



**Onyancha & another v Lagat (Environment and Land Appeal  
39 of 2022) [2023] KEELC 22634 (KLR) (5 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 22634 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT AND LAND APPEAL 39 OF 2022**

**JM ONYANGO, J**

**JULY 5, 2023**

**BETWEEN**

**SAMSON ATEKA ONYANCHA ..... 1<sup>ST</sup> APPELLANT**

**ABIUD OBURA ONYANCHA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DAVID SONGOK LAGAT ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 8<sup>th</sup> December, 2022, brought pursuant to section 1A, 1B, 3, 3A and 63 (e) of the *Civil Procedure Act* Cap 21, Order 42 Rule 6 of the *Civil Procedure Rules* and section 13 of the *Environment and Land Court Act*, the Appellants filed an application seeking a stay of execution of the judgment delivered on 4<sup>th</sup> November, 2022 by Hon. C. Menya in Eldoret CMELC No 309 of 2018 pending appeal.
2. The application is premised on grounds set out on the face of the Notice of Motion and the supporting affidavit of Samson Ateka the 1<sup>st</sup> Appellant herein.
3. In the said affidavit the 1<sup>st</sup> Appellant avers that he is the registered owner of land parcel number Kapkoi/mabonde Block 1 (Ex-Prison)/334 measuring 2.0 Hectares having been registered as the owner thereof on 28<sup>th</sup> May, 2001. He denies having sold the suit property to the Respondent. However, on 22<sup>nd</sup> November, 2022 the trial magistrate delivered a judgment where she directed that the suit property be transferred to the Respondent. The 1<sup>st</sup> Appellant has appealed against the said judgment and he is apprehensive that if the judgment is effected, he will suffer substantial loss as the Respondent will proceed to deal with the land as deems fit. He further avers that if a stay of execution is not granted, his appeal shall be rendered nugatory. It is his averment that the appeal was filed timeously and he is willing to furnish security for costs.



4. The application is opposed by the Respondent through his replying affidavit sworn on 17<sup>th</sup> February 2023 in which he avers that the application has been overtaken by events as he had deposited Kshs 750,000 being the balance of the purchase price in court.
5. He further avers that the appeal has no likelihood of success as the Applicant acknowledged entering into a sale agreement with the Respondent yet he is now playing victim to hoodwink the court.
6. The Respondent contends that the Applicants have failed to demonstrate that they shall suffer substantial loss. It is his further contention that an order of stay would be prejudicial to him as it would result in a reversal of the process of execution.
7. The application was canvassed by way of written submissions and both parties filed their submissions which I have considered.

### **Analysis and Determination**

8. The only issue for determination is whether a stay of execution should be granted.  
Order 42 Rule 6 (2) of the [Civil Procedure Rules](#) (2010) provides that;  
“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
  - b. that the application has been made without undue delay; and
  - c. such security as the court orders for due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”
9. Further, in [Elena D.Korir v Kenyatta University](#) (2014) eKLR Justice Nzioki wa Makau stated as follows;  
“the application must meet a criteria set out in precedents and the criteria is best captured in the case of [Halal & another v Thornton & Turpin Ltd](#) where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must be made without unreasonable delay.  
In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in [Hassan Guyo Wakalo v Straman EA Ltd](#) [11] (2013)”
10. I will now proceed to determine whether the Applicant has met the above-mentioned conditions.

### **Substantial loss**

11. What constitutes substantial loss was discussed by Gikonyo J in the case of [James Wangalwa & another v Agnes Naliaka Cheseto](#) (2012) eKLR where it was held inter alia that:  
...No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the



case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the [CPR](#). This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal.”

12. In the instant case the court issued an order compelling the defendants (now Appellants) to receive the sum of Kshs 750,000/ being the balance of the purchase price for the suit property within 2 months failing which the same would be deposited in court. The court also directed the defendants to execute the necessary documents to effect the transfer failing which the Deputy Registrar of this court would execute the same on their behalf. The 1<sup>st</sup> defendant has averred that he already deposited the said amount in court and granting a stay of execution would reverse the process of execution. However, he has not indicated if the transfer forms have been executed.
13. The court, in [RWW v EKW](#) [2019] eKLR, considered the purpose of a 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 if 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.

  9. 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.”
14. As correctly stated by the Applicant, if the suit property is transferred in the name of the Respondent, this would result in substantial loss to the Applicant as the Respondent would deal with the suit property as he wishes. This includes selling or charging the suit property. If this were to happen, before the appeal is heard, the appeal would be rendered nugatory. In the circumstances, I am of the view that the Applicant has established that he stands to suffer substantial loss if execution is not stayed.

### **Delay**

15. Regarding the question of delay, the judgment was delivered on 4<sup>th</sup> November, 2022 while the application for stay was filed on 8<sup>th</sup> December 2022. It is therefore not in dispute that the application was filed timeously.

### **Security for costs**

16. The 1<sup>st</sup> Applicant has in his supporting affidavit averred that he is willing to furnish security for costs. Although he has not indicated the nature and extent of security he is willing to provide, the court has a discretion to make appropriate orders which serve the interest of justice.
17. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the [Civil Procedure Act](#), I find and hold that the applicants have fulfilled the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the [Civil Procedure Rules](#)
18. Accordingly, I allow the application and make the following orders:



- a. A stay of execution is hereby granted on condition that the Applicants deposit the sum of Kshs 100,000/- in court within 21 days from the date of this ruling failing which the order for stay shall automatically lapse.
- b. The Appellants shall file a Record of Appeal within 60 days.
- c. The costs of the application shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5<sup>TH</sup> DAY OF JULY, 2023.**

.....

**J.M ONYANGO**

**JUDGE**

In the presence of;

Mr. Korir for Mr. Songok for the Respondent.

No appearance for the Appellant/Applicant

Court Assistant: H. Akidor

