



**Murithi v Wakhu & another (Environment and Land Appeal
25 of 2023) [2023] KEELC 20509 (KLR) (4 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20509 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 25 OF 2023**

CK NZILI, J

OCTOBER 4, 2023

BETWEEN

HARUN MUCHAI MURITHI APPLICANT

AND

JOAB INDECHE WAKHU 1ST RESPONDENT

PHYLLIS NYOROKA MBIJIWE 2ND RESPONDENT

RULING

1. By an application dated May 16, 2023, the court is asked to stay the execution of the lower court judgment or decree dated March 10, 2023, now the subject of this appeal. The reasons are contained in the affidavit sworn by Harun Muchai Murithi on May 16, 2023. It is deposed that if the stay is not granted, substantial loss and damage would be occasioned to the applicant, who believes his appeal has a high chance of success and that it is in the interest of justice to grant the orders sought.
2. The respondent opposed the application in a replying affidavit sworn by Joab Indeché Wakhu on February 24, 2023. The grounds are that no loss or damage has been demonstrated to enable this court to stay a lawful decree. That the applicant wants to stay on the land and continue deriving income from there as long as possible, yet the respondents were entitled to fruits of their judgment; that no security for the due realization of the decree has been offered for the sum of Kshs.12,000,000/= ordered by the lower court. The rental income should be deposited in court or an interest-earning account every month, and if the appeal was unsuccessful, there were no means of recovering Kshs.12,000,000/= from the applicant unless a deposit was made. Further, the respondents in the alternative deposed that the accumulated rent and future rent could be deposited in court or an interest-earning account as a condition precedent.
3. With leave of court, parties were directed to file written submissions. The respondents submitted that the application was filed late by 36 days after the initial stay lapsed, with no reasons preferred for the



- same. Secondly, the respondents submitted that no substantial loss has been substantiated as held in *Kinyanjui Muguta vs. Wotuku Muguta* (2018) eKLR. Therefore, it was not enough to merely allege significant loss without any evidence, more so when the applicant violated court orders to maintain the status quo. Reliance was placed on *Charles Mbaabu vs. Daniel M'Mwirebua Anampiu* (2022) eKLR, for lack of demonstration of substantial loss.
4. Further, the respondents submitted that the memorandum of appeal was not attached to the application for the court to gauge the arguability of the intended appeal as held in *Stanley Kangethe Kinyanjui vs. Tony Ketter & others* (2013) eKLR.
 5. Regarding security, the respondents submitted that the applicant had not demonstrated the means of satisfying the decree should the appeal fail, yet he has been illegally earning Kshs.250,000/= monthly out of the respondents' property. Reliance was placed on *Mwaura Kaaruga t/a Limit Enterprises vs. Kenya Bus Services Ltd and 4 others* (2015) eKLR.
 6. Since the grant of stay was a serious, grave and fundamental interruption of the right to enjoy the fruits of the judgment, the respondents submitted that there should be security for the due performance of the decree should the application be allowed and that in the absence of such security, it negatively weighs on the bona fide of the applicant.
 7. The power to order for a stay of execution is governed by Order 42 Rule 6 of the *Civil Procedure Rules*, Sections 1A and B of the *Civil Procedure Act* and Article 159 of the *Constitution*.
 8. A party seeking a stay must apply for the same without inordinate delay, demonstrate the loss likely to occur if the stay is not granted, offer security for the due realization of the decree should the appeal fail, and lastly, establish that it is in the interest of justice to grant the same based on the overriding objective of the court that there must be expeditious disposal of court cases.
 9. In *Charles Mbaabu vs Daniel Anampiu* (*supra*) and *Paul Robo vs Kingori* (*supra*), the court cited with approval *Samvir Trustee Ltd vs Guardian Bank Ltd* (2007) eKLR, *James Wangalwa & another vs Agnes Naliaka Cheseto* (2012) eKLR, *Seventh Day Adventist Ltd vs Muslim Mosque Committee and others* (2022) KECA 100 (KLB) 11th February (2022) (Ruling), that the length of delay reasons for the delay, degree of prejudice to the applicant, the demonstration of substantial loss and perhaps chances of success of the appeal, as some of the considerations in an application for a stay, since execution was a legal process.
 10. In this application, the lower court judgment was delivered on 10.3.2023. This application was only filed on May 18, 2023. The delay over a month after the execution took effect has not been explained. A delay of even one day has been termed as inordinate, depending on the circumstance of each case. The applicant has not indicated the status of the substratum of the appeal, who is in occupation, what developments are there, and what loss he was likely to incur should the application be denied. It is not enough to allege substantial loss without any demonstration of it.
 11. On the security, no offer for the same has been made, yet the respondents have raised the capacity of the applicant to meet the decree should the appeal fail. In *Kenya Shell Ltd vs Kibra* (1986) KLR, 410, the court observed that a litigant, if successful, should not be deprived of the fruits of his judgment, without a just cause.
 12. It was upon the applicant to show the just cause why this court should stay the lower court's decree. The applicant must show and meet the conditions of payment of security where it is a money decree as held in *Giafranco Manethi & another vs. AMACO Ltd* (2019) eKLR, since a debt is already owed and due for payment to the successful party. The court observed that the purpose of security was to ensure that litigants are not assisted by the courts to delay the execution process through filing vexatious or



frivolous appeals. The court said that the security issue was not just a mere willingness by the applicant, but for the court to determine.

13. Further, in *Arun C. Sharma vs. Ashana Rainkundalia t/a Raikundalia & Co. Advocates and others* (2014) eKLR, the court held that the purpose of security was to guarantee the due performance of a decree that was ultimately binding on the applicant and not to punish him since a debt was already anticipated.
14. In *Port Reizt Maternity vs James Karanga Kabia* C.A No. 63 of 1991, the court observed that the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment by having a just cause for depriving the plaintiff of that right.
15. Applying the foregoing case law to the instant application, does the applicant deserve the stay orders? I do not think so. The applicant has inordinately come late before the court and has not explained the delay. Secondly, the substantial loss is not demonstrated. Third, no security for the due realization of the decree has been mentioned, let alone offered. Lastly, the applicant has not shown the means or capacity to meet the decree terms should the appeal fail.
16. I therefore find no merits in the application before the court. The same is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 4TH DAY OF OCTOBER 2023

In Presence of:

Arithi for applicant

Kariuki for respondent

HON. CK NZILI

ELC JUDGE

