



**Omboga & another v King'ori & another (Environment and Land Appeal
35 of 2022) [2023] KEELC 16109 (KLR) (15 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16109 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL 35 OF 2022**

**JM ONYANGO, J
MARCH 15, 2023**

BETWEEN

PETER OMBOGA 1ST APPELLANT

ABIUD ONYANCHA 2ND APPELLANT

AND

DAVID WAWERU KING'ORI 1ST RESPONDENT

TERESA WAMBUI WAWERU 2ND RESPONDENT

RULING

1. The appellants filed an application dated November 2, 2022 seeking a stay of execution pending appeal against the judgment delivered in Eldoret CM ELC Case No. 259 of 2018. The application is supported by the affidavit of Abiud Onyancha, the 2nd appellant sworn on the November 2, 2022 and the further affidavit sworn on November 16, 2022.
2. In the said affidavit he avers that he was sued in Eldoret CM ELC Case No. 259 of 2018 together with the 1st appellant and another person who has since died. He instructed the firm of Ombima & Co Advocates to represent him and the 1st appellant but the case proceeded in their absence and they were ordered to pay an amount in excess of Kshs.10,000,000 together with interest and costs. He deposed that upon perusal of the court record he discovered that the firm of Ombima & Co Advocates had filed an application dated August 20, 2017 to cease acting for them which was never served upon them. They were equally never served with a hearing notice and he therefore contends that they were condemned unheard. They subsequently applied to set aside the ex-parte judgment but their application was dismissed on October 7, 2022, on the grounds that they did not have a valid defence. He avers that they are willing to furnish security for the due performance of the decree.
3. In opposing the application, the respondents filed a Replying Affidavit sworn by the 1st defendant on his own behalf and on behalf of the 2nd respondent. He refuted the applicant's allegation that they were



not served with a hearing notice as they had instructed the firm of Rioba Omboto & Co Advocates to act for them after the firm of Omwenga ceased acting for them. He averred that the counsel from the firm of Rioba Omboto & Co Advocates was present when the case was fixed for hearing on January 20, 2020 although he failed to attend court on the hearing date. The firm of Ombima & Co Advocates later came back on record for the applicant s they too failed to notify the applicant s of the hearing date or attend court when the matter came up for hearing on January 12, 2021. He blamed the applicant s for failing to follow up on their case.

4. He deposed that there was no appeal against the judgment in MC ELC Case No. 259 of 2018 as according to him; the appeal ought to have been filed within 30 days from July 9, 2021 when the judgment was delivered. He was of the view that since there was no valid appeal, the application had no basis.
5. In his further affidavit the 2nd applicant clarified that they never instructed the firm of Rioba Omboto & Company Advocates to act for them. He maintains that they were never informed about the hearing date as the firm of Ombima & Co Advocates filed an application to cease acting but never served them with the same. This was occasioned by a breakdown in communication between the applicant s and their advocate owing to strained personal relations. He also clarified that the appeal herein is not against the judgement of the lower court, it is against the ruling of the lower court delivered on October 7, 2022 and the appeal was therefore filed on time.
6. The application was canvassed by way of written submissions and both parties filed their submissions, which I have considered.
7. The singular issue for determination is whether a stay of execution should be granted pending appeal.
8. The provisions for stay pending appeal are found in Order 42 Rule 6 of the [Civil Procedure Rules](#) which 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 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 .
9. In order for one to qualify for an order of stay pending appeal, he must demonstrate that he has met the conditions set out in Order 42 Rule 6 (2) of the [Civil Procedure Rules](#) which is a) that substantial loss may result to the applicant unless the order is made; b) that the application has been made without undue delay; and c) that 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. I will therefore proceed to determine whether the applicant has met the above conditions.
11. With regard to substantial loss, the applicant s has stated that if a stay is not granted they will suffer substantial loss as they were condemned unheard and they were ordered to pay an amount in excess of Kshs.10,000,000 which is a colossal amount. The applicant s have already been confronted by auctioneers and they fear that execution is not stayed their property will be disposed of at an undervalue. It is also their contention that the financial status of the respondents is not known and since they appeared to be struggling to pay the consideration of Kshs. one million, they may not be able to refund the decretal sum if it is paid to them.
12. Learned counsel for the applicant s relied on the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012)eKLR where the court observed that substantial loss is what has to be presented by preserving the status quo because such loss would render the appeal nugatory.
13. In the case of *Michael Ntoubi Mitheu v Abraham Kivondo Musau* (2021)eKLR Odunga J (as he then was held opined that;

“Therefore the mere fact that the decree holder is not a man of means does not necessarily justify him from benefitting from the fruits of his judgment. On the other hand the general rule is that the court ought not to delay a successful litigant from enjoying the fruits of his judgment save in exceptional circumstances where declining to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher court”

The court further observed that;

“... Where execution of a money decree is sought to be stayed, in considering whether the appellant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes crucial. The court cannot shut its eyes when it appears that the possibility of the respondent refunding the decretal sum in the event the applicant is successful in his appeal is doubtful. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal to ensure that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

14. In the instant case the applicant s have argued that Kshs.10,000,000 is a colossal sum of money and if their goods are sold to recover the same and their appeal succeeds, they are not sure that the respondents would be able to refund the same as their financial status is not known. Apart from averring that the applicant s allegations have no evidentiary support the respondents have not given any assurances about their ability to refund the decretal sum if it is paid to them and the appeal is successful. I am therefore satisfied that the applicant s have demonstrated that they stand to suffer substantial loss.
15. The second condition is that the application must be filed without undue delay. The application was filed 26 days after the ruling was delivered. The respondent has wondered why the applicant had to wait for execution to commence before filing an application for stay. Learned counsel for the respondents have relied on the case of *Moi Teaching and Referral Hospital v Kenya union of Domestic Hotels Educational Institutions, Hospitals and Allied Workers* (2012) eKLR and *Jaber Mohsen Ali & another v Priscillah Boit & another* (2014) eKLR for the proposition that delay is relative and one day may be considered as inordinate delay.
16. As posited in the above mentioned cases, delay is relative and the court must consider the circumstances of each case before arriving at the conclusion that there is inordinate delay. In this case, it is apparent



from the 2nd applicant's affidavit that there was a breakdown of communication between the applicants and their advocates at the time the ruling was delivered. In the circumstances, the delay of 26 days is not unreasonable.

17. The third condition relates to the need for the applicant to furnish security for costs. The applicants have offered to provide security in the form of land equivalent in value to the decretal sum. On the other hand, the respondents have argued that the judgment resulted from a monetary decree and the applicants should be ordered to pay them half the decretal sum and deposit the other half in a joint interest earning account in the names of the advocates on record.
18. In the case of *Ndubiu Gitau v Warugongo* (1988)KLR 621 cited in the case of *Michael Ntouthi v Abraham Kivondo Musau* (*supra*) the Court of Appeal observed as follows:

“The process of giving security is one which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantees and payment into court are but two of them. So long as it is adequate then the form of it is a matter which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgment has been given. It is subject to appeal. It may be affirmed or it may be set aside. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiff. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending appeal. For that purpose, it matters not whether the plaintiffs are secured one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash, there is absolutely no reason in principle why they should not do so. The aim of the court in this case was to make sure, in an even-handed manner that the appeal would not be prejudiced and that the decretal sum would be available if required”

19. Having carefully considered the application, the affidavits, submissions, the law and authorities cited by the parties I am of the considered view that the application is merited. I grant a stay of execution on condition that the applicants deposit the sum of Kshs.600,000 in a joint interest earning account in the names of the advocates on record. The remaining amount shall be secured by a bank guarantee from a reputable financial institution. The said conditions shall be met within 45 days from the date of this ruling failing which the order for stay shall automatically lapse and the respondent shall be at liberty to proceed with execution.

**DATED, SIGNED AND DELIVERED VIRTUALLY VIA MS TEAMS PLATFORM AT ELDORET
THIS 15TH DAY OF MARCH 2023.**

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J.M ONYANGO

JUDGE

In the presence of;

1. Ms. Munji for Mr. Nyamweya for the appellants/applicants
2. Mr. Ogongo for the respondents

Court Assistant: Mr. Oniala

