



Kamu (Suing as the Legal Representative of the Estate of Martha Mbane - Deceased) v Kakundi & another (Environment & Land Case 8 of 2019) [2023] KEELC 20714 (KLR) (4 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20714 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 8 OF 2019
TW MURIGI, J
OCTOBER 4, 2023

BETWEEN

AARON KYENGO KAMU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MARTHA MBANE - DECEASED) PLAINTIFF

AND

HARRISON MUSYIMI KAKUNDI 1ST DEFENDANT

JEREMIAH NZOMO MASAI 2ND DEFENDANT

RULING

1. Before me for determination is the Notice of Motion dated 1st July, 2021 brought under the provisions of Sections 1A,1B,3A and 66 of the *Civil Procedure Act* in addition to Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 in which the Applicant seeks the following orders: -
 1. Spent.
 2. That there be stay of execution of the judgment delivered by this Honourable Court on the 29th day of June, 2021 pending the hearing of this application.
 3. That there be stay of execution of the judgment delivered by this Honourable Court on the 29th day of June, 2021 pending the hearing of the intended appeal before the Court of Appeal.
 4. That costs of this application be in cause.
2. The application is based on the grounds appearing on its face together with the supporting affidavit of Harrison Musyimi Kakundi sworn on even date.



The Applicant's Case

3. The Applicant averred that being aggrieved by this court's judgment delivered on 29/06/2021, he filed a Notice of appeal against the entire judgment. He further averred that he is apprehensive that the Plaintiff may execute the judgment since the court did not grant a stay of execution because the judgment was delivered via email.
4. He further averred that he will suffer irreparable loss if execution is allowed to proceed because his houses will be demolished and the fruit trees planted thereon will be destroyed. He added that he will suffer irreparably if he is evicted from the suit property where he has been in occupation since 1998.
5. The Applicant contended that if execution of the judgment proceeds, the intended appeal will be rendered nugatory because the subject of the appeal, which is ownership of the suit property, will have been affected. He added that the Plaintiff has been verbally threatening him with eviction which puts him in constant fear despite the fact that he has preferred an appeal.
6. The Applicant maintains that the orders of stay of execution are necessary in order to preserve the suit property from destruction as they await a determination on the intended appeal. The Applicant further averred that he is willing to furnish reasonable security pending the hearing and determination of the intended appeal.
7. The Applicant stated that the application has been brought without unreasonable delay and that the intended appeal is arguable with high chances of success. He contended that it was in the interest of justice that the orders sought herein are granted.

The Respondent's Case

8. The application was opposed by the Plaintiff/Respondent vide the replying affidavit sworn on 14th July, 2021. He averred that the Applicant has not demonstrated that he will suffer substantial loss if the orders sought are not granted. He argued that the subject matter of the appeal being immovable property would be available to any party who succeeds in the Appeal. He also added that the Applicant had not presented evidence of threatened eviction other than mere allegations.
9. Moreover, the Respondent underscored the fact that the Applicant had not tendered evidence that he had constructed houses on the suit property which would be threatened with demolition. The Respondent averred that the Court's duty in an application for stay of execution is to balance the interests of the Applicant by preserving the status quo while also preventing the appeal being rendered nugatory and allowing the Respondent to enjoy the fruits of his judgment.
10. Urging the Court to balance the rights of both parties judiciously, the Respondent endorsed the Applicant's proposal to furnish security as per Order 42 Rule 6 of the Civil Procedure Rules, 2010.
11. The application was disposed of by way of written submissions.

The Applicant's Submissions

12. The Applicant's submissions were filed on 29/09/2024. On behalf of the Applicant, Counsel underscored the conditions that must be satisfied in an application for stay of execution pending appeal as per Order 42 Rule 6 of the Civil Procedure Rules. On substantial loss to be borne by the Applicant, Counsel submitted that Applicant has invested heavily on the suit property by planting trees and building houses since 1995 when he took occupation. That in the event that the Applicant's trees and houses are destroyed, he will suffer irreparable loss and damage hence necessitating stay.



13. On the application being made without unreasonable delay, Counsel submitted that the judgment was delivered on 29/06/2021 while the application herein was filed on 02/07/2021. Counsel further submitted that the Applicant has an arguable appeal insisting that the trial Court disagreed with the Applicant on certain points of law which the appellate Court will have a chance to pronounce itself on. Counsel urged the Court to allow the application as prayed. To buttress the Applicant's submissions, Counsel relied on the case of G.N. Muema P/A(Sic) Mt View Maternity & Nursing Home Vs Miriam Maalim Bishar & Another [2018] eKLR.

The Respondent's Submissions

14. The Respondent's submissions were filed on 09/05/2023.
15. On behalf of the Respondent, Counsel submitted that the Applicant has not demonstrated that he will suffer substantial loss because the Applicant's occupation of the suit property since the 1970s has already been deemed as illegal. It was further submitted that the Applicant had not placed before this Court a draft memorandum of appeal that would make a case on whether the Applicant has an arguable appeal or not.
16. Urging the Court to dismiss the application herein with costs, Counsel for the Respondent relied on the following case law to buttress his submissions: -

In Re Estate of Richard Churko Stephen alias Richard Churko Guyo (Deceased) [2021] eKLR.

Annalysis And Determination

17. Having considered the application, the affidavits and the rival submissions, the only issue that arises for determination is whether the Applicant has satisfied the requirements for the grant of stay of execution pending Appeal.
18. Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules outlines the guiding principles to be met for the grant of stay and provides that;

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.

6(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 such security of costs for the performance of such decree or order as may ultimately be binding on him has been given by Applicant.
19. Going by the above provisions of the law, it is clear that in an application for stay of execution pending Appeal, the Applicant must satisfy the following three conditions: -
 - a. The Court is satisfied that substantial loss may result to the Applicant unless the order is made.
 - b. The application has been made without unreasonable delay.



- c. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the Applicant has been given by the Applicant.
20. In considering an application for stay of execution pending the hearing and determination of an appeal, I am guided by the case of *Butt Vs Rent Restriction Tribunal* (1982) KLR 417 where the Court of Appeal gave the following guidelines;
- “ 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.”
21. In the case of *Kenya Shell Ltd Vs Kibiru* [1986] KLR 416 Platt Ag. J.A. (as he then was) held as follows;
- “It is usually a good rule to see if Order XLI 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 a stay. That is what has to be prevented.”
22. The grant of an order of stay of execution is a discretionary one. In the case of *RWW Vs EKW* (2019) eKLR the court held that;
- “...the purpose of an application for stay of execution pending an appeal is to preserve the subject 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 the 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 damages.”
23. The Court is therefore called upon to balance the interest of both parties so as not to hinder the successful party from enjoying his fruits of judgment and those of the Appellant whose Appeal may succeed and be rendered nugatory if stay of execution is not granted.



24. The purpose of stay of execution is to preserve the substratum of the case. This was the holding in the case of Consolidated Marine Vs Nampijja & Another Civil App No. 93 of 1989 (Nairobi) where the court held that;
- “The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.”
25. On the first condition of proving that substantial loss may result unless stay orders are granted, the Applicant should not only state that he is likely to suffer substantial loss, he must prove that he will suffer substantial loss if stay orders are not granted.
26. In so finding, I am persuaded by the holding in the case of Charles Wahome Gethi vs Angela Wairimu Gethi (2008) eKLR where the Court of Appeal held that;
- “...it is not enough for the Applicants to say that they live or reside on the suit land and they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”
27. What amounts to substantial loss was expressed by the Court of Appeal in the case of Mukuma Vs Abuoga (1988) KLR as follows;
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
28. On substantial loss, the Applicant stated that he is apprehensive that the Respondent will execute the judgment and evict him from the suit property if the order of stay is not granted. He added that his appeal will be rendered nugatory if the orders of stay are not granted.
29. According to the judgment delivered on 29th June 2021, judgment was entered for the Plaintiff against the Defendants in the following terms:-
- a. An eviction order against the 1st and 2nd Defendants from land parcel Nzai/Nziu/393 to be supervised by the OCS Makueni Police Station.
 - b. A declaration that land parcel Nzai/Nziu/393 is the property of the estate of Martha Mbane (deceased).
 - c. Costs of the suit and Interest.
30. It is not in dispute that the Applicant has been in occupation of the suit property since the year 1998. It is also not in dispute that the judgment was delivered via email. The Applicant averred that he was not granted a stay of execution because the judgment was delivered via email. The Applicant averred that he has made significant improvements on the suit property by planting fruit trees and constructing houses thereon. From the foregoing, I find that the Applicant has demonstrated that he will suffer substantial loss if the Respondent executes the judgment delivered on 29th June, 2021.
31. In an application for stay of execution pending Appeal, an Applicant must also satisfy the Court that the application has been made without unreasonable delay. It is not in dispute that the judgment was delivered on 29th June, 2021. The present application was filed 2nd July, 2021. I find that the application was brought without delay.



32. On the last condition as to provision of security for costs, Order 42 Rule 6 (2) (b) of the Civil Procedure Rules is couched in mandatory terms to the effect that the Applicant must furnish security for the performance of the order or decree. In the case of Arun C Sharma Vs Ashana Rikundalia T/A Raikundalia & Co. Advocates, the court held that;

“The purpose of the security under Order 42 is to guarantee 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 applicant 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 a security for the 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.”

33. The Applicant has expressed his willingness to deposit such security as the court may order for the due performance of the decree. The Respondent has also supported the precondition for provision of security under paragraph 14 of his replying affidavit.

34. From foregoing this court finds that the Applicant has satisfied the conditions required for the grant of an order of stay of execution pending appeal.

35. The upshot of the foregoing is that the application dated 1st July, 2021 is allowed in the following terms;

- i. Stay of execution of the judgment/decree herein is granted pending the hearing and determination of the Applicant’s Appeal.
- ii. The Applicant shall deposit in court Kshs 200,000/= as security for costs within 21 days from the date of this ruling and in default the stay orders shall automatically lapse.
- iii. Each party to bear its own costs.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 4TH DAY OF OCTOBER, 2023.

In The Presence Of:-

Court assistant - Mr. Kwemboi.

Ms Kilonzo for the Plaintiff/Respondent.

Ms Mboya for the Defendant/Applicant.

