



**Gichengo v Ndiva (Environment and Land Appeal 66 of 2021)
[2023] KEELC 16701 (KLR) (8 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16701 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 66 OF 2021**

LL NAIKUNI, J

MARCH 8, 2023

BETWEEN

JANE WANGECHI GICHENGO APPELLANT

AND

KENNEDY MUTHINI NDIVA RESPONDENT

RULING

I. Introduction

1. The Appellant/Applicant – Jane Wangechi Gichengo, herein moved this Honorable Court through a Notice of Motion application dated August 19, 2021 for its determination. It was brought under the provision of Sections 1A, 1B, and 3A of the [Civil Procedure Act](#), Cap. 21 and Order 45, Order 50 Rule 6 of the [Civil Procedure Rules](#).

II. The Appellant/Applicant's case

2. The Appellant/Applicant sought for the following prayers:-
 - a. That pending the hearing and determination of this application, there be a stay of execution of the Judgement delivered herein on October 11, 2019 pending the hearing and determination of the appeal.
 - b. That pending the outcome of the intended appeal, there be a stay of execution of the Judgement delivered herein on October 11, 2019 pending the hearing and determination of the appeal.
 - c. That costs of this application to be provided for.



3. The application is premised on the grounds, the testimonial facts and the averments made out under the nine (9) Paragraphed Supporting Affidavit of Jane Wangechi Gichengo the Appellant/Appellant sworn and dated August 19, 2021 together with an annexature marked as “JWG – 1”.
4. She deponed being the Appellant/Appellant herein and hence well conversant with the facts and circumstances of the case and competent to swear this affidavit herein.
5. The Deponent stated that a case was filed against her by the Respondent herein – Kennedy Muthini Ndiva - in the sub – ordinate Court being Mombasa RMCC 2324 of 2013. Upon being heard, on October 11, 2019 the said Court delivered its Judgement in his favor.
6. That she was dissatisfied with the said Judgement and she filed a Memorandum of Appeal on November 5, 2019 and later a Record of Appeal on May 20, 2021. She deponed that the Respondent had attempted to register the suit land in his name despite the appeal herein.
7. She urged Court to preserve the subject matter of this appeal, which she argued was merited and with reasonable chances of succeeding until the appeal was heard and determined.

III. The Respondent’s case

8. The Respondent responded to the application for stay of execution pending appeal, by filing a 15 Paragraphed Replying Affidavit sworn by Kenedy Muthini Ndiva and dated September 17, 2021. He deponed that after the Judgement was rendered in his favor, he made an application dated December 1, 2020 for execution of the Judgement which was to effect transfer of the suit land as directed by court.
9. He held that all the parties filed their submission to the said application and it was awaiting delivery of ruling on October 22, 2021. Thus, according to him, this application was an abuse of the due process of Court. He claimed the Appellant/Applicant was making this application an year and nine months after the delivery of the Judgement which according to him it was a delaying tactic of the execution process which was at its completion.
10. Further it was deponed that the Appellant had not satisfied the requirements for stay of execution as provided by Order 42 Rule 6 of the *Civil Procedure Rules, 2010*. Therefore, he urged the Honorable Court to dismiss the application with costs.

IV. The Supplementary Affidavit by the Respondent

11. On March 29, 2022 with the leave of Court granted on March 3, 2022, the Respondent filed a Supplementary Affidavit dated even date. He deponed that on November 22 2021, the trial delivered a ruling to the application dated December 1, 2020 which had been filed by the Plaintiff/Applicant immediately after the delivery of the Judgement by the sub o ordinate Court. He stated that the Lower Court allowed the application.
12. As a result, the Executive officer of the Court subsequently signed the transfer documents and he was aware that the same were presented for endorsement and registration before the Mombasa Land Registrar. He claimed that Advocate of the Appellant was well aware of the execution process and was even served with a draft decree for approval on January 29, 2020.
13. He informed Court that the Appellant sold the to him her land and he pad her as per the agreement. She spend his money only to come back later and sought to reverse the sale agreement after he had already sold his other land to finance this purchase.



V. Submissions

14. On March 3, 2022 while all parties were present in Court, they were directed to have the application be canvassed by way of written submissions. Pursuant to that all the parties fully complied. Thereafter, the Honorable Court reserved a date for its ruling on notice accordingly.

A. The Written Submission by the Appellant/Applicant.

15. On February 21, 2022 the Learned Counsel the Law Firm of M/s. Gikandi & Co Advocates filed their written submission dated February 18, 2022. Mr. Gikandi Advocate provided the court with a detailed background about this matter. He held that the Appellant was the registered proprietor to the suit property Plot No. Kilifi/Mtwapa/1765 at Mtwapa Kilifi.
16. By an agreement of sale, he Appellant agreed to sell it to the Respondent at a sum of Kenya Shillings Two Million (Kshs 2, 000, 000/=) but the property being agricultural land under the Land Control Act Cap 302, and hence pursuant to the provision of Sections 6 (1) and 8 (1) of the Act is under the controlled transaction which calls for the proprietor to obtain a Letter of Land Control Board consent while undertaking on every transactions stipulated thereof including sale of land among others. According to the Learned Counsel, while in the process of trying to apply for the said consent from the Land Control Board, husband and son for the Appellant/Applicant refused/objected to the said sale and therefore the plans to obtain the LCB consent was thwarted. As far as she was concerned, that became the end of the said sale transaction.
17. Luckily, according to her, the sale agreement had an exit Clause 2(i) and whereby the Appellant/Applicant expressly indicated to the Respondent to terminate the transaction. She stated her willingness and readiness to refund the deposit of the purchase price paid to her and therefore proceed to terminate the agreement for sale.
18. However, this notwithstanding, the Respondent objected to that proposal of the termination of the sale. Instead, he decided to file the suit Civil suit before the sub ordinate court – “the CMCC No. 2324/2013 – Kennedy Muthini Ndiva –Versus- Jane Wangechi Gichengo” of which after its hearing, the claim was allowed through the Judgement delivered by the trial court on October 11, 2019. Being aggrieved by the said Judgment, the Appellant/Applicant instituted this Appeal hereof.

B. The Written Submission by the Respondent.

19. On February 17, 2022 the Learned Counsel the Law firm of Messrs. Munthythia, Mutugi Umara & Muzna Co. Advocates -f or the Respondent filed their written submissions dated February 14, 2022 in opposition of the application. Mr. Mutugi Advocate commenced his submission by stating that the application was brought one (1) year and ten (10) months after the Judgement was delivered which makes it an afterthought. Further it was submitted at the time of making the application, the appeal was yet to be filed and the Honorable Court could not issue a blanket stay of execution pending an intended appeal. The Counsel submitted that the provision of Order 42 Rule 6 of the Civil Procedure Rules, 2010 made it mandatory for the Applicant seeking stay of execution to demonstrate that; substantial loss will occur unless the order is made, the application has been made without unreasonable delay and security for costs has been provided for.
20. The Learned Counsel submitted that the Respondent was the one who stood to suffer loss since the Appellant/Applicant sold the suit land, received the purchase price but had refused to transfer the land to the Respondent. Further, the Counsel submitted that the delay of one year ten months



was inordinate and unreasonable and had not been explained to Court. It was an indication that the Appellant/Applicant stood to suffer no substantial loss if leave was not granted.

21. The Learned Counsel maintained that the Appellant/Applicant had not demonstrated her willingness to post security for costs which the Court may order for the performance of such decree of order which may be binding on her. He urged the Honorable Court to find that the Appellant/Applicant keeping the purchase price and being granted of stay of execution order would be to using the Court system to seek unjust enrichment. The Court was urged to find the application unmerited and dismiss it with costs.

C. The Supplementary/Skeletal written Submissions by the Respondent

22. On May 6, 2022 with the leave of Court granted on March 3, 2022 the Respondent filed their Supplementary submissions dated April 26, 2022. Mr. Mutugi Advocate held that the Respondent upon obtaining the leave of Court filed Supplementary Affidavit on March 28, 2022. From the said Affidavit he enumerated all the steps taken from the date when the Judgment was delivered on October 11, 2019 to date.
23. In a nutshell the Respondent extracted a decree from the lower court decision which was signed by the Court on February 26, 2020. According to the Respondent, the Appellant/Applicant was all along fully involved in the extraction of the decree. Upon the decree being issued, the Respondent filed a Notice of Motion application dated October 11, 2020 in the lower court which sought to have the Executive Officer of the Court to be allowed to execute all the documents to facilitate registration of the Respondent's name as the owner of the property in consonance to the Court's decision. The Appellant/Applicant participated fully in this application, filed submission and even argued it. On October 22, 2021 in the presence of both parties a ruling was delivered allowing the application and the prayers sought. There was no stay. Thereafter the relevant documents were signed by the Executive Officer and were presented to the Land Registrar Mombasa for registration.
24. The Appellant/Applicant only filed the present application before this Court on August 27, 2021 way after the Lower Court application had already been argued and was pending for ruling on October 22, 2022. the Appellant/Applicant never applied to arrest the Ruling. The Learned counsel argued that this court was being urged to issue stay of an event that had already taken place. The horse had already bolted.
25. The Appellant/Applicant was guilty of laches and there was nothing to be stayed.

VI. Analysis and Determination

26. I have carefully considered the pleadings with regard to the Notice of Motion application dated August 19, 2021 by the Appellant/Applicant herein, the Replies, written submissions, authorities cited by parties, the appropriate provisions of the statutes.
27. For this Honorable Court to reach an informed, fair and reasonable decision, it has set out the following three (3) issues for its determination. These are:-
 - a. Whether the Notice of Motion application dated August 19, 2021 by the Appellant/Applicant has met the threshold for the issuance of orders of stay of execution of the decision of the trial court pending the hearing and determination of the appeal.
 - b. Whether the parties herein are entitled to the relief sought.
 - c. Who will bear the Costs of the application.



ISSUE No. a). Whether the Notice of Motion application dated 19th August, 2021 by the Appellant/Applicant has met the threshold for the issuance of orders of stay of execution of the decision of the trial court pending the hearing and determination of the appeal.

28. The trial court delivered its Judgment on October 11, 2019 whereby Honorable Kiage found in favor of the Plaintiff (The Respondent herein) and issued an order of specific performance against the Defendant (the Appellant herein) compelling her to avail all the completion documents to their joint advocate to enable the sale of land be completed. The Respondent proceeded to extract the decree which was issued by court on February 26, 2020. Further, the Respondent formally moved Court through an application dated December 1, 2020 filed before the trial court that sought for orders to allow and/or authorize the Executive Officer to sign all the necessary transfer and registration documents pertaining to this transaction in order to effect the transfer of the suit land Plot No. Kilifi/Mtwapa/1765 to himself as per the decree of court. On October 22, 2021, upon considering the application, the court allowed it as prayed. Pursuant to that, all the documents were signed and presented to the Land Registrar Mombasa for registration. Although none of the parties informed this Court whether the registration was ever effected, but I feel perhaps it is yet to take place. The Appellant/Applicant was dissatisfied with the Judgment and decree issued herein filed a Record of Appeal on May 20, 2021, and consequently filed this application on August 27, 2021 seeking to stay of execution of the Judgment delivered on October 11, 2019 pending the hearing and determination of the appeal.
29. Stay of execution is provided under Order 42 Rule 6, which provides as follows:-
1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (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.
30. The Appellant/Applicant need to satisfy the court these three conditions before court can grant stay orders; substantial loss may result to the applicant unless the order is made, the application has been made without unreasonable delay, and such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant. All these three (3) conditions must be present. I say so seeking support from the case:- “*Tabro Transporters Limited – Versus -Absalom Dova Lumbasi* (2012)eKLR it was held that “These conditions are the essence of Order 42 Rule 6 of the CPR. They however share an inextricable bond such that, if one is absent, it will affect the exercise of the discretion of the court in granting stay of execution.”
31. Applying these legal principles to the instant case, the Appellant/Applicant has not demonstrated with empirical documentary evidence to this Court what substantial loss she stands to suffer when the execution of the judgment dated October 11, 2019 is undertaken eventually. Execution is a legal process which a winning party undertakes to enjoy the rewards and the fruits of the Judgment that



was entered in his/her favour. Setting off the process of execution is not a ground for granting stay. Instead, the Applicant has to demonstrate the substantial loss will occur if the execution is not stayed. In the instant case, the Respondent has vehemently submitted that the Appellant/Applicant herein will not suffer any substantial loss since she admitted having received a deposit of a sum of Kenya Shillings One Million (Kshs 1,000,000/=) as part payment for the purchase of the suit property from the Respondent. But despite of this argument, on the other hand, the Appellant/Applicant contended that the Respondent was in the process of registering the suit property in his name despite the pending appeal and urged court to stay the same.

32. In the Memorandum of Appeal, the Appellant/Applicant has informed Court that her family never supported this sale of land transaction. Essentially, due to this, she failed to apply and obtain the Letter of Consent from the Land Control Board for the sale of the suit property. Arising from this assertion, it makes the honorable Court assume perhaps the suit land may be a family home or property of the Appellant/Applicant which may cause some discomfort or loss if it was disposed off to a third party. At this juncture, this Honorable Court may not wish away the fact that issues of family are paramount and are well safeguarded under the fundamental right as founded under the Article 45 of the *Constitution of Kenya, 2010*. I shall be looking at this issue once again in this ruling. However, the Appellant/Applicant has not demonstrated through evidence that the suit property is her family home and that she stands to be evicted if the suit land is registered in the name of the Respondent. In such an instance the court is left to make a finding that the land was open and any loss suffered by the Appellant/Applicant could be compensated by an award of damages. In such an instance there will be no substantive loss that would be suffered by the Appellant/Applicant herein.
33. In the case of “*Sammy Some Kosgei – Versus - Grace Jeled Boit* [2013] eKLR it was held that:-

“In matters related to land, the nature of the land, and its user is therefore important in determining whether substantial loss would be occasioned. There would be an inclination to grant stay, with conditions, where the subject matter is the home of the applicant, or the suit land is so utilized in a way that would cause hardship to the appellant, or to members of the public, if stay is not granted, subject of course to the issuance of security. Where the suit premises is business premises, and there is a decree for recovery of the same, any loss suffered by the appellant is quantifiable and so long as the premises is left intact, or the respondent offers some security, then there would be no substantial loss to be suffered by the appellant.”

Additionally, there is no valuation report or ground report annexed to the affidavit of the Appellant/Applicant that would guide court into making a determination on the status of the suit land. I am still left to speculate whether it was a rental property or a home occupied by the Appellant/Appellant. The Court emphasizes that it does not have the privilege of such information within its domain for consideration. Therefore, I find that the Appellant/Applicant has failed to demonstrate to court a probability of substantial loss if the suit land would be transferred to the Respondent. However, in the interest of justice, and in order to balance the scale of justice, I am of the view that there may be a danger that the Respondent may deal with the suit land in a manner that would make it unavailable if the appeal succeeded in the long run. I say so since the decree compels the Appellant/Applicant to transfer interest of the suit land to the Respondent.

34. On whether the application has been made without unreasonable delay. Certainly, I am of the view that the application by the Appellant/Applicant was made belatedly. From the records, the Judgment by the trial court was delivered on October 11, 2019 and this application was filed in court on August 27, 2021. There is a delay of two (2) years done the line. This prolonged delay has not been explained by the Appellant/Applicant. The only activity that may have happened in between was the application made



by the Respondent to cause the Executive Officer execute the transfer and registration documents. This application was made almost immediately after the Judgement was delivered. I do not see the said application by the Respondent having contributed to this delay. On the contrary, it should have been the prime reason for the Appellant/Applicant moving this Court for the orders of Stay of execution including this effort of enforcing the Decree. The Counsel for the Appellant/Applicant was well aware that the Respondent had initiated the execution process, since it has been demonstrated by the Respondent that on January 31, 2020 they were served with a letter from the Counsel for the Respondent requesting for approval of a draft decree. The Respondent has been vigilant in seeking the on the execution process, his application seeking execution of the transfer documents was made on December 1, 2020 and a ruling delivered on October 22, 2021 two months after this application was filed. It seems the Appellant/Applicant only made this application upon the realization that the Respondent was serious with the execution process and that she will lose ownership of the suit land. That, in my view, the delay of two years inordinate and unreasonable in the absence of a rational explanation from the Appellant/Applicant makes this application an afterthought which was filed belatedly.

35. The last consideration is security. The Appellant/Applicant must offer such security for the due performance of the orders as may ultimately be binding on the Appellant/Applicant. In the case of *“Focin Motorcylce Co. Limited – Versus - Ann Wambui Wangui & Anor (2018)eKLR* it was held that:-
“When an Applicant proposes to provide security as the applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the Respondent the fruits of Judgement. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security.”
36. In this case, the Appellant/Applicant has not proposed any security, on the contrary, the Counsel for the Respondent has submitted that the Appellant/Applicant has no willingness to post security since she has been kept the purchase price and has also refused to transfer the suit land. However, it is not the Respondent who demands security for costs. Instead it’s the Court which determines the security upon ordering stay to ensure that due performance of the obligations by the Appellant/Applicant as to costs and to satisfy the decree. In granting orders of stay of execution, the court is called to strike a balance between the right of the Appellant/Applicant to appeal and the Respondent right to enjoy the fruits of this Judgement. In case of *Tabro Transporters (supra)* it was held,

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. Then the court is faced with a novel task of balancing the two competing rights to an almost constitutional symmetrical bound.

In carrying out the exercise, the focus is on the reconciliation of the two rights, which is not a question of discrimination as espoused by the Court of Appeal in *Swanya Ltd V Daima Bank Ltd Civil Application No 45 Of 2001* that;

Whilst it is true that the Court does not make a practice of depriving a successful litigant of the fruits of his litigation and locking up funds to which prima facie he is entitled pending an appeal, it is equally true that when a party is appealing, exercising his undoubted right of appeal, if successful, is not rendered nugatory but is however in the discretion of the court to grant or refuse a stay.”



37. Be that as it may, this being a land matter involving a nuclear family – its interested safeguarded under the fundamental rights of the provision of Article 45 (1), (2), (3) and (4) of the Constitution of Kenya, 2010 and of course taking its sensitivities, it one of those few and peculiar cases that the Honorable Court feels the great need to exercise its discretion while considering such applications. The said discretion and inherent powers are founded in the principles of Overriding Oxygen Rule under the provision of Article 159 (1) and (2) of the Constitution of Kenya, 2010, Section 3 and 13 of the Environment and Land Act, No 19 of 2011 Section 101 of the Land registration Act, No 3 of 212, Section 150 of the Land Act No 6 of 2012 and Order 42 Rule 6 of the Civil Procedure Rules, 2010, I am inclined to stay the execution pending the determination of the appeal. In my view, the Appellant/Appellant cannot be shut from the seat of justice, which is exercised discretionally by the court and they should be given an opportunity to prosecute the appeal. On the same breath, the Respondent should be assured of his Judgement debt being secured as security for costs.

ISSUE No. b). Who will bear the Costs of the application

38. It is trite law that the issue of costs is at the discretion of the Court. Costs mean the award that is granted to a party upon the conclusion of a legal action, or process or proceedings in any litigation. The provision of Section 27 (1) of the Civil Procedure Act, Cap 21 holds that costs follow the events. (See the Supreme case of “Jasbir Rai Singh Rai – Versus – Tarchalon Singh (2014) eKLR, the Court of appeal case of Mary Wambui Munene – Versus – Ihururu Dairy Co – Operative and Cecilia Karuru Ngayu – Versus – Barclays bank of Kenya & Another (2016) eKLR.

39. In this case, the results of the matter is that the Appellant/Applicant has succeeded in prosecuting her application on the parameters founded in Law. Nonetheless, based on the nature of the application, it is in the interest of natural justice, Equity, Conscience, fair and reasonable that each party bears its own costs.

VI. Conclusion & Disposition

40. Consequently, having conducted an elaborate analysis to the framed issues, the Honorable Court on preponderance of probability finds that the Appellant /Applicant has been successful in prosecuting her application. Thus, I proceed to grant the following orders:-

- a. That the Notice of Motion application dated August 19, 2021 by the Appellant/Applicant herein be and is hereby allowed for being meritorious.
- b. That an order be made that the Respondent shall not utilize the suit properties and based on “the Doctrine of *Lis Pendens*” under the provisions of Section 52 of the Transfer of Property Act shall not sell, charge, or in any other way dispose Plot No Kilifi/Mtwapa/1765.
- c. That an order be and is hereby made that the Appellant/Appellant directed to deposit the original Certificate of the title deed document and a current Certificate of Official Search for all that parcel of land known as Land Reference No Kilifi/Mtwapa/1765 with Court within the next thirty (30) days from the date of the delivery of this Ruling and shall remain in the custody of the Court until the hearing and determination of the appeal or until such other orders are made in respect of the same.
- d. That for expediency sake, this Appeal should be set down for hearing and disposal within the next ninety (90) days from the date of the delivery of this Ruling. There should a mention date on 8th May, 2023 for purposes of taking direction of the Appeal under the provisions of Section 79B and G of the Civil Procedure Act, Cap. 21 and Order 42 Rules 13 (1), (2),(3) & (4), 16 and 18 of the Civil Procedure Rules, 2010.



- e. That each party to bear their own costs.

IT IS SO ORDERED ACCORDINGLY.

RULING DELIEVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 8TH DAY OF MARCH 2023

HON JUSTICE L L NAIKUNI (JUDGE),

ENVIRONMENT & LAND COURT AT

MOMBASA

In the presence of:

- a. **M/s Yumnah, the Court Assistant.**
- b. M/s Mutheke Advocate holding brief for Mr S Mutugi Advocate for the Respondent.
- c. No appearance for the Appellant/Applicant.

