



REPUBLIC OF KENYA



KENYA LAW
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**Kenduiywa v Ngetich & another (Environment and Land Appeal
3 of 2022) [2023] KEELC 16017 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16017 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND APPEAL 3 OF 2022**

MC OUNDO, J

MARCH 9, 2023

**BEING AN APPEAL ARISING FROM THE PRINCIPAL MAGISTRATES COURT
AT BOMET ENVIRONMENT AND LAND COURT CASE NO. E011 OF 2020**

JOHN KIPNGENO KENDUIYWA.....PLAINTIFF

VERSUS

GILBERT NGETICH.....1ST DEFENANT

VINCENT NGETICH.....2ND DEFENDANT

BETWEEN

JOHN KIPNGENO KENDUIYWA APPELLANT

AND

GILBERT NGETICH 1ST RESPONDENT

VINCENT NGETICH 2ND RESPONDENT

(Being an application for stay of execution pending the hearing and determination of an appeal from the judgment and Decree made by the Principal Magistrates court at Bomet (The Honorable K. Kibelion PM dated 4th May 2022 in BOMET PMC ELC case No. E011 of 2020)

RULING

1. Before me for determination is a notice of motion dated July 14, 2022 brought under the provisions of order 42 rule 6 the [Civil Procedure Rules 2010](#), where the applicant seeks for orders of stay of execution of the judgement and decree issued on the May 4, 2022 in Bomet PMC ELC case No. E011 of 2020, pending the hearing and determination of his intended appeal.
2. The applicant's grievance was that in the said judgment, it had been ordered for the cancellation of title No Kericho/Kimulot/1836 registered in favour of the plaintiff who was now apprehensive that



- the respondents were likely to enter the suit property and/or dispose of the same to third parties thus rendering his appeal, which had good prospect of success obsolete and which in turn would cause him to suffer irreparable damage.
3. The application was supported by the grounds therein as well as the supporting affidavit by John Kipngeno Kenduiywa the applicant /appellant herein dated the July 14, 2022.
 4. The said application was opposed *vide* the 1st respondent's replying affidavit with the authority of the 2nd respondent dated the January 16, 2023 to the effect that the appellant having sued them for trespassing on the suit land LR No Kericho/Kimulot/1836, the matter had been determined on merit in their favour. That the memorandum of appeal did not raise any arguable legal issues which had high chances of success. That the application herein was therefore frivolous vexatious and abuse of the court process and also had no substance as the threshold for granting the orders sought had not been met.
 5. That the appellant had not annexed any evidence to show any development, on the allegation of disposal, charge, alienation on other manner of rendering the portion un-available in case his appeal succeeded. The respondents sought that the application be dismissed with costs.
 6. By an order of the court of December 5, 2022, parties had been directed to dispose of the application by way of written submissions.

Applicant's Submissions

7. The applicant's submission was that his application was for stay of execution of the judgment in Bomet PMC ELC No E011 of 2020 delivered on May 4, 2022 and as such, the only issue he had framed for determination was whether the applicant had made out a case for the grant of stay of execution.
8. Reliance was placed on the case in [Antoine Ndiaye v African Virtual University](#) [2015] eKLR that had established the ingredients that need to be satisfied for the grant of the orders so sought.
9. That on the first ingredient as to whether the application had been filed within reasonable time, that was the applicant's submission was that pursuant to the delivery of the impugned judgment on May 4, 2022, the appellant herein had to clear with his previous advocates, despite not having knowledge of the judgment, in time to instruct his current advocates who had filed the memorandum of appeal on the June 13, 2022, wherein after the instant application was filed which was within time.
10. On the second ingredient as to whether the appellant had proved that he would suffer substantial loss unless the order is made, the applicant submitted that it was is not in dispute that he had purchased the suit property and therefore was apprehensive that should the orders sought not be granted, the respondents would proceed to dispose of the suit property to third parties to his detriment and as he would not be able to recover it. That it would in the best interest of justice to preserve the subject matter of the suit so that were the appeal successful, the same is not rendered nugatory. Reliance was placed on the decided cases in [RWW v EKW](#) [2019] eKLR and [Halal & another v Thornton & Turpin \[1963\] Ltd](#) [1990] eKLR.
11. That the grant of an order of stay of execution was a discretionary one to which a court exercising it must act judiciously within the confines of the law and not capriciously as was held by the Court of Appeal in [COI & another v Chief Magistrate Ukunda Law Courts & 4 others](#) [2018] eKLR.
12. That the court should endeavor to balance the interests of both the successful party in litigation so as not to unnecessarily bar him from enjoying the fruits of judgment, and that of the appellant whose appeal may succeed and be rendered nugatory if stay of execution is not granted.
13. The applicant submitted that he had made out a case for the grant of stay of execution pending appeal.



The Respondent's Submissions.

14. In opposition of the application, the respondents framed their issues for determination as follows;
 - i. Whether the applicant will suffer substantial loss if the order of stay is not granted.
 - ii. Whether the application is brought without undue delay.
 - iii. Whether the applicant has provided security for the due performance of the decree.
 - iv. Whether the applicant has established sufficient cause for grant of the orders of stay of execution,
15. On the first issue for determination, the respondent submitted that the applicant had not demonstrated that he would suffer loss if the order of stay was not granted in that he did not state the nature of loss he was likely to suffer. That nothing had been annexed to show any development on the allegation of disposal, charge, alienation on other manner of rendering the portion un-available in case his appeal succeeded. Reliance was placed on the decided case in [Machira T/A Machira 7 Co Advocates v East African Standard \(2\)](#) [2002] KLR.
16. On the second issue as to whether the application was brought without undue delay, the respondent submitted while relying on the decided case in [Jaber Moshen Ali & another v Priscillah Boit & another](#) [2014] eKLR that the respondents had immediately after the delivery of judgment, taken possession of the land and had begun the process of having the title deed, which had been fraudulently obtained by the applicant/appellant herein, cancelled. That the application was also brought with undue delay.
17. On the third issue for determination as to whether the applicant had provided security for due performance of the decree, the respondents relied on the provisions of order 42 rule 6(2)(b) of the [Civil Procedure Rules](#) to submit that the applicant had not made any offer as security which was a mandatory requirement and as such, he had not met the conditions for grant of stay.
18. As to whether the applicant had established sufficient cause for grant of the orders of stay of execution, the respondents submitted that since they were the successful litigants, they ought to enjoy the fruits of their judgment. That the application was made in bad faith with an intent of denying them the fruits of their judgment which could not be done unless under exceptional circumstances which circumstances did not arise in this case. Reliance was placed on the decision in [Francis Dawa Kawa v Tobias Obilo Anduru](#) [2014] eKLR.
19. Further submission was to the effect that an appeal did not operate as a bar to execution of judgment. That an applicant seeking for stay of execution must demonstrate that they were not using the appeal to delay justice and must show that not only did they have an arguable appeal, but also that they had come to court without undue delay. The applicant had therefore not established sufficient cause to warrant the court to granting a stay of execution.

Determination.

20. I have considered the applicant's application for stay of execution of the court's judgement and decree of July 30, 2020, pending the hearing and determination of his intended appeal. I have also considered the reasons given for and against granting the orders as sought.
21. The applicant contends that his is apprehensive that the respondents were likely to enter the suit property and/or dispose of the same to third parties thus rendering his appeal, which had good prospect of success obsolete and which in turn would cause him to suffer irreparable damage.



22. The law concerning stay of execution pending appeal is found in order 42 rule 6 of the [Civil Procedure Rules](#) which stipulates 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 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 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. There are three conditions for granting of stay order pending appeal under order 42 rule 6 (2) of the [Civil Procedure Rules](#) to which :

- i. The court is satisfied that substantial loss may result to the applicant unless stay of execution is ordered;
- ii. The application is brought without undue delay and
- iii. 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.

24. I find issues for determination arising therein namely:

- i. Whether the applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending appeal.
- ii. What orders this court should make.

25. For the applicant to succeed in the present application the onus was on him to satisfy the conditions as set down under order 42 rule 6 of the [Civil Procedure Rules](#). Indeed the purpose of stay of execution is to preserve the substratum of the case. In the case of *Consolidated Marine v Nampijja & another*, civil app No 93 of 1989 (Nairobi), the court held that:-

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.

26. The applicant’s contention is that if the stay orders were not granted, he stood to suffer substantial loss in that respondents were likely to enter the suit property and/or dispose of the same to third parties. The applicant has however not demonstrated that the respondents intend to dispose of the suit property or deal with it in a way that may change the character of the suit property.



27. 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. In other words the court should not only consider the interest of the applicant but to consider also, in all fairness, the interest of the respondent who could be denied the fruits of his judgment. In this matter the applicant has neither claimed that the suit land would be disposed of or even annexed any evidence to depict that respondents intends to sell the portion of land in dispute. In any event should his appeal be successful the he can always take back possession of the suit land.
28. In an application of this nature, the applicant was bound to show what damages he stood to suffer if the order for stay was not granted since by granting stay it would mean that the status quo should remain as it were before the judgment and that would be denying a successful litigant of the fruits of his judgment which should not be done if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay. See *Kenya Shell Ltd v Kibiru & another* [1986] KLR 410
29. I find in the present circumstance, that the applicant has not established sufficient cause to warrant the court to exercise its discretion in his favour and therefore this ground must fail.
30. On the second condition, I find that the applicant herein filed the application on the July 14, 2022 wherein the impugned judgment had been delivered on the May 4, 2022 which was a period of about two (2) months. His explanation was that he had to instruct another counsel to represent him which explanation I find is plausible. I find that the delay period of two months was not inordinate in the circumstance.
31. On the last condition as to provision of security, I find that order 42 rule 6 (2) (b) of the *Civil Procedure Rules* stipulate in mandatory terms 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. The applicant has not furnished any security or pledged to furnish any security for due performance of such decree or order as may ultimately be binding on him.
32. The grant of stay remains a discretionary order that must also take into account the fact that the court ought not to make a practice of denying a successful litigant the fruits of their judgment.
33. In the persuasive decision, the court in the case of *Loice Khachendi Onyango v Alex Inyangi & another* [2017] eKLR held that;
- “The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the applicant . In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under order 42 rule 6 of the Civil Procedure Rules. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the applicant s unless stay of execution is granted; and thirdly 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”
34. I have considered whether there exists any special circumstances which can sway my discretion to either grant or refuse the application for stay wherein I have also balanced the scales of justice which in my view would not render the appeal nugatory while at the same time ensuring that the successful party is not impeded from the enjoyment of the fruits of his judgment. The two conditions necessary for grant



of orders for stay of execution to issue under order 42 rule 6(2) of the *Civil Procedure Rules* having not been met by the applicant and further in regard to the provisions of the law as stipulated under section 3A of the *Civil Procedure Act*, I am not inclined to grant the order of stay of execution so sought.

35. The application dated July 14, 2022 is herein dismissed with costs.

DATED AND DELIVERED AT KERICHO VIA TEAMS MICROSOFT THIS 9TH DAY OF MARCH 2023

M.C. OUNDO

ENVIRONMENT & LAND JUDGE

