



Omar & another v Luigi (Suing as the legal representative of the Estate of Bontempi Luigi (Deceased)) & 3 others (Environment & Land Case 130 of 2015) [2023] KEELC 16218 (KLR) (8 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16218 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 130 OF 2015**

**MAO ODENY, J
MARCH 8, 2023**

BETWEEN

SHARIFF MOHAMMED A OMAR 1ST PLAINTIFF

BOGANVILLAE COTTAGES LTD 2ND PLAINTIFF

AND

ORNELLA BONTEMPI LUIGI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF BONTEMPI LUIGI (DECEASED)) 1ST DEFENDANT

RAKESH RAJPAL 2ND DEFENDANT

SAHALE ABDALLA SALIM 3RD DEFENDANT

REGISTRAR OF LANDS TITLES MOMBASA 4TH DEFENDANT

RULING

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1. This Ruling is in respect of an application dated March 22, 2022 by the 3rd Defendant/Applicant seeking the following orders; -
 - a. Spent
 - b. That this Honourable Court be pleased to issue a stay of execution of the Judgment and/or decree dated March 1, 2022 by this Honourable Court and all consequential orders and/or proceedings arising out of the said Judgment dated 1st March, 2022 pending the hearing of this application inter partes.
 - c. That upon inter parties hearing this Honourable Court do issue a stay of execution of the Judgment and/or decree dated 1st March, 2022 by this Honourable Court and all



consequential orders and/or proceedings arising out of the said Judgment pending the hearing and determination of this application and thereafter pending the hearing and determination of the intended appeal.

- d. That the costs of and incidental to this application be provided for.
2. The application was supported by the grounds on the face of the application as well as the supporting affidavit of Sahale Abdalla Salim sworn on the March 22, 2022 where he deponed that he is dissatisfied with the decision of the Court and intends to appeal against the whole decision at the Court of Appeal.
3. It was the Applicant's case that the Plaintiffs/ Respondents have now commenced the process of executing and he is apprehensive that he risks losing the suit property and that unless the Plaintiffs/ Respondents are restrained the whole substratum of the Appeal and/or intended Appeal will be destroyed thereby rendering the intended Appeal nugatory.
4. The Applicant further deponed that he will suffer substantial loss if the orders sought herein are not granted by the court since the Plaintiffs will proceed and execute the said Judgment.
5. In response to the application, the Plaintiffs/ Respondents filed a Replying Affidavit sworn by Sharif Mohamed Omar sworn on the 12th April, 2022 where he deponed that he is entitled to the fruits of his judgment and further that the Applicant had failed to demonstrate the substantial loss that he will suffer if the orders of stay are not granted.
6. It was the Respondent's case that the Applicant can be compensated by an award of damages should the appeal be successful and that stay of execution is discretionary hence the court ought to balance the rights of both parties so as not to defeat the rights of the decree holder.

Applicant's Submissions.

7. Counsel for the Applicant identified two issue for determination namely, whether the 3rd Defendant/ applicant is entitled to the orders sought and who should bear the costs of the application.
8. Counsel relied on the provisions of order 22 rule 22 and order 42 rule 6 of the *Civil Procedure Rules* and cited the case of *Elena D. Korir vs Kenyatta University* (2012) eKLR where the court held that an Applicant in an application for stay of execution must demonstrate that he will suffer substantial loss if the order is not granted, the same must be made without unreasonable delay and must provide security for the due performance of such orders or decree as may ultimately be binding on the Applicant.
9. On whether the Applicant will suffer substantial loss, counsel submitted that the Applicant risks losing his suit property as the Respondent may execute the decree by selling or transferring the suit land to third parties thereby defeating the Applicant's appeal.
10. On whether the application has been made without unreasonable delay, it was counsel's submission that the instant application was filed without unreasonable and/or inordinate delay as the judgment was delivered on 1st March, 2022 and the instant application was filed on 29th March, 2022.
11. On the issue for security for the due performance of such decree or order, counsel submitted that the Applicant is willing and ready to abide with the terms as the court may order. Counsel further submitted that the Applicant is willing to deposit the title to Plot No. 8980 (Orig No. 28/34) Malindi as security for due performance of the decree herein.
12. Counsel relied on the case of *Butt v rent Restriction Tribunal* (1982) KLR 417 and urged the court to exercise its discretion in favour of the Applicant and further submitted that a successful party ought to



enjoy the fruits of their judgment but the same ought not be at the expense of a party who has exercised his right of appeal and there is need to preserve and protect the subject of the appeal.

Respondent's Submissions

13. Counsel for the Plaintiff/Respondent submitted that the issues for determination are whether the Applicant has met the requirements for grant of an order for stay of execution pending appeal and whether the Applicant has offered security in the event of a stay of execution being granted.
14. On the first issue counsel relied on the provisions of order 42 rule 6 of the [Civil Procedure Rules](#) and the case of [Masisi Mwita vs Damaris Wanjiku Njeri](#) (2016) eKLR where the court held that the court's discretion to order stay of execution is fettered by three conditions, namely, sufficient cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security and the application must be made without unreasonable delay.
15. On whether the Applicant will suffer substantial loss, counsel submitted that the Applicant has not demonstrated the nature of the substantial loss hence the application should be dismissed.
16. It was counsel's further submission that the orders issued in the judgment are of a declaratory nature and injunctive therefore there is nothing the Plaintiff/ Respondent to execute and relied on the cases of [Johana Nyokwonyo Buti vs Walter Rasugu Omariba & 2 Others](#) (2011) eKLR where the court held that "a declaration/ declaratory judgment is an order of the court which merely declares what the legal rights of the parties to the proceedings are and which has no coercive force, that is, it does not require anyone to do anything".
17. Counsel also relied on the cases of [Katiba Institute v President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others \(Interested Parties\)](#) (2020) eKLR and [Kaushik Panchatia & 3 others vs Prime Bank Limited & Another](#) (2020) eKLR and submitted that the judgment contained negative orders not capable of execution.
18. On whether the Applicant has offered security in the event of a stay of execution being granted, counsel relied on the case of [Shades Horticulture Ltd vs Hydro Water Well \(K\) Limited](#) (2021) eKLR and [Michael Ntouthi Mithen vs Abraham Kivondo Musau](#) (2021) eKLR and submitted that the court discretion is fettered by the conditions under order 42.

Analysis and Determination.

19. The issues for determination is whether the Applicant has met the threshold for grant of an order of stay of execution as provided for under order 42 rule 6 of the [Civil Procedure Rules](#).
20. Order 42 rule 6(1) and (2) of the [Civil Procedure Rules](#) provides as follows: -
 - "(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.”

21. In the case of *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR the court held that: -

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

22. The Judgment in this case was delivered on March 1, 2022 and the Applicant filed this application on March 22, 2022 which taking into consideration that inordinate delay is not cast in stone and the measurement of the delay must be on a case by case basis, I find that the Applicant filed the application timeously.

23. On the issue whether the Applicant will suffer substantial loss if stay of execution is not granted, the Applicant stated that the Respondent might sell or transfer the suit land to third parties.



24. In the case of *Antoine Ndiaye —Vs- African Virtual University* [2016] eKLR Justice Gikonyo cited the holding in the case of *Sewankambo Dickson —VS- Ziwa Abby* HCT-OO-CC MA 0178 of 2005 where it was held that,

“Substantial loss is a qualitative concept. It refers to any loss great or small that is red worth or value as distinguished from a loss without value or loss that is merely nominal insistence on a policy or practice that mandates security for the entire decretal amount is likely to stifle possible appeals especially in a commercial court such as courts where the underlying transactions typically tend to leaf to colossal decretal amounts”.

25. Proof of substantial loss in an application for stay of execution is core in such applications. There mere fact that the issue involves land is not enough to prove substantial loss.

26. On the question of security, the Applicant stated that he is willing to deposit the title to the suit land in court and the Respondent also submitted that the Applicant should deposit Kshs 7Million.

27. In the case of *Focin Motorcycle Company Limited -vs- Ann Wambui Wangui & Another* (2018) eKLR the court held that it is sufficient for the Applicant to state that he is ready to provide security or propose the kind of security but it is the discretion of the court to determine the security.

28. Being cognizant of the court’s discretion to grant orders of stay of execution, the court can exercise such discretion to ensure that justice is done to both the successful litigant and the party who desires to appeal.

29. I therefore find that the Applicant has made a case for grant of stay of execution and order that the Applicant deposits a verified original title to plot No. 8980 Original No. 28/34) Malindi within 14 days failure to which the order lapses. Costs to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 8TH DAY OF MARCH, 2023

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

