



**Njoroge v Rukwaro (Environment and Land Appeal
E045 of 2022) [2023] KEELC 18526 (KLR) (3 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18526 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E045 OF 2022**

OA ANGOTE, J

JULY 3, 2023

BETWEEN

ANN NJERI NJOROGE APPELLANT

AND

JAMES MWANGI RUKWARO RESPONDENT

RULING

1. Before this Court for determination is the Appellant's/Applicant's Motion dated June 2, 2022 brought pursuant to the *Constitution of Kenya*, Sections 1A,1B,3A and 63 (e) of the *Civil Procedure Act*, Order 42 Rule 6(1), (2) and Order 51 Rule 1 of the *Civil Procedure Rules* seeking the following reliefs;
 - i. Spent
 - ii. That there be a stay of execution of the Judgement delivered in the lower Court in Milimani ELC No 1495 of 2020 on May 6, 2022 and any other subsequent and consequential orders pending the hearing and determination of the Application/Appeal.
 - iii. That costs be in the cause.
2. The application is premised on the grounds on the face of the Motion and supported by the Affidavit of Anne Njeri Njoroge, the Applicant/Appellant herein of an even date, who deponed that the suit was heard and Judgement delivered on May 6, 2022 by Hon DW Mburu virtually sitting at Mombasa and that the Court thereafter promised to send a copy of the Judgement to its former station Milimani.
3. According to the Appellant, despite several attempts, it was only until May 27, 2022 that she managed to get a copy of the Judgement; that upon perusal of the same and being aggrieved by the Courts' decision to award the Respondent Kshs 5,050,00, she promptly instructed her Counsel to file an



Appeal hence the Appeal and the present application and that the Appeal raises arguable issues that ought to be determined on merit.

4. It was deposed by the Appellant that the application was brought without delay upon receipt of the copy of the Judgment; that unless stay is granted, she will suffer irreparable/substantial loss as the Respondent will execute the Judgment and that the amount in question is substantial and will cause her prejudice and loss.
5. The Appellant deposed that she is ready to give her property LR 209/17238 (Eagle Plains Estate, Imara Daima Area-Nairobi County) as security for due performance of the decree pending determination of the Appeal and that the application has been brought in good faith and as such no prejudice will be suffered by the Respondent if it is allowed.
6. In response to the application, the Respondent deposed that the application is unmeritorious and an afterthought; that contrary to the Appellant's assertions, the Court file has always been available and the Appellant has not demonstrated any inability to obtain the Court file by communicating with the Court and that the Appeal does not stand any chance of success.
7. It was deposed by the Respondent that the Judgment herein being a money decree, it shall not prejudice the Appellant in any way; that he is able to refund the entire decretal sum in the event the Appeal is successful and that no reason has been advanced as to why he should be kept away from the fruits of his judgment.
8. The Respondent deposed that the Appellant is attempting to dispose off the suit property and is using the Appeal to shield herself and deny him his rightful interest; that the security offered as a house is under litigation and a caution has been placed thereon; that any security offered should be in the form of money and/or bank guarantee and that litigation should come to an end and the Appellant should be directed to immediately settle the decree.
9. The Appellant filed a Supplementary Affidavit in which she deposed that she is unaware of the alleged caution on the property she has offered up as security; that the records from the land office confirm that the property has no encumbrances and that the interest of justice dictate that the Court should grant the orders in the application. The Appellant filed submissions which I have considered. The Respondent did not file submissions.

Analysis and Determination

10. Having carefully considered the pleadings and submissions by the parties, the sole issue that arises for determination is whether the Appellant/Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution pending Appeal?
11. The law with respect to stay of execution pending Appeal is to be found under Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules* which provides as follows;
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.”

12. In *Visbram Ravji Halai vs Thornton & Turpin* Civil Application No Nai 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the *Civil Procedure Rules* is fettered. The Court stated as follows:

“The Superior Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

13. What arises from the foregoing is that the grant of orders of stay of execution is subject to the court’s discretion, the Court in this respect being guided by the provisions of Order 42 rule 6 of the *Civil Procedure Rules*. The question of how the court should exercise this discretion was extensively discussed by the Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 as follows:

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 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)(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.”



14. As to what constitutes sufficient cause in this regard, the decision by the Court in *Antoine Ndiaye vs African Virtual University* [2015] eKLR, is instructive. Gikonyo J persuasively opined as follows;

“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, 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. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:

- a) The application is brought without undue delay;
- b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and
- c) 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.”

15. The Court will be guided by the foregoing provisions of the law and authorities.

16. By way of a brief background, the Respondent herein, as the Plaintiff in Milimani E1495 of 2020, instituted a suit as against the Appellant, as the 1st Defendant, and two other parties, seeking, *inter-alia*, permanent injunctive orders restraining the Defendants from interference with the property known as Kitchen 20 on LR 209/28648. The Defendants filed a Counter claim seeking to have the Plaintiff stopped from interfering with the property.

17. The matter proceeded for hearing and vide the Judgement delivered on May 6, 2022, the Court found that both the Plaintiff and the Defendants’ cases had partly succeeded. The Court awarded the Plaintiff the sum of Kshs 5,050,000 and granted the Defendants permanent injunctive orders after declaring the Defendants to be the bona-fide owners of the suit property.

18. The Appellant is aggrieved by this decision, and in particular the award of the sum of Kshs 5,050,000/= and has filed a Memorandum of Appeal dated May 2, 2022. The Appellant is asking this Court to stay the execution of the Judgment pending the determination of the Appeal.

19. Before delving into the merits of the application, the court will determine the aspect of whether the Motion has been brought without unreasonable delay. The question of what constitutes unreasonable delay was discussed in the case of *Jaber Mohsen Ali & another vs Priscillah Boit & another* [2014] eKLR where Munyao J stated as follows:

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.”



20. The Court in *Utalii Transport Company Limited & 3 Others v NIC Bank Limited & Anor* [2014] eKLR further stated;

“Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so, on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court’s mind on the delay, caution is advised for courts not to take the word ‘inordinate’ in its dictionary meaning, but in the sense of excessive as compared to normality.”

21. The Judgement sought to be appealed against herein was delivered on the May 6, 2022 whereas the present application was filed on June 2, 2022. This constitutes a period of a few days shy of a month. The Appellant states that the delay was occasioned by the movement of the file to Nairobi from Mombasa where the Magistrate who delivered the Ruling was on transfer. The Respondent states that there is no evidence of this and that the period constitutes unreasonable delay.

22. It is not disputed that the Ruling was delivered by the Magistrate in Mombasa where he was on transfer. The Court finds that the movement of the file in the circumstances would take some time. In any event, the one-month delay cannot by any stretch of imagination be said to be unreasonable delay. Ultimately, and guided by the broad approach under the *Constitution*, the Court finds that the period between the delivery of the Judgement and the filing of the present application does not constitute unreasonable delay.

23. What constitutes substantial loss was discussed by the Court of Appeal in the case of *Rhoda Mukuma v John Abuoga* [1988] eKLR where their Lordships stated as follows:

“Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security. The discretion under rule 5(2)(b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory...”

24. In the case of *Tropical Commodities Suppliers Limited & Others v International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331, the Court persuasively defined the aspect of substantial loss thus;

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value is a loss that is merely nominal.”

25. In considering whether the Appellant will suffer substantial loss unless an order of stay of execution is granted, the court is guided by the decision of the Court of Appeal in *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* [1986] eKLR in which the court stated as follows;

“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare



case when an Appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

26. It is the Appellant’s contention that she stands to suffer substantial loss if stay is not granted. She states that the decretal amount is colossal and the Respondent will be unable to refund the said sum if execution proceeds.
27. In response, the Respondent asserts that no legitimate reason has been advanced as to why he should be kept away from the fruits of his Judgement and that he is able to repay the decretal sum should the Appeal succeed.
28. It has been stated by the Courts that whereas the Applicant bears the onus of proving an Appeal in a monetary decree would be rendered nugatory by a Respondents’ inability to pay back the decretal sum, where a reasonable fear has been raised, the burden shifts to the Respondent to prove their ability to do so. This position was stated by the Court of Appeal in National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & Another [2006] eKLR where the learned Judges opined as follows:

“... while the legal duty is on the Applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a Respondent or lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

29. What amounts to reasonable grounds for believing that a Respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In this case, the Applicant contends that the decretal amount is colossal and the Respondent is unlikely to repay.
30. Whereas the Respondent stated that he is able to refund the sum, he did not provide evidence to show his financial capability nor did he swear an affidavit of means. In the absence of the same, the Court finds that the Appellant is likely to suffer substantial loss if orders of stay are not granted.
31. The purpose of providing security under Order 42 was discussed by the Court in Arun C Sharma v Ashana Raikundalia t/a Rairundalia & Co Advocates & 2 Others [2014] eKLR, where the court stated as follows:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

32. While in Focin Motorcycle C Ltd v Ann Wambui Wangui [2018] eKLR it was stated that:

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine



the security. The Applicant has offered to provide security and has therefore satisfied this ground of stay.”

33. From the above persuasive decisions, it is clear that the issue of security is discretionary and it is upon the court to determine the same. The Appellant has indicated that she is ready to provide the title to her property LR 209/17238 (Eagle Plains Estate, Imara Daima Area, Nairobi) as security.
34. The Respondent is opposed to the security being offered and states that the same is not available because a caution has been registered against it. This Court is not bound by the type of security offered by an Applicant, and may make appropriate orders in respect thereof. That being the position, it is the finding of this court that the Appellant provides a bank guarantee/and or deposits the sum that he was directed to pay by the lower court in a joint account.
35. The upshot is that the Appellants’ Notice of Motion dated June 2, 2022 is allowed as follows:
 - a) A stay of execution of the Judgment of the Chief Magistrates Court at Nairobi dated May 6, 2022 in Nairobi Chief Magistrates ELC No E1495 of 2020 pending the hearing and determination of the appeal is hereby granted on the following conditions:
 - i. The Appellant does provide security for the sum of Kshs 5,050,000 in the form of either a bank guarantee or the said sum deposited in a joint account in the name of the parties’ Advocates within 45 days hereof.
 - ii. That in default of (i) above, the orders for stay shall automatically lapse.
 - b) Each party to bear his/her own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 3RD DAY OF JULY, 2023.

O. A. Angote

JUDGE

In the presence of;

Mr. Gekonge for Appellant/Applicant

Mr. Kimani for Respondent

Court Assistant - Tracy

