



**Rinyuru v Mbui (Environment and Land Appeal E021 of 2022)  
[2023] KEELC 17759 (KLR) (7 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17759 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E021 OF 2022**

**CK YANO, J**

**JUNE 7, 2023**

**BETWEEN**

**JACKSON MWITI RINYURU ..... APPELLANT**

**AND**

**SILAS RINYURU MBUI ..... RESPONDENT**

**RULING**

1. The appellant herein moved this court vide a notice of motion dated 11<sup>th</sup> August 2022 seeking for orders-;
  1. Spent
  2. Spent
  3. Spent
  4. That this Honourable court be pleased to issue an order of stay of execution of the order by the lower court in Nkubu Civil Suit No. 9 of 2021 dated 3<sup>rd</sup> August 2022 pending the hearing and determination of this appeal.
  5. That upon the issuance of the order issued in prayer 3 above the same be served upon the O.C.S Nkubu Police Station for compliance.
  6. That this Honourable court be pleased to issue any or better orders as it may deem fit and just to meet the ends of justice.
  7. That the costs of this application be in the cause.
2. The application is premised on the grounds-;



- i. That the subject matter of the suit herein L.R No. Abogeta A/L- Kiongone/209 which has since been subdivided.
  - ii. The appellant has a prima facie case with a high probability of success.
  - iii. Unless the orders sought herein are issued the respondent will evict the appellant from the suit land.
  - iv. It is only fair and just that the matter be heard during the vacation and orders herein be issued to maintain the status quo.
3. The application is supported by the affidavit of JACKSON MWITI M'RINYURI sworn on 11<sup>th</sup> August 2022. The applicant avers that he is the appellant herein and that on 3<sup>rd</sup> August 2022 the Principal Magistrate court at Nkubu delivered a ruling and dismissed his application for stay of execution pending his appeal herein. That the effect of the said ruling if effected, executed or implemented, the respondent will evict him and his family from the family land as he vowed to do so immediately after the court ruling.
  4. The applicant avers that he is aggrieved by the said decision and order of the court on 3<sup>rd</sup> August 2022 and has filed an appeal herein.
  5. The applicant states that he verily believes that the appeal is well grounded and raises serious arguable issues and unless an order for stay of execution of order made on 3<sup>rd</sup> August 2022 is made the respondent will enforce the order before the appeal is heard and determined.
  6. The applicant further states that his family which include their children are now living in fear due to the intended eviction from their home by the respondent. That the respondent has openly told them that they are not going anywhere since he has a court order and will deal with the same as he deems fit.
  7. The applicant avers that having filed the appeal, he was awaiting directions from the court. That under the circumstances he was apprehensive that the respondent will also transfer the land to 3<sup>rd</sup> party unless an order of stay of execution of the lower court's judgment are granted pending the hearing and determination of the appeal.
  8. The applicant further states that the application is made in utmost good faith and has been brought to court without undue delay and the prayers being sought for if granted will not in any way prejudice the respondent's case if any since he is not in occupation of the entire suit land and has since left home and is living at Nkubu township.
  9. The applicant states that he verily believes that the facts, nature and circumstances of the case are in favour of granting the prayers sought for vide the application and he humbly urged the court to exercise its discretion and grant the same.
  10. The applicant has annexed copies of the ruling and memorandum of appeal.
  11. The respondent filed his replying affidavit dated 28<sup>th</sup> November, 2022 where he strongly opposed the application by the applicant.
  12. The respondent states that the applicant has not demonstrated to meet all the requirements of Order 42 Rule (b) of the Civil Procedure Rules as required by the law.
  13. The respondent further states that the Honourable court had adjudicated the subject matter herein in ELC Appeal No. 47 of 2019 and he annexed a copy of the decree marked MMI".



14. The respondent avers that the applicant has not demonstrated that in the event the appeal succeeds, it will change the substantive judgment to be implemented. That he is entitled to enjoyments of the fruits of his judgment and the applicant should not be allowed to abuse the court process to frustrate him.
15. The respondent avers further that the application is not merited and should be dismissed with costs. That the applicant has filed a similar application in the lower court and the same was dismissed and he annexed a copy of the ruling marked “MMI”

### **Applicant’s Submissions.**

16. The applicant identified only one key issue that arises for determination in the application being whether the applicant has met the threshold for grant of the orders of stay of execution sought.
17. The applicant’s counsel cited the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules and submitted that the applicant herein has met the threshold for grant of the stay order sought and urged the Honourable court to exercise its discretion and issue the same for the following reasons, first that the lower court at Nkubu delivered the subject ruling on the 3<sup>rd</sup> August 2022 and the applicant approached the court expeditiously without any unreasonable delay and filed the instant application on the 11<sup>th</sup> August 2022, . It is their submissions that the application is not guilty of inordinate delay and the same was filed timeously. Secondly, that the applicant has established his dwelling home on the suit property L.R No. Abogeta/L-Kiungone/809 and the consequent effect of the execution of lower court’s order is that he will be evicted from the suit land to allow the respondent vacant possession thereon and thus stand to suffer irreparable loss and or substantial harm should the said decree be executed against him. The applicant’s counsel urged the court to be guided by the holding in the case of Esther Wanjiru v Jackline Arege [2014] eKLR where the court held that for an order of stay of execution to issue the court must be satisfied that the applicant is likely to suffer substantial loss should the same not issue.
18. As regards security, counsel for the applicant submits that this is not a monetary claim and that security does not apply adding that for the wider interest of justice, the court should exercise its discretion in the applicant’s favour and not impose security on the applicant who is a son to the respondent and relied on the case of HGE v SM [2020] eKLR.
19. The applicant submits that a perusal of the Memorandum of Appeal filed in Court on the 17<sup>th</sup> May 2022 indicates that the same raises some cogent points of law with a very high probability of success.
20. The applicant further submitted that should the decree in lower court be executed then the said appeal will be rendered an academic exercise as the main substratum will have already dissipated, adding that the purpose of a stay of execution is to preserve the substratum of the appeal as was held in the case of Consolidated Marine v Nampija & another, Civil appeal No. 93 of 1989 (Nairobi) (unreported.)
21. The applicant submitted that it would be fair enough and it would serve the ends of justice to stay the execution of the ruling delivered in Nkubu Civil suit No. 9 of 2012 dated 3<sup>rd</sup> August 2022 pending the hearing and determination of the appeal in Meru ELC Appeal No. e021 of 2022 between Jackson Mwiti Rinyuru v Silas Rinyuru Mbui.
22. The applicant submitted that based on the foregoing the balance of convenience tilts in the applicant’s favor owing to the predicament he finds himself in and urged the court to step in and insulate him against the impending eviction from the respondent pending the hearing and determination of the said appeal. It is the applicant’s submission that justice and equity tilts in favour of the applicant who is at risk of losing his permanent home and it is only fair enough and in the wider interest of justice that the subject matter be preserved pending the hearing and determination of the applicant’s appeal.



## Respondent's Submissions.

23. In his submissions, the respondent cited Order 42 Rule 6 of the Civil Procedure Rules and relied on the case of *RWW v EKW* [2019] where the court stated the purpose of stay of execution Order pending appeal in the following words:

“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 is 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. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appeal with those of the respondent.”

24. The respondent submitted that the court has the discretion to grant or refuse to grant an order of stay but the discretion must be applied judiciously.
25. The respondent relied on the case of *Kenya Power & lighting Company Ltd v Esther Wanjiur Wakobi* [2014] eKLR, *James Wangalwa & another Vs Agnes Naliaka Cheseto* ( 2012) eKLR where Gikonyo J held-;

“The applicant must establish other factors which show that the execution will create a state of affairs that will create an irreparable effect...”

26. The respondent also relied on the case of *Equity Bank Ltd v Taiga Adams company Ltd* [2006] eKLR, *Elena D Korir & Kenyatta University* [2012] eKLR, and *Stanley Kiplagat Rono v another William Kiprotich Cherus* [2021] eKLR.
27. The respondent submitted that in this case he is a successful litigant and he is entitled to enjoy the fruits of his judgment and the applicant has not satisfied the requirement of Order 42 Rule 6 (2) and has not demonstrated to the court the irreparable loss and damage he will suffer if the stay is not granted and that he is not entitled to the orders sought.
28. The respondent further submitted that the said order are negative orders and it is the applicant's application that was dismissed and that the applicant was seeking to stay the orders of 28<sup>th</sup> April 2022 which allow the applicant to be evicted from the respondent's land and he is seeking stay orders over the dismissed application for stay orders.
29. The respondent submitted that the applicant is a vexatious litigant and that the subject matter herein was heard on merit and the court found in favour of the respondent and that the applicant has filed an appeal in Meru ELCA No. 47 of 2019 which the court decided in favor of the respondent and further the applicant filed an Appeal in Nyeri Civil Appeal No. 50 of 2020 which was also in favour of the respondent. The respondent sated that it is the same subject matter the applicant is appealing herein to stall the implementation of the above mentioned court decrees and/orders.
30. The respondent submitted that in the event that the Honourable court considers otherwise, the stay should be on condition that the applicant do deposit security for costs before the Honourable court.
31. The respondent submitted that the application is not merited and should be dismissed with costs.



## Analysis And Determination

32. I have considered the application, the response made and the submissions filed. In my view, the only issue for determination is whether the applicant has met the criteria for the grant of orders of stay pending appeal.
33. The principles upon which stay of execution pending appeal may 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 which 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 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.”
34. 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 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 large 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) 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.”
35. In the case of *RWW v EKW* [2019] eKLR, it was stated that:-
- “The purpose of an application for stay of execution pending 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, it is not rendered nugatory. However, in doing so the court should weight 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. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellant with those of the respondent.”
36. Therefore, for an applicant to move the court into exercising its discretion to stay execution pending appeal, 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 the due performance of the decree.
37. The purpose of stay pending appeal is also to preserve the substratum of the case while the appeal is pending so that the appeal may not be rendered nugatory. However, in exercising its discretion on whether or not to grant stay, the court should weigh the rights of both the appellant against the successful litigant who should not be deprived from enjoying the fruits of his judgment.
38. In the case of *Victory Construction v BM* ( a minor suing through next friend one PMM ( 2019) eKLR, the court stated that “the court in deciding whether if not to grant a stay of execution, the overriding objective stipulated in section 1A and 1B of the *Civil Procedure Act* should also be taken into consideration.” The court further stated that the court is no longer limited to the Provisions of Order 42 Rule 6 adding that the courts are now enjoined to give effect to the overriding objectives of the Act and Rules in exercise of its power under the *Civil Procedure Act* or interpretation of any of its provisions.
39. On the first criterion as set out in Order 42 Rule 6, that is whether the application has been brought without unreasonable delay the ruling in the lower court was delivered on the 3<sup>rd</sup> August 2022 while the application herein was filed on 11<sup>th</sup> August 2022. I find that there was no delay in filing the application for stay pending appeal.
40. The second criterion is whether the applicants have demonstrated that they are bound to suffer substantial loss if the orders of stay of execution are not granted. In *Silverstein v Chesoni* [2002] 1KLR 867 the issue of what comprises substantial loss was held as follows-;
- “The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what loss has to be prevented by preserving the status quo because such loss would render the appeal nugatory”
41. The applicant has deposed that failure to grant the orders sought would expose him to eviction to allow the respondent vacant possession thereon and thus stand to suffer irreparable loss and or substantial harm should the said decree be executed against him. The third criterion to consider is that the applicant must furnish security for the due performance of the decree.



42. Be that as it may, the orders sought are discretionary. This court has considered the evidence on record. It is clear that the subject matter of this suit was also the subject matter of Meru ELC appeal No. 7 of 2019 which appeal was dismissed. Still dissatisfied, the applicant filed a further appeal to the court of appeal sitting in Nyeri being appeal No. 50 of 2020. The respondent submitted that the appeal was also dismissed. That has not been denied by the applicant. It is my considered opinion that although the application has been filed timeously, it would not be in the interest of justice to exercise the court's discretion and grant stay especially considering that there are orders made by other courts, including the Court of Appeal, that have never been set aside. In this case, I am not satisfied that the applicant has demonstrated that he has an arguable appeal to warrant the issuance of the orders being sought. Moreover, in the event the applicant is evicted and his appeal succeeds, he can still be reinstated back to the suit land. It follows therefore that the chances of suffering substantial loss or the appeal being rendered nugatory is remote.
43. By reasons of the foregoing, it is my finding that the notice of motion dated 11<sup>th</sup> August 2022 is devoid of merit and the same is dismissed with costs.
44. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MERU THIS 7<sup>TH</sup> DAY OF JUNE 2023**

**IN THE PRESENCE OF**

Miss Mukaburu present for appellant

Respondent - absent

Court Assistant – V. Kiragu

**C.K YANO**

**JUDGE**

