



Ngaruiya & 3 others v Mutuku (Being Sued as the Chairman for and on Behalf of Runda Paradise Residents Association) (Environment & Land Case 128 of 2021) [2023] KEELC 21437 (KLR) (9 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21437 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 128 OF 2021**

JG KEMEL, J

NOVEMBER 9, 2023

BETWEEN

**MUNGAI NGARUIYA 1ST PLAINTIFF
NGARUIYA MUNGAI NGARUIYA 2ND PLAINTIFF
NJERI MUNGAI NGARUIYA 3RD PLAINTIFF
WANJIKU MUNGAI NGARUIYA 4TH PLAINTIFF**

AND

THADDEUS MUTUKU (BEING SUED AS THE CHAIRMAN FOR AND ON BEHALF OF RUNDA PARADISE RESIDENTS ASSOCIATION) ... DEFENDANT

RULING

1. Vide an Application dated the 4/4/2023 the 1st Applicant(Applicant) moved the Court under Order 42 & order 51 rule 1 of the [Civil Procedure Rules](#) , Section 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law.
2. The Applicant sought orders of stay of execution of the orders of the Court issued on the 23/3/23 pending the hearing and determination of the intended appeal.
3. The Application is premised on the grounds annexed thereto and the Supporting Affidavit of the Applicant sworn on the 4/4/2023 where he avowed that in its Ruling dated the 23/3/2023 the Court held him in contempt of Court and ordered that he purges the said contempt within 15 days; that he is aggrieved by the said orders of the Court and he has preferred an appeal in the Court of appeal against the said decision.
4. Further the Applicant states that though he has preferred the said appeal, he has been advised by his Counsel that the same does not operate as a stay of execution of the orders of the Court and that in the



absence of stay the Court shall proceed to implement the said orders. Inter alia the deponent states that whereas the Court ordered him to purge the contempt within 15 days from the date of the order, he was of the opinion that he should be given the opportunity of prosecuting his intended appeal and in the event that it fails he will be willing to purge the contempt. That if the Court proceeds to implement the orders his intended appeal will be rendered nugatory.

5. With respect to substantial loss the Applicant states that it is imminent that his personal liberty may be denied through custodial sentence as there is no guarantee that the Court will simply condemn him to pay fine and in default serve an alternative custodial sentence. That he has an arguable appeal with a high probability of success and that the Application has been brought without delay. Finally, that he is ready to abide by any condition set by the Court including the furnishing of security as may be set by the Court for the due performance of the orders of 23/3/23
6. The Application is opposed by the Replying Affidavit of Thaddeus Mutuku sworn on the 19/4/2023 where he deponed that he is the Chairperson of Runda Paradise Residents Association and duly authorised to swear the said affidavit.
7. He stated that he is aware that the Applicant has failed to comply with the orders of the Court by paying for the services rendered and or the prescribed service charge. That this conduct has brought disrepute to the dignity of the Court and the said conduct should not go unpunished.
8. In addition, that the Applicant has not met the prerequisites of Order 42 rule 6 as to the demonstration of substantial loss that would be occasioned if the stay is not granted. That the Applicant remains defiant of the Court orders and is yet to purge the contempt. It was further urged by the Respondent that there is no arguable appeal and the Application is a mere fishing expedition and has no chance of success.
9. On prejudice, the Respondent stated that it stands to suffer grave prejudice on grounds that the Applicant through his Counsel recorded the consent willingly; the consent has never been set aside and or reviewed; the Applicant had knowledge of the order; Applicant failed to purge the contempt; no plausible reasons have been advanced to warrant the grant of the orders sought; Application is calculated to delay the settlement of the amounts due to the Respondent. That if the Court will be inclined to grant the stay, the same be conditional on depositing into Court the security of Kshs 870,000/- plus interest in the name of both the Applicants and the Respondents Advocates. The Court was urged to reject the Application.
10. Parties filed written submissions through their learned Counsel on record. I have read and considered the same in the Ruling.
11. The key issue for determination is whether the Applicant is deserving of the orders of stay of execution.
12. In granting orders of stay of execution, the Court shall be guided by Order 42 Rule 6 of the Civil Procedure Rules which states as follows:-

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.
- (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.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An Application for stay of execution may be made informally immediately following the delivery of judgment or Ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate Court or tribunal has been complied with.”

13. What does an Application for stay of execution serve? This question was answered in the case of [*RMW Vs EKW*](#) (2019) eKLR, as follows;

“The purpose of an Application for stay of execution pending 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.”

14. Orders of stay of execution are equitable reliefs, which are granted at the discretion of the Court. Like all discretionary reliefs, it must be exercised judiciously and within the confines of the law. It must not be extensively callous or whimsical. For one to succeed in an Application for stay of execution, the following must be satisfied, that:-

- (a) The Application was brought without delay;
- (b) Substantial loss may result to the Applicant unless the stay is granted; and
- (c) Security for the due performance of the order or decree has been provided.

15. This was the holding of the Court in the case of *Elena D Korir Vs Kenyatta University* (2013) eKLR where the Court stated that the Courts power to grant stay of execution is fettered by three conditions namely; sufficient cause, substantial loss that would ensue from the refusal to grant stay, the Applicant



must furnish security and the Application must be made without unreasonable delay and that in addition the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted.

16. In the main, this Court is further guided by the decision in the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417. In this case, the Court of Appeal set out what ought to be considered in determining whether to grant or refuse stay of execution pending appeal as follows;-
 - a. 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.
 - b. The general principal 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.
 - c. 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.
 - d. The Court in exercising its discretion whether to grant or refuse an Application for stay will consider the special circumstances of the case and its unique requirements.
17. With respect to the question whether the Application was filed without undue delay, the Court finds that the Ruling of this Court was issued on the 23/3/23 and the Application was filed on the 4/4/23 thereby timeously.
18. The second requirement that the Court is being called upon to inquire is whether the Applicant has demonstrated the substantial loss that he stands to suffer if the Application is denied. In the case of *Machira T /A Machira & Company Advocates v East African Standard (No 2)* 2002 2 KLR the Court held that substantial loss must be specified, details or particulars thereof must be given and the conscience of the Court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the Applicant is likely to suffer substantial injury by letting the other party proceed further.
19. In this case the Applicant has urged the Court that if the orders are not granted, he stands to suffer substantial loss in the event that the Court denies him his personal liberty if the orders are implemented. The Applicant was ordered to purge the contempt within a period of 15 days in default he should show cause why he should not be committed to civil jail for contempt of Court for the disobedience of the Court orders issued on the 23/3/2023. The Court has perused the file and save for the draft memorandum of appeal and the notice of appeal. There is no evidence that the appeal was filed. In the event that no appeal has been filed then there would be no appeal for hearing and the Court will proceed to dismiss the Application as being unmeritorious.
20. In the case of *Republic vs Director of Lands and Urban Planning, Government of Makeni County Exparte Edward Mutinda & 15 Others* [2015] eKLR the Court stated as follows;

“In matters where the liberty of the Applicant is at risk or jeopardy, the Court normally grants stay of execution since to decline to do so may lead to the Applicant being imprisoned a fact which cannot be undone if the appeal succeeds. As was appreciated by the Court of Appeal in *United Insurance Co. Ltd. v Stephen Ngare Nyamboki* Civil Application No. Nai. 295 of 2001, in a matter involving the threat of imprisonment, if the order of imprisonment were



to be enforced, even for a few days and the intended appeal were to succeed, that success will obviously be rendered nugatory and therefore stay granted.”

21. Equally in the case of *Nation Media Group Vs Child Welfare Society of Kenya* [2021]eKLR the Court stated as follows;

“It is evident that the trial Court is about to render its sentence having found the appellant and the alleged contemnors guilty of contempt of Court. The proceedings specifically relating to the issue of contempt of Court are quasi criminal in nature. The Applicant’s apprehension that there is a likelihood of the contemnors being denied their personal liberty through a custodial sentence is quite true. There is no guarantee that the trial Court will simply condemn the contemnors to pay a fine and in default serve an alternative prison sentence. I do find that the Applicant has established that there is likelihood of a substantial loss being suffered should the orders being sought be denied. I see no good reason as to why the Applicant should be denied audience. There has been no persistent pattern exhibited by the Applicant indicating that even if the appeal is dismissed, still the contempt will not be purged.”

22. In this case the Court finds that the Applicant has demonstrated substantial loss which is the possibility of losing his personal liberty and the Court finds that this is irreversible.
23. With respect to security for costs, the Applicant is ordered to pay the sum of Kshs 100,000/- being for the due performance of the decree in this matter. The same to be deposited in an interest earning account in the names of the two Counsels for the parties within a period of 15 days from the date hereof and in default the orders shall lapse automatically.
24. The costs shall be in favour of the Respondent.
25. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 9TH DAY OF NOVEMBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

