



**Wilson v M'Mboroki (Environment and Land Appeal
E055 of 2022) [2023] KEELC 17267 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17267 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E055 OF 2022**

**CK NZILI, J
MAY 3, 2023**

BETWEEN

MUCHERA WILSON APPELLANT

AND

DAUDI MURUNGI M'MBOROKI RESPONDENT

RULING

1. What is before the court is an application dated 30.1.2023 where the appellant is seeking for a stay of execution of a lower court judgment or decree given out of a consent by parties pending the hearing and determination of the appeal.
2. In the supporting affidavit sworn on 30.1.2023, Muchera Wilson deposed that following an admission of the claim, judgment was by consent entered for Kshs 500,000/= plus costs assessed at Kshs 126,005 after which he sought to clear the same through installments.
3. The applicant averred that the reasons for his inability to clear the amount in lumpsum was because of a lot of fees for his children at the university both in Kenya and abroad, but out of support from well-wishers he has raised Kshs 100,000/= which he was willing to deposit as security. He attached copies of receipts, an admission letter to the University, a visa to travel to China, a copy of the fundraising card and a letter from the respondent's counsel as annexures marked WM – 01 – 05 respectively.
4. Through a replying affidavit sworn on 3.2.2023, Daudi Murungi M'Mboroki the respondent opposed the notice of motion. He deposed that the suit at the lower court sought for a refund of Kshs 500,000/= paid to the applicant for a land purchase, that later on aborted. That following entry of judgment by consent on 29.3.2022, a certificate of costs and decree was issued and a stay for 60 days granted. That the applicant waited till 20.7.2022 to pay the sum in instalment which the trial court dismissed on 6.9.2023 leading to the appeal before this court. That the proposals in the application were payment in instalments of Kshs 250,000/=: Kshs 200,000 and Kshs 50,000/= by 2022. That the issue of university



fees was known on 13.8.2021. That the application and the appeal are maliciously made to delay the enjoyment of his fruits of judgment, and obstruct the cause of justice and make him suffer loss. That the applicant is a prominent businessman, a large-scale farmer and therefore capable of paying the decretal amount. That the money was paid as lumpsum on 26.10.2015. Therefore, it would be unfair, unjust and prejudicial to stay the execution. More so given the inordinate delay, following the filing of the appeal on 6.10.2022.

5. With leave of court, parties were directed to file written submissions in canvassing the application. The respondent submitted that the applicant has failed to meet the parameters for a grant of stay orders as set out under Order 42 Rule 6(1) &(2) of the *Civil Procedure Rules* and dismissed in [*Nicholas Stephen Okaka & another v Alfred Waga Wesonga*](#) (2022) eKLR, which cited with approval [*RWW v EKW*](#) (2019) eKLR, [*Michael Ntouthi Mitheu v Abraham Musau*](#) (2021) eKLR, which cited with approval [*Visbaram Ravji Halai v Thornton Turpin*](#) (1990) KLR & [*Samvir Trustee Ltd v Guardian Bank Ltd*](#) (2000) eKLR.
6. Further, the respondent submitted that substantial loss had not been demonstrated as held in [*James Wangalwa & another v Agnes Naliaka Cheseto*](#) (2012) eKLR and [*Kenya Shell Ltd v Kibiru*](#) (1986) KLR.
7. Additionally, the respondent submitted that there has been inordinate delay of more than 3 months since filing the appeal which has not been explained at all. Again the respondent submitted that no adequate security had been offered as held in [*Mwaura Karuga t/a Limit Enterprises v Kenya Bus Service Ltd & others*](#) (2015) eKLR & [*Gianfranco Manenti & another v AMACO*](#) (2019) eKLR.
8. A party seeking for stay of execution has to file the application without delay, demonstrate substantial loss, offer security for the satisfaction of the decree should the appeal fail and lastly, demonstrate that it is in the interest of justice to grant the orders sought.
9. What amounts to inordinate delay depends on the circumstances of each case. Equity aids the vigilant not the indolent. In [*Utalii Transport Co. Ltd & another v NIC Bank Ltd & another*](#) (2014) eKLR, the court said that even though there was no precise measure of what amounts to inordinate delay the court must consider the circumstances of each case, the nature of the case, the subject matter, explanation given for the delay, and above all, the litmus test should be the amount of delay.
10. In [*Jabeo Mohsen Ali & another v Priscillah Boit & another*](#) (2014), the court opined that even one day's delay amounts to delay and found four days delay inordinate.
11. As to what substantial loss is the Court in [*Kenya shell Ltd v Kibiru*](#) (*supra*) held that it was what had to be prevented from happening. Further in [*James Wangalwa*](#) (*supra*), the court held that a party has to demonstrate other factors except execution process which has been put on motion likely to cause a state of affairs affecting the very essential core of the applicant as the successful party in the appeal.
12. Turning to what amounts to security, a decree is like a debt owed to the successful party. In [*Gianfranco*](#) (*supra*) the court held that if the security is provided and the appeal fails, the court would then order for the release of the deposited sum since it was not the work of the court to assist litigants to delay execution through the filing of a vexatious or frivolous appeal.
13. The subject matter in this appeal is a money claim in which the applicant is aggrieved by the exercise of discretion by trial court on whether to allow him to liquidate the decretal sum in instalments under Order 22 Rule 222 *Civil Procedure Rules*.
14. In the case of [*Rajabali Alidina v Remtalla Akina & another*](#) (1961) KLR the court held that the parameters to apply in determining whether to allow for the settlement of a decree in installments



- as inter alia; the circumstances under which the debt was contracted, the conduct of the debtor, his financial position and his bona fides in offering to pay a fair proportion of the debt at once.
15. So the question is, if the court were to deny the request, what substantial loss will the applicant incur?
 16. In the case of *Kenya Shell Ltd (supra)* the court held that it was not enough to merely state that the sum is a lot of money and the applicant would suffer loss if the money is paid.
 17. In *Lavington Security Ltd & another v Lelkina Dairies Ltd & another* (2005) eKLR the court held a judgment debtor is entitled to payment of the decretal amount and that if a judgment debtor is unable to pay the entire amount he has to show seriousness in paying the amount by arranging for fair payment proposals to liquidate the amount.
 18. In *Pius Kimaiyo Langat v Cooperative Bank of Kenya Ltd* (2017) eKLR, the court said that it is not its business to rewrite contracts between parties while in *Kenya Airways PLC v Alex Wainaina Mbugua* (2018) eKLR, the court while granting an order of stay of execution held that a successful party should not be deprived of the fruits of a judgment in his favour in absence of a just cause.
 19. In this application, there is no doubt that there has been inordinate delay in applying for stay since the filing of the application. No explanation has been given for such delay. No attempts have been made to this court to explain any difficulties that the applicant may have been having since filing the appeal.
 20. Secondly the judgment was as a result of a consent following which the applicant was granted a stay of 60 days. Instead of making some payments, the applicant waited until the expiry of the stay to apply to liquidate the decree in installments. Even after making proposals in the supporting affidavit to the dismissed application the applicant before this court seems to be revising his earlier proposal to Kshs 100,000/=.
 21. Given the circumstances to the debt and for lack of requisite security for the due satisfaction of the decree should the appeal not succeed, I do not think it would be in the interest of justice to grant any stay order.
 22. Consequently, the application dated 30.1.2023 is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS / OPEN COURT AT MERU
THIS 3RD DAY OF MAY 2023**

In presence of

C.A John Paul

Miss Maore for applicant

HON. C. NZILI

ELC JUDGE

