others; Nairobi City County  
 (Interested Party) (Environment & Land Case 725 of 2016 & 325 of 2019  
 (Consolidated)) [2024] KEELC 5142 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5142 (KLR)

**REPUBLIC OF KENYA  
 IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
 ENVIRONMENT & LAND CASE 725 OF 2016 & 325 OF 2019 (CONSOLIDATED)**

**JA MOGENI, J  
 JULY 4, 2024**

**BETWEEN**

**HABIBA NYAMBURA ABDULLAHI ..... PLAINTIFF**

**AND**

**SHEIKH ABDULLAHI MOHAMED ..... 1<sup>ST</sup> DEFENDANT**

**MELIHUN HASSEN WORSEME ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**NAIROBI CITY COUNTY ..... INTERESTED PARTY**

**AS CONSOLIDATED WITH  
 ENVIRONMENT & LAND CASE 325 OF 2019**

**BETWEEN**

**MELIHUN HASSEN WORSEME ..... PLAINTIFF**

**AND**

**HABIBA NYAMBURA ABDULLAHI ..... DEFENDANT**

**AND**

**NAIROBI CITY COUNTY ..... INTERESTED PARTY**



## RULING

1. This Motion filed on 5/04/2024 is brought under Section 1A and 3A of the *Civil Procedure Act*, Order 42 Rule 6 (1) & (2), Order 51 Rule 1 of the Civil Procedure Rules and all other enabling Provisions of the Law seeking the following orders;
  1. Spent.
  2. Spent.
  3. That this Honourable Court do order stay of execution of the Judgment and Decree made on the 20/03/2024 pending the hearing and determination of the intended appeal.
  4. That the costs of this application be provided for.
2. The application is premised on the grounds stated on the face of the application together with the Supporting Affidavit of Melihun Hassen Worsame, the 2<sup>nd</sup> Defendant/Applicant herein sworn on the 5/04/2024. I do not need to reproduce the same.
3. The application is opposed. There is a Replying Affidavit by Habiba Nyambura Abdullahi, the Plaintiff/Respondent herein, sworn on 8/05/2024. The Respondent argues that a stay of execution of the judgment and decree serves no purpose, particularly given that the first defendant, who allegedly sold the land to Melihun Hassen Worsame, did not defend the suit and there were irregularities in his acquisition of the land. She contends that without the participation of all parties involved in the original suit, granting a stay will only cause further delay in her accessing the property. This is compounded by the lack of support for her case from Sheikh Abdullahi Mohamed, whose ownership of the property was dubious as it had already been allocated and leased to her.
4. Furthermore, the Respondent points out that the absence of the 1<sup>st</sup> defendant in ELC Suit Number 725 of 2016 left a significant gap in the intended appeal, rendering it unlikely to succeed. She asserts that she will suffer prejudice and irreparable damage due to any delay in accessing the benefits of the judgment.
5. Lastly, she highlights that this High Court had already determined in ELC Number 63 of 2010 that the property belongs to her, and thus, this appeal appears to be an attempt to delay the transfer of the suit land to her.
6. On 15/05/2024, counsels agreed to file written submissions to the application and the Court gave directions on the same. The parties duly submitted and I have considered them. The 2<sup>nd</sup> Defendant/Applicant filed his written submissions dated 22/05/024 and the Plaintiff/Respondent filed her written submissions dated 26/6/2024.

### **Analysis and Determination**

7. I have considered the instant application, the annexures thereto, the written submissions and the cited authorities together with the relevant provisions of law and found that the issues for determination before this Court is whether the orders for stay of execution pending appeal are merited.



8. The legal burden in this instant matter is on the Applicant to prove that she is entitled to the orders of stay of execution. These principles are clearly provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:

“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.

9. In addition, it is important to note that, 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 sections 1A and 1B of the *Civil Procedure Act*, 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 the *Civil Procedure Act* or in the interpretation of any of its provisions

10. 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.”

11. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye v African Virtual University* [2015] eKLR.

12. On the issue of substantial loss, the court 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.”



13. It is clear that for the Court to grant stay of execution of the Judgment, the Applicant needs to satisfy the Court that he will suffer substantial loss. In the case of *Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007* the Court stated;  

“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence.  
The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”
14. With the above in mind, the Court must then determine whether the Applicant has established that he will suffer substantial loss and or has presented special circumstances that will warrant the Court to exercise its discretion and grant stay of Execution.
15. It is the Applicant’s submission that she will suffer substantial loss if stay of execution is not granted as there is a likelihood that the plaintiff/respondent would proceed to evict the applicant and demolish the structures built on the suit property by the applicant before the issues raised in the appeal are heard and determined hence rendering the appeal nugatory and an academic exercise. Further, in the event the 90 days’ lapses without a stay of execution, the applicant would be in contempt of court by merely remaining on or continuing to be in occupation of the suit property.
16. The Applicant submitted that she purchased the suit property sometime in 2016 for Kshs. 6 million and the property was undeveloped. She proceeded to construct 30 units’ apartment on the said property; the current value of the suit property together with the development thereon is approximately Kshs. 150,000,000.00. However, there is no evidence in Court to support the allegation that the Current value is approximately Kshs. 150,000,000.00. The valuation report dated 9/02/2016 by Njihia Muoka Rashid Co. Ltd did not provide details on the estimated value of the suit property.
17. The Applicant further submitted that if development on the suit property is demolished, the applicant will suffer great financial loss which the plaintiff/respondent cannot be in a position to refund incase the demolition and eviction proceeds before the intended appeal is heard and determined in favor of the applicant. She relied on the case of Antoine Ndiaye Vs African Virtua University [2015] eKLR. The applicant therefore submits that the loss she would suffer if a stay is not granted cannot by any stretch of the imagination to be without value or nominal.
18. The Applicant submitted that the subject matter in dispute is the ownership of all that property known as L. R. No. 135663 presently registered in the name of the applicant and on which the applicant has developed 30 apartment units. Consequently, if a stay is not granted and the development in the suit property is demolished, the subject matter, as far as the applicant is concerned will not have been safeguarded and "a state of affairs" will have been created that will irreparably affect or negate the very essential core of the applicant as a successful party in the appeal.
19. The Respondent’s case is that she stands to suffer prejudice and irreparable damage by any delay on her way to accessing the fruits of the judgment.
20. The Court in its Judgment which was delivered on 20/03/2024 granted the Plaintiff an order directing the Applicant herein to vacate the suit property and demolish the structures erected thereon within 90 days from 20/03/2024. The Applicant submitted that the current value of the suit property is approximately Kshs. 150,000,000.00 but she did not provide evidence to support this allegation. Be that as it may, she asserted that she has developed 30 apartment units on the property and this has not been denied by the Respondent.



21. The Applicant must prove that if the orders sought are not granted and her appeal eventually succeeds, then the same shall have been rendered nugatory. 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 dispute herein is one of ownership and it is also not disputed that there are 30 apartment units developed on the suit property. The purpose and objective of the order for stay of execution is to preserve the substratum of the appeal in order to ensure that the appeal is not defeated. See Consolidated Marine. vs. Nampijja & Another, Civil App.No.93 of 1989 (Nairobi). Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory. It is my humble view that demolition of the 30 apartment units developed on the suit property before the intended appeal is heard and determine would irreparably affect or negate the very essential core of the appeal.
22. To this end, this Court is persuaded that the Applicant has shown that they stand to suffer substantial loss, limited to the demolition of structures, if the order of stay is not granted.
23. Secondly the Applicant must satisfy the Court that the Appeal was made without inordinate delay. Judgement was delivered on 20/03/2024, and the instant Application is dated 5/04/2024 and filed on the even date. The Court notes that there was no inordinate delay in bringing this Application.
24. On Security of Costs, the Applicant seeking stay pending appeal is also required to provide security for the due performance of such decree or order as may ultimately be binding on him. I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules 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. See Aron C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates.
25. The Applicant deponed that she is willing to abide by the conditions the court will impose for granting an order of stay pending the hearing and determination of the intended appeal. The Applicant also submitted that in the instant case security is not required or necessary as due execution of the decree would require the applicant to demolish the development in the suit property and not to remain or continue occupying the property. If unsuccessful on appeal the applicant can demolish of the plaintiff/ respondent can demolish the development on the suit property and thereafter the applicant would not remain in the property. Be that as it may, the applicant is ready and willing to abide by any condition that the court would impose when granting the stay of execution.
26. The Respondent on the other hand, deponed that should the court be inclined to grant the orders sought, the Applicant do deposit Kshs. 5 Million with her lawyers as damages as granted by the court. In response to this, the Applicant submitted that that the said amount was not attributed to the applicant herein but to the 1<sup>st</sup> defendant who did not participate in these proceedings. It would be unfair, unjust and insincere for the respondent to propose that the applicant herein bears the burden of another party. The plaintiff/ respondent is free and at liberty to recover the said sum from the 1<sup>st</sup> defendant herein.
27. The Applicant stated her willingness to comply with court-directed security for the decree's performance. Whereas it is the duty of the applicant to provide security, the law allows the court the discretion to provide security where a litigant has opted to subject themselves to the direction of the court. Therefore, I shall exercise my discretion regarding security to be offered and direct that she does so within the time to be stipulated in this ruling if she intends to proceed with the Appeal. Noting that the Applicant claims that to have purchased the suit property sometime in 2016 at Kshs. 6 million and that the current value of the suit property together with the development thereon is approximately Kshs. 150,000,000.00, I shall direct that the Applicant deposits, Kshs. 6 million as security.



## Disposal Orders

28. Having fully considered the facts of this case, the arguments submitted by both parties and the relevant law and authorities, I am persuaded by the position adopted in the case of *Butt –vs- Rent Restriction Tribunal Civil App No. NAI 6 of 1979*, where Madan, Miller and Porter JJA, while considering an application of this nature, had this to say; (i) The discretion of the court should be exercised in such a way as not to prevent an appeal. (ii) The general principal 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. (iii) 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. (v)The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
29. The upshot is that in applying the above principles, I hereby allow the application before me and order as follows: -
- a. The Application dated 5/04/2024 is allowed in terms of Prayer (c).
  - b. The Applicant/2<sup>nd</sup> Defendant shall deposit the entire Kenya Shillings Six Million (Kshs. 6,000,000.00) Only in a joint fixed deposit interest earning account to be opened in the joint names of the advocates of both parties herein as security for costs within ninety (90) days from the date of this Ruling.
  - c. Failure to comply with order (b) hereinabove, Order (a) hereinabove shall automatically lapse.
  - d. Costs of the Application to abide the Appeal.
30. It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 4<sup>TH</sup> DAY OF JULY 2024.**

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**MOGENI J**

**JUDGE**

**In the virtual presence of:**

Ms. Njeri for the Plaintiff/Respondent

Mr. Osodo for the Applicant/2<sup>nd</sup> Defendant

No appearance for the 1<sup>st</sup> Defendant (Did not participate)

No appearance for Interested party (Did not participate)

Ms. Caroline Sagina: Court Assistant

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**MOGENI J**

**JUDGE**

