



REPUBLIC OF KENYA



**KENYA LAW**  
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**Asher v Kuria & 6 others (Environment and Land Appeal  
E020 of 2022) [2023] KEELC 503 (KLR) (8 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 503 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E020 OF 2022  
CA OCHIENG, J  
FEBRUARY 8, 2023**

**BETWEEN**

**JAYANT GOVINDJI ASHER ..... APPELLANT**

**AND**

**MARTIN WAINAINA KURIA ..... 1<sup>ST</sup> RESPONDENT**

**CAROLINE WARUGURU WANG'OMBE ..... 2<sup>ND</sup> RESPONDENT**

**SURYASINGH PURUSOTTAM NEGANDHI ..... 3<sup>RD</sup> RESPONDENT**

**JITENDRA TRIKAMDAS SWALY ..... 4<sup>TH</sup> RESPONDENT**

**SAMUEL MURIGI MWANIKI ..... 5<sup>TH</sup> RESPONDENT**

**SAMUEL MURIGI MWANIKI, JOEL KINYUA KATHUMBI &  
CHRISPIN WAINAINA T/A KINYUA MWANIKI & WAINAINA  
ADVOCATES ..... 6<sup>TH</sup> RESPONDENT**

**JOSEPH GAKAHU GITHI ..... 7<sup>TH</sup> RESPONDENT**

**RULING**

1. What is before Court for determination is the Appellant's Notice of Motion Application dated the June 22, 2022 where he seeks the following orders:
  1. Spent.
  2. Spent.
  3. That this Honourable Court be pleased to grant an order for stay of execution of the Judgment and Decree of the Chief Magistrate's Court at Machakos in MC ELC No 76 of 2019 by the



Honourable Evans H. Keago delivered on May 26, 2022 pending hearing and determination of this Application.

4. That this Honourable Court be pleased to grant an order for stay of execution of the Judgment and Decree of the Chief Magistrate's Court at Machakos in MC ELC No 76 of 2019 by the Honourable Evans H. Keago delivered on May 26, 2022 pending hearing and determination of the Appeal.
5. That the costs of this Application be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Jayant Govindji Asher where he deposes that the Chief Magistrate's Court at Machakos in MC ELC No 76 of 2019 in its Judgment delivered by Hon. Evans H. Keago on May 26, 2022 entered Judgment against himself and the 4<sup>th</sup> Respondent jointly and severally to pay the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Kshs. 6, 306,950.00 together with costs including interest and costs to the 6<sup>th</sup> Respondents but failed to enter Judgment against the 3<sup>rd</sup> Respondent or his Estate despite being a registered proprietor of the suit land. He confirms that he was aggrieved by the said Judgment and lodged an Appeal against the whole decision. He is apprehensive that the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents will commence execution process of the impugned Judgment and Decree any time after June 25, 2022 as there are no interim orders that have been granted to stay the said execution beyond thirty (30) days from May 26, 2022. He avers that he has an arguable Appeal and unless the orders of stay are granted, the Appeal will be rendered nugatory. He reiterates that the Application has been brought without any or undue delay and the Respondents will not suffer any prejudice if the said Application is allowed.
3. The Application was opposed by the 1<sup>st</sup> Respondent who filed a Replying Affidavit where he deposes that the Applicant has not demonstrated any sufficient cause for stay of execution to be granted. He insists that the Applicant has not proved he is likely to suffer substantial loss. He avers that the Applicant has failed to provide any security at all. He explains that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents purchased LR No 12715/1409 ( original number 12715/10/3) on December 18, 2013 for Kshs. 4,650,000 from the Appellant, 3<sup>rd</sup> and 4<sup>th</sup> Respondents. Further, they paid the purchase price to the Appellant's lawyers' being the 5<sup>th</sup> and 6<sup>th</sup> Respondents but a transfer has never been effected to their favour nor purchase price refunded. He insists that they have suffered loss and damage. He states that Judgment was entered in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the decretal sum amounts to Kshs. 10,181,632. Further, that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were also awarded costs of the suit which they estimate to be around Kshs. 500,000. He reiterates that it is now nine (9) years since the Appellant and his partners received their purchase price and they got no value for it and they are hence entitled to the fruit of their litigation. He reaffirms that the Appellant has not demonstrated a good reason for the stay of execution to be granted. Further, that since it is the discretion of the court to grant a stay of execution, it should be conditional that the Appellant is directed to deposit the decretal sum as well as costs, amounting to Kshs. 10,681,632 in an interest earning account in the name of their advocate as well as the Appellant's Advocate, pending the determination of the Appeal.
4. The Appellant filed a Further Affidavit where he reiterated his averments, insisted that the amount of Kshs. 10,681,632 which the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' seek is colossal, and this will occasion him substantial loss unless a stay is granted. He avers that, in the impugned Judgment, it is not clear whether the same was entered jointly and severally against the Defendants in the lower court. Further, that it is difficult to ascertain security for due performance of the Decree. He contends that the amount of Kshs. 10,681,632 includes damages, all of which are disputed and are subject to appeal. Further, that the costs of Kshs. 500,000 are yet to be taxed. He claims he is not aware of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' financial standing and they may not be in a position to refund him.



5. The Application was canvassed by way of written submissions.

### **Analysis and Determination**

6. Upon consideration of the Notice of Motion Application dated the June 22, 2022 including the respective affidavits and rivaling submissions the only issue for determination is whether there should be a stay of execution of the Judgment and Decree in Machakos MC ELC No 76 of 2019 pending the hearing including final determination of the Appeal.
7. The Appellant in his submissions reiterated his averments and contended that he has an arguable Appeal. Further, that he will suffer substantial loss if the stay order is not granted. He argued that he had filed the Application without any undue delay and the costs should abide the outcome of the Appeal. To buttress his averments, he relied on the following decisions: *Leonard Awori V Patrick Ochieng* (2021) eKLR; *Rbodab Mukuma V John Abuoga* (1988) eKLR; *James Kamau Njenga Vs Peter Ndambuki Mutunga* (2021) eKLR; *Silas Kanyolu Mwachira Vs Josephine Kavive James* (2021) eKLR and *Kenya Orient Insurance Co. Ltd Vs Paul Mathenge Gichuki & Another* (2014) eKLR .
8. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents in their submissions insists the Appellant and the 4<sup>th</sup> Respondent have not satisfied any part of the Decree as the court issued a stay of execution of the Decree on June 27, 2022. They argue that there is an error apparent on face of record as pertains to the stay of execution order issued on June 27, 2022 as it prevented them from executing the Decree which is not contested by the 4<sup>th</sup> Respondent. They sought for the court to vary the order of stay of execution issued on June 27, 2022. They reiterate that the Appellant has not demonstrated what substantial loss he stands to suffer and neither has he offered security for due performance of the Decree. Further, that the Appellant has not placed before court any exceptional circumstances to justify for the stay of execution to be granted, however if the court should be inclined to grant it then it should be conditional and the Appellant directed to deposit the sum of Kshs. 10,181,632 in a joint account. To support their arguments, they relied on the following decisions: *Vishram Ravji V Thornton Turpin Civil* (1999) KLR 365 and *Victory Construction Vs B M (a minor suing through next friend PMM)* (2019) eKLR .
9. The legal provisions governing stay of execution pending Appeal are contained in Order 42 Rule 6(2) of the *Civil Procedure Rules* which provides as follows:
- 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. In this instance, Judgment was entered in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the May 26, 2022 and the Appellant including the 3<sup>rd</sup> Respondent directed to pay the following:
- Aggravated damages of Kshs. 1,350,000; Special damages of Kshs. 306, 950; Refund of the purchase price of Kshs. 4,650,000 as well as interest on special damages and purchase price. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents were further awarded costs of the suit in the lower court.
11. The Appellant being dissatisfied with the whole of the said Judgment filed a Memorandum of Appeal dated the June 22, 2022. The Appellant claims the learned Magistrate erred in entering Judgment as it is not clear whether it was jointly or severally. He contended that he stands to suffer substantial loss if the order of stay is not granted and the Appeal will be rendered nugatory. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents



insist that the Appellant has not demonstrated the substantial loss he stands to suffer and further that he has not offered any security pending Appeal.

12. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the Court of Appeal while dealing with an Application for stay of execution pending Appeal held that the Court has discretionary power to grant it. Further, a stay must be granted so that an Appeal may not be rendered nugatory and a Judge should not refuse a stay if there are good grounds for granting it merely because in her opinion, a better remedy may become available to the Applicant at the end of the proceedings.

13. While in *James Wangalwa & Another Vs Agnes Naliaka Cheseto* (2012) eKLR it was held that:

An Applicant must establish factors which show that the execution will create a state of affairs that will irreSUBPARA bly affect or negate the very essential core of the Applicant as a successful party.”

14. From a perusal of the proceedings in the lower court culminating in the Judgment dated the May 26, 2022, I note the 1<sup>st</sup> and 2<sup>nd</sup> Respondents paid the Appellant’s lawyers the full purchase price but the suit land was never transferred to them. Further, the Appellant and his partners procured a new title to the land and disposed of the said land to third parties. I note the Appellant has not indicated how much money he intends to provide as security pending Appeal. On the Appellant’s averments that he will suffer substantial loss if the stay is not granted, I will refer to the decision of Platt, Ag. JA (as he then was) in *Kenya Shell Limited v Kibiru* [1986] KLR 410 , at page 416 where he stated thus:

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 corner stone 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.”

15. While in the case of *Machira T/A Machira & Co Advocates v East African Standard* (No 2) [2002] KLR 63 it was held that:

To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

16. See also the decision of *Victory Construction v BM (a minor suing through next friend one PMM)* [2019] eKLR .

17. Based on the facts before me while relying on the legal provisions I have cited as well as associating myself with the decisions quoted, it is my considered view that the Appellant has failed to demonstrate what substantial loss he stands to suffer if the stay of execution is not granted. Except for claiming that the decretal sum is a colossal amount and insisting that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents will not be able to



refund the said amount, he has failed to provide proof to that effect. I opine that since the Appellant and his partners received the purchase price from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and never transferred the suit land to them, in the interest of justice, I hold that the stay pending Appeal sought by the Appellant should be conditional. I direct that the Appellant including the other Judgment debtors do pay half the decretal sum to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and deposit the balance in a joint interest earning account in Kenya Commercial Bank Machakos, in the names of both the Appellants as well as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Advocates' within thirty (30) days from the date hereof, failure of which this Application shall be deemed to have been dismissed with costs to the Respondents.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2023**

**CHRISTINE OCHIENG**

**JUDGE**

