



**Said (Legal representative of the Estate of Said Abdalla Azubedi (Deceased) v Ikumbu  
(Environment & Land Case 178 of 2015) [2023] KEELC 18913 (KLR) (11 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18913 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 178 OF 2015**

**A OMBWAYO, J  
JULY 11, 2023**

**BETWEEN**

**FEISAL SAID (LEGAL REPRESENTATIVE OF THE ESTATE OF SAID ABDALLA  
AZUBEDI (DECEASED)) ..... PLAINTIFF**

**AND**

**SAMUEL MBUGUA IKUMBU ..... DEFENDANT**

**RULING**

1. Feisal Said (Legal representative of the Estate of Said Abdalla Azubeh (Deceased) hereinafter referred to as the applicant has come against Samuel Mbugua Ikumbu, hereinafter referred to as the respondent praying that pending the hearing and determination of the appeal there be a stay of orders issued on March 1, 2023 and that the order of status quo to be made. That the court to expedite in the hearing of the suit.
2. The grounds of the application are that the application has been made without undue delay and that the notice of appeal has been filed and served. That the source of the initial deposit of Kshs 20,000,000/= paid and acknowledged by the respondent was money borrowed by Said Abdalla Azubedi (Deceased) from the First Community Bank for investment purposes in real estate and its repayment would be generated from rent yielded from the suit premises and the orders made by the court would be highly detrimental and prejudicial to the Applicant for it would effectively defeat the very purpose the property was purchased for.
3. The respondent would not be prejudiced in any manner as he continues to benefit from profit/interest accrued thereof of the Kshs 20,000,000/= deposit paid to him. The suit premises remains security for the due performance of decree to either party. The applicant should be allowed to pursue his right of appeal that the same is not rendered nugatory should the court of appeal allow the same. The appeal raised substantial constitutional/legal triable issues as per annex draft.



4. The application for injunction and account was suspiciously brought by the respondent after a length inordinate delay and at the eve of hearing the main suit to forestall the hearing of the suit and to achieve ulterior motives
5. The application is supported by the affidavit of Feisal Said that amplifies grounds of the application. The respondent filed a replying affidavit stating that the plaintiff applicant has delayed in prosecuting this matter for 7 years. According to the respondent the plaintiff intends to delay the hearing of this case.
6. I have considered the application and read the replying affidavit and supplementary affidavit and the submissions on record.
7. The applicant have detailed how they have filed a notice of appeal. The notice of appeal was dated March 9, 2023 and lodged in the court of appeal on March 10, 2023. It was served on March 21, 2023. I do find that this court has a duty to ensure that the applicant satisfies 3 conditions before granting the application for stay of execution pending appeal . Order 42 rule 6 provides as follows

6. Stay in case of appeal [Order 42, rule 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 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.
- (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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (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 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.
  - (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.
  - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
8. The order of the court was made on the March 1, 2023. The application was made on March 31, 2023. This is 30 days after the ruling. The notice of appeal was lodged on March 10, 2023. The application was filed 20 days after the notice of appeal. I do find that a delay of 20 days in the circumstances of this case is not inordinate delay.
  9. On the issue of substantial loss, the applicant has not demonstrated that he will suffer any substantial loss if they agreed to a joint property manager to be appointed to manage the property and collect rent that will be accounted for on a quarterly basis. I do find that the application lacks merit and is dismissed with costs.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 11<sup>TH</sup> DAY OF JULY 2023.**

**A O OMBWAYO**

**JUDGE**

