



**Kwambai v Mathenge (Environment and Land Appeal 18 of 2022)
[2023] KEELC 16060 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16060 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL 18 OF 2022**

**LA OMOLLO, J
MARCH 9, 2023**

BETWEEN

STANLEY KIPRONO KWAMBAI APPELLANT

AND

PATRICK MAINA MATHENGE RESPONDENT

RULING

Introduction

1. This ruling is in respect of the Appellant/Applicant's Notice of Motion application dated 10th May, 2022. The said application is expressed to be brought under Order 42 Rule 6 & Order 22 Rule 22 of the Civil Procedure Rules and Section 63E of the [Civil Procedure Act](#).
2. The application is brought under certificate of urgency and seeks the following orders:
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this appeal, there be a stay of execution in Nakuru CMC ELC No. 217 of 2019.
3. The application is based on the grounds on its face and supported by the affidavit of one Stanley Kiprono Kwamba sworn on 10th May, 2022.

Factual Background.

4. This appeal was commenced by way of the Memorandum of Appeal dated 10th May, 2022 and filed on 12th May, 2022.



5. The Appeal is from a ruling delivered by Honourable B. Ochieng Chief Magistrate Nakuru on 21st April, 2022.
6. The application under consideration first came up in court on 12th May, 2022 and the Appellant/Applicant was directed to serve the Respondent with the application and the application reserved for inter partes hearing on 29th June, 2022.
7. The matter was mentioned on 29th June, 2022 and 12th July, 2022 before directions were issued on 19th September, 2022 that the application to be canvassed by way of written submissions.
8. Subsequently, On 9th November, 2022 parties confirmed that they had filed submissions and the application was reserved for ruling.

The Appellant/applicant's Contention.

9. The Appellant/Applicant contends that the ruling delivered in Nakuru CM ELC No. 217 of 2019 on 21st April, 2021 dismissed his application seeking to set aside the judgement.
10. It is his contention that his then advocates on record did not inform him on what transpired in court.
11. He further contends that he has now been informed that the matter proceeded for formal proof and an order was issued
12. for him to file a defence which defence his former advocates did not file.
13. He also contends that for the ends of substantive justice to be met, it is only fair and just that the ruling issued on the 21st April, 2022 be stayed and he be allowed to file his defence.
14. He further contends that the Respondent is in the process of evicting him from the suit property which he has developed and if given a chance to prove his case, judgement in that case would be different.
15. It is his contention that his advocates fault should not be visited on him as he is ready to defend what is rightfully his adding that the Respondent will not be prejudiced if the orders sought are granted.
16. He ends his deposition by stating that he stands to suffer irreparable loss and damage if his application is not allowed.

Respondent's Response.

17. In response to the application, the Respondent filed a Replying Affidavit sworn on 27th June, 2022.
18. He deposes that judgment was delivered on 30th April, 2019 and that the Appellant/Applicant has made several applications that have been dismissed.
19. He also deposes that the Appellant/Applicant has had sufficient time to move from his land but has refused to vacate.
20. He further deposes that the Appellant/Applicant does not have any right to be on his land as he was given a chance to present his defence but chose not to even after judgement was set aside by consent in the High Court.
21. He deposes that the Appellant/Applicant only intends to frustrate him from enjoying the fruits of his judgement adding that the Appellant/Applicant has never filed a statement of defence and that the court cannot presume that one exists.



22. He further deposes that the Appellant/Applicant's ignorance is not a defence in law. That the Appellant/Applicant's development of the Respondent's property cannot be a defence for his illegal occupation.
23. It is his deposition that the Appeal has no basis and that it ought to be dismissed as it meant to obstruct and delay the course of justice.
24. He also deposes that the Appellant/Applicant's application is meant to obstruct and delay the course of justice.
25. He further deposes that if stay of execution is issued he prays that the Appellant/Applicant deposits Kshs. 500,000/= as security on costs and other eventualities.
26. He deposes that the Appellant/applicant has to satisfy the court that substantial loss would result if no stay is granted adding that no damage would be occasioned to the Appellant/Applicant which cannot be compensated with costs.
27. He ends his deposition by stating that there is no bonafide issue to be argued before the court as the Appellant/Applicant did not annex a defence and so he has no defence.

Issues for Determination._

28. The Appellant/Applicant filed his submissions on 9th November, 2022 while the Respondent filed his submissions on 18th October, 2022.
29. The Appellant/Applicant submits that Nakuru CM ELC No. 217 of 2019 proceeded for formal proof without giving him an opportunity to file his statement of defence.
30. He also submits that he has the title deed to the suit property and that he is in possession and that he was denied a chance to be heard.
31. He concludes his submissions by stating that it is only fair and just that his application be allowed.
32. The Respondent in his submissions relies on Order 42 Rule 6 of the Civil Procedure Rules and submits that for orders of stay of execution to be granted, the Appellant/Applicant has to prove the following:
 - a. That substantial loss may result to the Applicant unless the order is made.
 - b. That the application has been made without unreasonable delay.
 - c. That such security as the court orders for the due performance of such decree or order may ultimately be binding on the Applicant has been given.
33. The Respondent cites the decisions in the cases of Butt v Rent Restriction Tribunal [1979], James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR among other cases and submits that the Appellant/Applicant has not demonstrated any loss that will be occasioned to him in the event that stay is not granted.
34. With regard to security of costs, the Respondent cites the decisions in the cases of Absalom Dova v Tarbo Transporters [2013] eKLR, Mwaura Karuga t/a Limit Enterprises Vs Kenya Bus Services Ltd & 4 others [2015] eKLR among other cases and submits that the Appellant/Applicant has not provided any security for due performance of the decree and should stay be granted, it should be on condition that he deposits Kshs. 500,000/= as security.



35. The Respondent cites the decisions in the cases of *RWW v EKW* [2019] eKLR and *Machira t/a Machira & Co. Advocates East Africa Standard (No. 2)* [2002] KLR 63 and concludes his submissions by stating that the Appellant/Applicant had numerous opportunities to file his defence but he did not and that the assertions that his previous advocates failed to file his defence is not tenable. He prays that the Appellant/Applicant's application be dismissed with costs to him.

Analysis and Determination.

36. I have considered the application, the replying affidavit and the rival submissions filed by parties herein and the only issue that arises for determination, save for costs of this application, is;

a. Whether orders of stay of execution of the Learned Magistrate's ruling should be issued pending the hearing and determination of this Appeal.

37. The decision in *RWW v EKW* [2019] eKLR is insightful in reminding us of the purpose of an order of stay of execution pending Appeal. It is stated that:

“The purpose of an application for stay of execution pending an Appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of Appeal are safeguarded and the Appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

38. Another decision that speaks to the purpose for grant of an order of stay pending Appeal is *Cotton L J in Wilson v Church (No 2)* [1879] 12ChD 454 at page 458. Hancox JA stated,

“I will state my opinion that when a party is appealing, exercising his undoubted right of Appeal, this court ought to see that the Appeal, if successful, is not rendered nugatory.”

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed Appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

39. In *Absalom Dova v Tarbo Transporters* [2013] eKLR it was stated:

“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. The court in balancing the two competing rights focuses on their reconciliation...”



40. In *Butt v Rent Restriction Tribunal* [1979], the Court of Appeal gave pointers on what ought to be considered in determining whether to grant or refuse stay of execution pending Appeal. The court stated thus:
- i. The power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an Appeal.
 - ii. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an Appeal may not be rendered nugatory should the Appeal court reverse the judge's discretion.
 - iii. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
 - iv. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
41. The principles guiding the grant of a stay of execution pending Appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules which states 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.
42. In *Victory Construction v BM* (a minor suing through next friend one PMM) [2019] eKLR, the Learned Judge stated that the Court in deciding whether or not to grant a stay of execution, the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, should also be taken into consideration. He stated that the Court is no longer limited to the provisions of Order 42 Rule 6 adding that the courts are now required to give effect to the overriding objectives of the Act and Rules in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.
43. Section 1A of the *Civil Procedure Act* provides that
- 1) The overriding objective of the Act and the Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of Civil Disputes governed by this Act.
 - 2) 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 specified in sub section (1).
44. Section 1B of the *Civil Procedure Act* explains some of the aims of the overriding objectives as:
- a) the just determination of the proceedings;



- b) the efficient disposal of the business of the Court;
- c) the efficient use of the available judicial and administrative resources;
- d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties and
- e) the use of suitable technology.

45. The first criterion as set out in Order 42 Rule 6 (2) i.e. the Applicant/Appellant should bring his application without unreasonable delay. The Ruling the Appellant/Applicant seeks to appeal from was delivered on 21st April, 2022 while the application under consideration was filed on 12th May, 2022 i.e. within 21 days of delivery of the ruling. In my view there is no delay.

46. The second criterion is that the Applicant/Appellant must demonstrate that he is bound to suffer substantial loss if orders of stay of execution are not granted. The question that follows is what comprises substantial loss. In *Silverstein Vs Chesoni* (2002)1 KLR 867 it was held that;

The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory”

47. I need to clarify that the Appellant/Applicant alleges that unless stay of execution is granted, he stands to be evicted from the suit property. The Respondent on the other hand argues that the Appellant/Applicant will not suffer any substantial loss if the orders sought are not granted.

48. The Appellant/Applicant is seeking stay of execution orders against the ruling delivered by the magistrates’ court on 21st April, 2022 in Nakuru CMC ELC No. 217 of 2019. He annexed a copy of the said ruling to his application.

49. The learned Magistrate in his ruling delivered on 21st April, 2022 dismissed the Appellant/Applicant’s application dated 1st October, 2021. It sought orders, as stated in the ruling, for review and/or variation of the judgment and decree issued on 29th June, 2021. The applicant has not demonstrated what loss he will suffer on account of an order of dismissal of an application for review or judgment.

50. The Court of Appeal for East Africa in the case of *Western College of Arts and Applied Sciences v Oranga & Others* [1976-80] 1 KLR held as follows:

“But what is there to be executed under the

judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In *Wilson Vs Church* the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in and application for stay, it is so ordered”



51. The Court of Appeal in the case of Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others [2016] eKLR, stated as follows:

16. In Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C).”

17. The same reasoning was applied in the case of Raymond M Omboga v Austine Pyan Maranga (supra), that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the Respondent which is capable of execution, there can be no stay of execution of such an order...The Applicant seeks to Appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the Applicant has lost. The refusal simply means that the Applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the Appeal being rendered nugatory do not arise...” (emphasis is mine).

52. In view of the foregoing, it is evident that there are no orders capable of being stayed. Taking cue from the decision in Raymond M Omboga (Supra), the dismissal of the application by the Learned Magistrate meant that the Applicant stayed in

the situation he was before the application was determined. Therefore, the question of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise.

B. Who shall bear the costs of this application?

53. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. This was the holding in Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287.



Disposition.

54. In conclusion therefore, the Appellant/Applicant's Notice of Motion application dated 10th May, 2022 has no merit and is dismissed with costs to the Respondent.

55. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 9TH DAY OF MARCH, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

No appearance for the Appellant/Applicant.

Miss Nyabuto for Gatheca for the Respondent.

Court Assistant; Monica Wanjohi

