



**Kaunda v Wambua (Environment & Land Case 196 of 2014)  
[2023] KEELC 21388 (KLR) (8 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21388 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 196 OF 2014  
CA OCHIENG, J  
NOVEMBER 8, 2023**

**BETWEEN**

**TABITHA NGINA KAUNDA ..... PLAINTIFF**

**AND**

**FRANCISCO KAUNDA WAMBUA ..... DEFENDANT**

**RULING**

1. What is before Court for determination is the Applicant's Notice of Motion Application dated the November 4, 2022 where it seeks the following Orders:
  - a. That stay of execution of the order of this honourable court given on January 27, 2017 and issued on May 18, 2017 be and is hereby granted pending the hearing and determination of the appeal filed by the applicant in the Court of Appeal dated December 14, 2018 being Nairobi Court of Appeal civil appeal No. 438 of 2018.
  - b. That the costs of this Application be provided for.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Francisco Kaunda Wambua where he deposes that his Application to set aside the *ex parte* Judgment entered against him on January 27, 2017 was dismissed on February 23, 2018. He explains that being dissatisfied by the Court's Ruling, he appealed against it, to the Court of Appeal. He contends that the Honourable Court handled this case as a dispute regarding matrimonial property before the dissolution of the marriage subsisting between the Plaintiff and himself. He avers that his Appeal to the Court of Appeal raises the fundamental question whether division of matrimonial property between spouses can be ordered before the marriage is dissolved and in the absence of one of the spouses, to the marriage. He reiterates that it would be unjust and unfair for this Court's Order granted on January



27, 2017 and issued on May 18, 2017 being enforced, before the Court of Appeal hears as well as determines his Appeal.

3. The Respondent opposed the instant Application by filing a Replying Affidavit sworn by Tabitha Ngina Kaunda where she deposes that the said Application is vexatious, scandalous and actuated by malice on the part of the Applicant. She contends that though the Applicant was married to her, he has without involving her and in spite of the Orders of the Court, sold a portion of Plot No. 887 'A' to Patrick Maii and Dominic Musyoki. She insists that the instant Application is actuated by ulterior motive on the part of the Applicant exhibited by his acts of illegal sale of the matrimonial property in total disregard to the Court Order sought to be stayed and in blatant violation of her spousal matrimonial proprietary rights. She states that the instant Application is unmerited as it is aimed at giving the Applicant a leeway to continue with his acts of wanton wastage of the matrimonial property since the aforementioned purchasers' have taken possession and started developing the said property in total disregard to her rights. She reiterates that an earlier Application by the Applicant was dismissed after the Court was satisfied that the Applicant had been duly served but he chose to ignore the Court proceedings until the final orders were issued. Further, that the Applicant is guilty of laches. She reaffirms that the instant Application is unmerited as the Applicant has not suffered and is not likely to suffer any irreparable loss. Further, the Application is fatally defective as the Applicant has not complied with the provisions of the law with regard to supply of sufficient security.
4. The Application was canvassed by way of written submissions.

### **Analysis and Determination**

5. Upon consideration of the instant Notice of Motion Application including the various Affidavits and respective submissions, the main issue for determination is whether the Applicant is entitled to orders of stay of execution pending the outcome of the Appeal.
6. The Applicant in his submissions reiterated his averments as per the Supporting Affidavit and insisted that a Litigant has an undoubted right to Appeal. Further, that it would be a great injustice to him if the Respondent was allowed to execute the *ex parte* order of this Court before the Court of Appeal pronounces itself on his Appeal. He further submits that the properties listed in the order are all registered in his name and their marriage is yet to be dissolved. To support his averments, he relied on the case of [\*RWW v. EKW\*](#) Nairobi High Court (Family Division) Civil Suit No. 25 of 2012 (unreported).
7. The Respondent in her submissions highlighted the orders issued on May 18, 2017 and contends that the Court dismissed the Applicant's Notice of Motion Application dated the July 10, 2017, on 23<sup>rd</sup> February, 2018. She insists that the Applicant has not established a sufficient cause to warrant the orders sought, since the titles to the suit properties are in his hands and the same cannot be transferred without his consent. Further, that she has not threatened to transfer them. She argues that the Applicant will not suffer any substantial loss if the Orders of stay are not granted, since he is the registered owner of the suit properties while she is the beneficial owner as she has been living thereon as well as developing them. She contends that she is in fear that if the instant Application is allowed, the Applicant might transfer the suit properties hence hindering her from enjoying the fruits of the decisions delivered in her favour. She reiterates that the Applicant has not furnished court with any security for the due performance of the Decree. To support her averments, she relied on the case of [\*Halai & another v Thornton & Turpin \(1963\) Ltd\*](#) (1990) eKLR.
8. The Applicant seeks a stay of execution pending the outcome of the Appeal. He explains that the Appeal in the Court of Appeal is still pending. The Respondent has opposed the instant Application



insisting that the Applicant will not suffer any irreparable loss as he is the registered owner of the suit properties and has the titles to the said properties in his custody. I note the Judgment was entered in favour of the Plaintiff in this matter on 27<sup>th</sup> January, 2017. The Applicant proceeded to apply to set aside the said Judgment vide its Notice of Motion Application dated the 10<sup>th</sup> July, 2017 which was dismissed on 23<sup>rd</sup> February, 2018. The Applicant proceeded to file his Appeal at the Court of Appeal dated the 14<sup>th</sup> December, 2018 being Nairobi Court of Appeal Civil Appeal No. 438 of 2018. Further, on the 19<sup>th</sup> October, 2022, this Court allowed the Respondent's Notice of Motion Application dated the 23<sup>rd</sup> February, 2022 where she sought to cite the Respondent including the aforementioned purchasers for contempt. The Applicant has now filed the instant application claiming that he has to seek orders of stay of execution in the court that delivered the ex parte Judgment. I note the Applicant has not denied that the suit properties are still registered in his name and he has the titles in his custody. He has further not denied that despite the Court Order, he sold a portion of Plot No. 887 'A' to Patrick Maii and Dominic Musyoki.

9. The legal provisions governing stay pending Appeal are contained in order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides *inter alia*:

"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."

10. Further, Rule 5(2) (b) of the [Court of Appeal Rules](#) stipulates *inter alia*:

"Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just."

11. In the case of [Butt v Rent Restriction Tribunal](#) [1982] KLR 417 the Court of Appeal provided direction on how a Court should proceed to exercise its discretion in instances where a party seeks a stay of execution pending Appeal and stated thus:

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."



12. While in the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, the Court held 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

13. Based on the facts as presented while associating myself with the decisions cited above, I find that the Applicant will not suffer any substantial loss if a stay is not granted since he is the registered owner of the suit properties while the Respondent was declared the beneficial owner as she resides thereon. Further, I find that the Applicant is not being candid in seeking orders of stay of execution pending Appeal, five (5) years later, yet he has even disposed of a portion of the suit properties to third parties. In the circumstances, I find that the Applicant has failed to meet the threshold set for granting stay of execution pending Appeal and will decline to grant the said orders.
14. It is against the foregoing that I find the Applicant's Notice of Motion Application dated the November 4, 2022 unmerited and will dismiss it with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2023**

**CHRISTINE OCHIENG**

**JUDGE**

