



**Marumbu v Katamo (Environment and Land Appeal E024 of 2024)
[2024] KEELC 6751 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6751 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E024 OF 2024
EC CHERONO, J
OCTOBER 11, 2024**

BETWEEN

MERCY MARUMBU APPELLANT

AND

ELIZABETH KATAMO RESPONDENT

RULING

1. Vide a Notice of Motion application dated 23rd May, 2024 brought under Section 3 & 3A of the [Civil Procedure Act](#) and Order 42 Rule 6 of the [Civil Procedure Rules](#), the applicant prays for the following orders;
 - a. Spent.
 - b. Spent
 - c. That there be a stay of execution for costs in Bungoma CMCC Elc Case No. E017 Of 2023 (elizabeth Katamo v Mercy Marumbu) pending the hearing and determination of this appeal.
 - d. That costs of this application be provided for.
2. The application is based on the grounds outlined on the face of said application and the supporting affidavit of Mercy Marumbu, the Applicant herein sworn on 23rd May, 2024.
3. It is the Appellant/Applicant's case that Bungoma CMCC ELC CASE NO. E017 of 2023 (Elizabeth Katamo v Mercy Marumbu) is yet to be heard and is pending pre-trial direction. It is stated that an interlocutory application was heard and the Respondent has since taxed costs of the said application at Kshs. 99,100/= and obtained warrants of attachment in execution of the same yet there is no judgment or decree. The Applicant averred that she made an application for the trial court to have the execution vacated but the same was disallowed. As such, an appeal has been preferred against the said ruling. The Applicant further stated that she will suffer substantial loss if this application is not allowed as the



- appeal will be rendered nugatory. The Applicant further stated that she is willing to give security for the due performance of the decree as may ultimately be binding on him.
4. From the record, it appears that the Respondents did not file a response by way of a replying affidavit or grounds of opposition despite such directions having been issued. Parties were also directed to canvass the applications by way of written submissions.
 5. The Applicant filed submissions dated 31st May, 2024 where she argued that Order 51 Rule 11(2) of the Civil Procedure Rules is clear on when costs can be taxed. It was argued that by taxing the costs of an interlocutory application and issuing warrants of attachment in execution of a decree for money was in utter disregard to the above provision. The Applicant also argued that the trial court in its order gave the execution a clean bill of health to the detriment of the Applicant herein. On stay, the Applicant argued that she had satisfactorily discharged the conditions warranting the grant of stay pending appeal as required under Order 42 Rule 6 of the Civil Procedure Code. It was further submitted that this application was filed in a timely manner i.e. 7 days after the impugned ruling. Reliance was placed in the case of Commercial Bank of Africa v Lalji Karsan Rabadai & 2 Others (2012) eKLR.
 6. The Respondent filed submissions dated 18th June, 2024 where she argued that the Applicant is not deserving of the orders sought as required under Order 42 Rule 6 of the Civil Procedure Rules. Reliance was placed in the cases of; Selestica Limited v Gold Rock Development Ltd (2015) , Vista Holdings, Vista Holdings International Limited v Span Image(K) Limited (2014) eKLR and Oraro & Rachier Advocates v Co-operative Bank of Kenya EALR (1999)1 EA 236.
 7. I have considered the application and the rival submissions by parties and find that the single issue for determination in this application for stay of execution for costs ought to be granted pending the outcome of the main appeal.
 8. As rightly submitted by both parties, this Court’s jurisdiction to either grant or not to grant stay of proceedings is derived from Order 42 Rule 6 of the Civil Procedure Rules which provides 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 from whose decision the appeal is preferred may apply to the appellate Court to have the orders set aside.”
 9. Sub – rule 2 of Order 42 Rule 6 of the Civil Procedure Rules provides that;
 2. No order for stay of execution shall be made under sub-rule (i) 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. Essentially, the Applicants need to satisfy the following conditions before this Court can grant the orders sought;
 - a. Substantial loss may occur to the Applicant unless stay orders are granted.
 - b. The application has been made without unreasonable delay, and



- c. Security as may be ordered by the Court.
11. Further to the above, stay may be granted by a Court if sufficient cause is demonstrated, having regard to the overriding objective that the Courts are now enjoined to give effect to. Section 1A(2) of the *Civil Procedure Act* provides as follows;
- “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.
- Section 1B of the Act outlines the objectives as being to facilitate; “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.”
12. The first consideration is whether substantial loss may occur to the Applicant if stay is not granted. It is incumbent upon the Applicant to establish that he/she will suffer substantial loss if the orders sought are not granted. The Court of Appeal emphasized the centrality of substantial loss in *Kenya Shell Ltd v Kibiru & Another* (1986) eKLR, by stating as follows;
- “... If there is no evidence of substantial loss to the Applicants, it would be a rare case when an appeal would be rendered nugatory by some other event...the issue of substantial loss is the cornerstone of both jurisdictions. The substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
13. In the current application, the Applicant seeks a stay of execution of costs arising from an interlocutory application. Following the determination of the interlocutory application, the Respondent is reported to have taxed costs at Kshs. 99,100/=, resulting in the issuance of warrants of execution and attachment. To contest the execution, the Applicant filed an application dated 8/4/2024, seeking to have the execution orders vacated. A ruling was delivered on 15/5/2024, directing the service of the certificate of costs and permitting execution to proceed thereafter. Dissatisfied with this ruling, the Applicant filed a memorandum of appeal dated 23/5/ 2024.
14. The Applicant in her submissions argued that she will suffer substantial loss and stated that in the event execution proceeds, she will be condemned to pay an amount which is excessive, exaggerated and/or astronomical. Further, she contends that the amount taxed by the taxing master for in costs cannot accrue at this stage since the main suit is yet to be heard. As I mentioned above, the Respondent failed to file a response to the application and has not spoken to how she will be prejudiced if this application is granted. In my considered view, it is clear that a certificate of costs has been issued and execution is imminent. I am persuaded that if the certificate of costs is executed and the appellant succeeds on appeal, then his appeal would be rendered nugatory. I have also considered the grounds of appeal and note that the same raises weighty triable issues.
15. Regarding whether the application was filed without undue delay, the Court observes that the impugned ruling was delivered on 15/5/2024, while the current application dated 23/5/2024 was filed on 24/05/2024. Thus, the application was filed within 8 days, therefore I do find that there has been no inordinate delay in the filing of this application.
16. On the issue of security, the Applicant has offered to provide security as may be determined by the court for due performance of the decree/order as may ultimately be binding on her. I think the only sort of security to be offered is a deposit of the taxed costs. In my considered view half of the taxed costs



would suffice as security and I hereby order that half of the costs be deposited by the applicant in the court within 30 days of this ruling.

17. The last issue is the costs of this application. I will order that the costs of this application be costs in the appeal.

18. Orders accordingly

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 11TH DAY OF OCTOBER, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Were for the Applicant/Appellant.
2. M/S Wanyama H/B Muyala for the Respondent.
3. Bett C/A.

