



**Murithi v Ciomaroo (Environment and Land Appeal E031 of 2022)  
[2023] KEELC 16291 (KLR) (15 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16291 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E031 OF 2022**

**CK YANO, J**

**MARCH 15, 2023**

**BETWEEN**

**PETER MURITHI ..... APPELLANT**

**AND**

**VERONICA CIOMAROO ..... RESPONDENT**

**RULING**

1. This is a ruling in respect of the notice of motion application dated June 20, 2022 brought pursuant to order 42 rule 6(1), (2) and (6) and order 51 rule 1 of the *Civil Procedure Rules* in which the appellant/ applicant is seeking stay of execution of the judgment and decree of the trial court in Maua Chief Magistrate's court Civil case no 278 of 2015 delivered on June 2, 2022 pending the hearing and determination of this appeal.
2. The application is supported by the affidavit of Peter Murithi, the applicant sworn on June 20, 2022 and a further affidavit sworn on July 13, 2022. The applicant avers that the trial court ordered for his eviction from his land parcel No 3590 Amungeti "A" Adjudication section and for the removal of the parcel from the record of existing rights for the said section. That being aggrieved, the applicant has filed this appeal and states that unless the orders sought are granted, the applicant will be forcefully evicted from the suit land thereby rendering the appeal nugatory.
3. The applicant states that the application has been brought without undue delay and that he will suffer substantial loss if the orders sought are not granted as he will not only lose his land, but will also be evicted from the land which is his only source of livelihood for his family.
4. In the affidavit in support of the application, the applicant has annexed a copy of consent of Land Adjudication Officer, copy of the plaint filed in the subordinate court and the impugned judgment and proceedings.



5. The respondent opposed the application vide a replying affidavit dated June 29, 2022 wherein she avers that she has already taken possession of her land. That the suit was to restrain the applicant from entering the land which the respondent has been using and argues that the applicant wants to enter the land again using the orders sought herein. The respondent avers that she is an elderly widow and the applicant's invasion of her land has impoverished her hence and urged the court not to allow the oppression to continue by allowing the application which the respondent has described as underserving. That the execution having taken place, there is nothing left to be protected by the orders sought herein.
6. The application was canvassed by way of written submissions which were duly filed by the parties through their advocates on record and which I have read and considered.
7. I have considered the application, the response and the submissions filed. The issue for determination is whether stay of execution of the judgment and decree of Maua CMCC No 278 of 2015 should be granted pending the hearing and determination of the appeal herein.
8. Stay of execution pending appeal is a discretionary power bestowed upon this court by the law. The Court of Appeal in the case of *Butt – vs Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how a court should exercise the said discretion and held that;

- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. 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 that appeal court reverse the judge's discretion.
3. 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.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a larger amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under order xli rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

9. The principles upon which stay of execution pending appeal can be allowed are now well settled from the authorities from this court and from the superior courts. Generally, stay of execution is provided for under order 42 rule 6 of the *Civil Procedure Rules*. Sub-rule 1 gives the court discretionary powers to stay execution and provides as follows:

- “6(1). 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 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 undue 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. As such for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.

11. As for the applicants having to suffer substantial loss, in the case of *Kenya Shell Limited – Vs- Benjamin Karuga Kigibu & Ruth Wairimu Karuga* (1982 – 1988) KAR 1018 the Court of Appeal pronounced itself to the effect that-;

“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 rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both Jurisdiction for granting stay.”

(see also the case of *Machira T/A Machira & co advocates – Vs East African Standard (No 2)* 2002) eKLR 63)

12. The applicant has a burden to show the substantial loss he is likely to suffer if no stay is ordered. 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 the reconciliation which is not a question of discrimination (see *Absalom Dora – Vs Turbo Transporters* [2013] (eKLR))

13. In *Geoffrey Muriungi & another Vs John Rukunga M’imonyo suing as legal representative of the estate of Kinoti Simon Rukunga (deceased)* [2016] eKLR F Gikonyo stated-;

“... The undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as reducing the successful appellant into a pious explorer in the judicial process.” The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High court, or “rendering the appeal nugatory” within the judicial precincts of the court of appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal...”



14. I am persuaded by the decision in the above case. In my view, stay pending appeal is to have the *status quo* prevailing remain in force pending appeal.
15. In the instant case the applicant stated that the application was brought without unreasonable delay. The appellant filed his application on the 20<sup>th</sup> day of June 2022 while the judgment was delivered on June 2, 2022. That is a period of 17 days from the date the judgment was delivered in the trial court. In my view, the application was filed timeously.
16. The applicant further submitted that he was willing to abide by any conditions that the Honourable court may impose in terms of security for due performance of the decree.
17. As already stated, order 42 rule 6 lays out the law on stay of execution pending appeal, by giving court the discretion to order stay for sufficient cause. Sub rule 2 outlines the mandatory conditions that have to be met for the court to grant stay pending appeal. 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.
18. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under order 42 rule 6. Firstly, the application must be brought without undue delay, Secondly, the court will satisfy itself that substantial loss may result to the applicant 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.
19. I have already found that the application was made timeously.
20. Regarding the second pre-requisite in order 42 rule 6, that is substantial loss occurring to the applicant, the court has already referred the consideration to be made in the case of *Kenya Shell Limited vs Benjamin Karuga Kigibu & Ruth Wairimu (supra)*. No doubt, if the decree is executed and the applicant is evicted, the appeal will be rendered nugatory and the applicant will certainly suffer substantial loss. In my view, the applicant has demonstrated the substantial loss he will incur if the stay is not granted.
21. In the result, this court finds merit in the notice of motion dated June 20, 2022 and is hereby allowed. Costs of the application to abide the outcome of the appeal.
22. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU THIS 15<sup>TH</sup> DAY OF MARCH 2023.**

**In the presence of**

Court Assistant – Kibagendi

Ms Asuma holding brief for Mutembei for Respondent

Kaberia for Appellant

**C.K YANO**

**JUDGE**

