



**Baudry v Kiraya (Environment & Land Case 32 of 2019)
[2024] KEELC 4988 (KLR) (1 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 4988 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 32 OF 2019**

MAO ODENY, J

JULY 1, 2024

BETWEEN

RICHARD GARTH BAUDRY PLAINTIFF

AND

ALBERT KIRAYA DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 9th October 2023 by the plaintiff/applicant seeking the following orders:
 - a. Spent
 - b. Spent
 - c. There be a stay of execution of the judgement and decree given on 20th June 2023 pending the hearing and determination of the plaintiff's appeal against the judgement dated 20th June 2023.
 - d. The costs of this application be provided for.
2. The application was supported by the affidavit of Richard Garth Baudry sworn on 6th October 2023 where he deponed that he was aggrieved by the judgment dated 20th June 2023 in favour of the defendant of which he has filed a Notice of Appeal.
3. The Applicant deponed that he has an arguable appeal with good chances of success because the court granted an order that was not sought by the defendant in his counterclaim and that the court erred in holding that there was a shared use of the road and water pipes between the two properties.
4. He also stated that unless stay of execution is granted, he stands to suffer substantial loss as the limited easement granted on 20th June 2023 will be registered against the title of the suit property and the time within which the parties are to agree on the shifting of water pipes would lapse before the appeal is



heard and determined. He further deponed that he is ready to maintain the status quo of the water pipes on the suit property pending the hearing and determination of the appeal.

5. The defendant filed grounds of opposition dated 11th November 2023 which he relied on and stated that the applicant has not met the threshold for grant of stay of execution and urged the court to dismiss the application with costs.

Plaintiff's Submissions

6. Counsel relied on the case of Daniel Kibet Mutai & 9 Others vs Attorney General [2019] eKLR and submitted that since the defendant did not file a replying affidavit, all the factual issues deponed in the plaintiff's affidavit sworn on 6th October, 2023 are unconverted.
7. Counsel identified the following issues for determination:
 - a. Whether the notice of appeal filed on 3rd July 2023 was withdrawn by operation of law.
 - b. Whether the plaintiff ought to be granted stay of execution pending appeal.
 - c. Who should bear costs of the appeal.
8. On the first issue, counsel submitted that the defendant alleged that there was no existing appeal as the Notice of Appeal dated 3rd July 2023 was withdrawn by operation of the law. Counsel argued that when the plaintiff filed its notice of appeal, it also wrote a letter requesting for proceedings for purposes of lodging an appeal.
9. Counsel further argued that under Rule 84(1) of the Court of Appeal Rules, where an application for typed proceedings has been made, the time taken to compute the proceedings is exempted in the computation of sixty days and on the case of Kenya Ports Authority v Maur Abdalla Bwanamake [2018] eKLR.
10. It was counsel's submission that the plaintiff is yet to receive the proceedings and once he does, he will be issued with a certificate of delay and therefore the notice of appeal has not been withdrawn by operation of the law.
11. On the issue of stay pending appeal, counsel relied on the cases of Vishram Ravji Halal vs Thornton & Turpin [1990] KLR 365, Butt vs Rent Restriction Tribunal [1982] KLR 417 and submitted that the plaintiff was seeking that the court maintains the status quo pending the hearing and determination of the intended appeal.
12. Counsel relied on the case of James Wangalwa and another versus Agnes Naliaka Cheseto [2012]eKLR and submitted that the plaintiff was likely to suffer substantial loss if stay of execution was not granted and that if the stay of execution is not granted, the limited easement over the suit property will be registered against the title to the suit property and the time within which the parties were to agree on the shifting of the water pipes would lapse before the plaintiff's appeal is heard and determined.
13. On the issue of security, counsel submitted that in the judgment delivered by the court on 20th June 2023, did not make any monetary award to the parties and therefore the issue of providing security for the decretal sum as a condition for the grant of stay pending appeal does not arise.
14. It was counsel's submissions that the delay in filing the present application was not inordinate and relied on the cases of Utalii Transport Company Limited & 3 others v NIC Bank Limited & anor [2014] eKLR, Sundowner Lodge Limited v Kenya Tourist Development Corporation [2019] eKLR and urged the court to allow the application as prayed.



Defendant's Submissions

15. Counsel for the defendant identified the following issues for determination; whether there exists an appeal to warrant a stay of execution and whether the application meets the threshold for granting the orders sought.
16. On the first issue counsel relied on Order 42 Rule 6(4) of the Civil Procedure Rules and Rules 84 & 85 of the Court of Appeal Rules and submitted that since the plaintiff filed a Notice of Appeal on 4th July 2023 and to date he has not filed a record of appeal, a plain reading of Rule 85 indicates that no appeal exists as it had been withdrawn by operation of the law.
17. Counsel also submitted that the plaintiff had not filed any application seeking extension of time to file the record out of time and relied on the case of Fahim Yasin Twaha v Timamy Issa Abdalla & 2 Others [2015] eKLR.
18. On whether the plaintiff filed the application without unreasonable delay, counsel submitted that the application was filed 100 days after the judgment was delivered with no explanation as to the delay.
19. Counsel also submitted that the defendant had been enjoying water for a period of three months courtesy of the easement and that the plaintiff's application which sought to interrupt the same was unfair and relied on the case of Mohsen Ali & another v Priscillah Boit & another [2014] eKLR.
20. On the issue of substantial loss, counsel submitted that the water pipes had been on the suit property long before the plaintiff acquired the land and relied on the case of Mukuma vs Abuoga [1988] KLR 645 and submitted that the plaintiff had not demonstrated the substantial loss that he is likely to suffer if stay of execution is not granted.
21. On the issue of security, counsel submitted that the plaintiff had not offered any security for the appeal and argued that if stay is granted and the plaintiff transfers the land before the easement is registered, the defendant would be frustrated and justice defeated.

Analysis And Determination

22. The issue for determination is whether the plaintiff has met the threshold for grant of stay of execution as provided for under Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:
 - “(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.”
23. For the court to grant an order of stay of execution, the plaintiff must demonstrate that he filed the application under consideration without unreasonable delay, that he will suffer substantial loss if the orders sought are not granted and that he is willing to offer security for the due performance of the decree.
24. On whether the application was filed without unreasonable delay, a perusal of the court record shows that judgment in the matter was delivered on 20th June 2023 while the application under consideration was filed on 9th October 2023.



25. In the case of *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] the court held as follows:
- “The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.”
26. In the present matter, the plaintiff filed the application for stay of execution after a period of about one hundred and ten days had lapsed from the date of delivery of judgment. As pointed out by the defendant, no explanation has been offered by the plaintiff for the delay. In the absence of an explanation the delay in filing the application, I find that this amounts to inordinate delay.
27. The plaintiff has to demonstrate that unless the court grants stay of execution pending appeal, he stands to suffer substantial loss. It was the plaintiff’s case that if the stay is not granted the defendant will register an easement over the title of the suit property, which will cause him substantial loss. Registration of an easement over the suit property strictly speaking would not amount to substantial loss as the same can be deregistered if the applicant is successful in the appeal.
28. In the case of *Elishaphan Omollo Nyasita v Gradus Atieno Othim & another* [2019] eKLR the court held as follows:
- “ 11. It is trite law that it is not merely sufficient for the applicant to state that he or rather she is likely to suffer substantial loss if the application for stay of execution sought is not allowed. The applicant has not shown the damage or loss that he is likely to suffer if the order sought in the application is not granted. Moreover, to grant the order aforesaid would deny a successful litigant (respondent) the fruits of his Judgment as held in *Kenya Shell Ltd* case.”
29. On the issue of security for the due performance of the decree, the plaintiff argued that the court in its judgment did not make any monetary award and therefore the issue of providing security does not arise. He argued that he is willing to maintain the status quo pending the hearing and determination of the appeal. The applicant’s argument that only monetary decrees require security for the due performance of the decree is flawed. Order 42 Rule 6 applies to all decrees be it a declaration of rights or monetary. The security can either be monetary or otherwise depending on the circumstances of each case.
30. In the case of *Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others* [2014] eKLR the court held 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 1st applicant 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 1st applicant. I presume the security must be one which can serve that purpose.”
31. I have considered the application, the submissions by counsel together with the relevant authorities and find that the applicant has not met the threshold for grant of stay of execution pending appeal and the same is dismissed with costs.



DATED, SIGNED AND DELIVERED AT NAKURU THIS 1ST DAY OF JULY 2024.

M. A. ODENY

JUDGE

