



**Muthama v Malindi Estates Limited (Land Case 106 of 2015)
[2022] KEELC 4769 (KLR) (7 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4769 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE 106 OF 2015
MAO ODENY, J
SEPTEMBER 7, 2022**

BETWEEN

SUSAN WANJIKU MUTHAMA PLAINTIFF

AND

MALINDI ESTATES LIMITED DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated April 22, 2021 by the defendant/applicant seeking the following orders:
 - a. Spent
 - b. After the said inter-partes hearing of this application this court be pleased to grant a stay of execution of the judgment and decree of the Honourable Court rendered on March 23, 2021 pending the hearing and determination of the applicant's Appeal.
 - c. This Honourable Court do grant such further orders as it deems necessary and expedient in the circumstances; and
 - d. An appropriate order be made for costs of this application.
2. Counsel agreed to canvas the application by way of written submissions but at the time of writing this ruling only the applicant had complied.

Defendant/applicant's Submissions

3. Counsel relied on the grounds on the face of the application and the supporting affidavit of Dinkar Meghji Chhaya, a director of the defendant/applicant Company who deponed that that judgment was entered on March 23, 2021, in favour of the plaintiff/respondent for breach of contract of sale



of the land parcel No. 4883 (Orig. No. 1935/6260 and he therefore intends to appeal against the said judgment and has filed a Notice of Appeal dated March 23, 2021.

4. He further deponed that there being no subsisting orders of stay, he is apprehensive that the plaintiff/respondent will commence execution and further that he is ready and willing to meet any conditions for grant of the stay orders.
5. On preliminary issues counsel submitted that the court should to dismiss the plaintiff's replying affidavit and grounds of opposition for being filed by the plaintiff/respondent's former advocates Messrs Mogaka Bwongaki & Company Advocates despite there being a notice of change of advocates filed by Michira Messah & Company Advocates.
6. Counsel further submitted that the applicant has a constitutional right of appeal whose essential substance is to ensure that the appeal is not rendered nugatory and relied on the case of [James Wangalwa & another v Agnes Naliaka Cheseto](#) [2012] eKLR, and that the power to grant stay orders is discretionary as was held in the case of [Butt v Rent Restriction Tribunal](#) [1982] KLR 417.
7. Mr Kinuthia relied on Order 42 Rule 6 which sets out the conditions to be met in an application for stay which he submitted that the defendant has met and cited the case of [Kenya Commercial Bank Limited v Sun City Properties Limited & 5 others](#) [2012] eKLR.
8. On the issue as to whether the applicant will suffer substantial loss counsel relied on the cases of [James Wangalwa](#) [*supra*] and [G.N Muema p/a Mt View Maternity & Nursing Home v Miriam Maalim Bishar & another](#) [2018] eKLR, and submitted that it stands to suffer substantial loss by reason of loss of ownership as well as the execution of the awarded costs. Further that the plaintiff/respondent did not demonstrate her capability to refund or repay the value of the suit property and the sum of the certified costs in the event that the appeal is successful and cited the case of [National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another](#) [2006] eKLR.
9. On the issue of delay in filing this application, counsel submitted that the delay was not unreasonable as the same was occasioned by the court registry in receiving the supporting affidavit and relied on the cases of [Focin Motorcycle Company Limited v Ann Wambui Wangui & another](#) [2018] eKLR and [Kenya Commercial Bank Limited case](#) [*supra*] where a delay of 2 months and 1 month respectively was considered not unreasonable.
10. On security for the due performance of the decree, counsel argued that it was sufficient for the applicant to state that they are willing to provide security and leave the determination of such security to the court, as they have done in this case.
11. In response to the application, the plaintiff/respondent filed a Replying Affidavit and grounds of opposition dated May 31, 2021. The plaintiff/respondent deponed that she began the execution process as soon as judgment was delivered, issued a notice of entry of judgment and filed the advocates' bill of costs dated May 5, 2021. She added that she already took possession of the suit premises and started developing the same. She therefore urged the court to dismiss the application with costs

Analysis And Determination

12. The issues for determination in an application for stay of execution pending appeal are as provided for under Order 42 rule 6 of the *Civil Procedure Rules, 2010* which provides 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 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.
13. If an applicant meets the threshold as provided above then the court can grant the orders as prayed. The court also has discretion to either grant or refuse to grant such orders of stay but such discretion must be exercised judiciously. Each case is determined on its circumstances.
14. The applicant filed this application on May 5, 2021, approximately 42 days after judgment was delivered on March 23, 2021. The affidavit in support of the application, Mr. Dinkar explained that the delay was occasioned by the court registry in issuing a copy of the judgment and the executed notice of appeal. When there is a delay in obtaining documents from the registry or typed proceedings, the Registrar can issue a certificate of delay upon request by a party. There is no such certificate of delay applied for or obtained in respect of this matter to explain the delay.
15. Timelines for doing certain activities are very important as one day makes a big difference in execution proceedings. The plaintiff respondent deponed that she has already executed the decree and taken possession of the suit land hence there is nothing to stay.
16. In the case of *Francis Sirma Kios v Kibore Sigilai* [2013] eKLR the Court of Appeal held that:

But more fatal to this application was the admission by Mr Machage at the hearing of the application that the decree of the High Court has effectively been executed and that the respondent has taken possession of all the arable portions of the suit property and is now cultivating the same. The only point of contention between Mr Machage and Mrs Wanderi, learned counsel for the respondent was whether or not the applicant was still living in a house on the suit property. In *International Centre for Policy and Conflict v Kamlesh Mansukhlal Damji Pattni & 5 others*, (Civil Application No Nai 87 of 2013 (Ur 57/2013), this court reiterated that an order for stay of execution cannot be countenanced where the decree or order sought to be stayed has already been executed. The Court stated:

“There is no doubt that the criminal case facing the respondents was terminated in execution of Mutava J’s judgement. The sureties have already been discharged by the court. We are not persuaded that there is anything to stay in this matter”.
17. It is trite that where a decree of order sought to be stayed has already been executed there can be no order of stay.
18. On the issue whether the Defendant/applicant will suffer substantial loss if the order of stay is not granted, the applicant has not demonstrated the kind of loss he is likely to suffer. The defendant just indicated that the plaintiff has not demonstrated that she is in a position to refund the money and the value of the suit land should the appeal succeed. This does not amount to substantial loss.



19. In the case of *Kenya Shell Limited v Kibiru* [1986] KLR 410 , it 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 corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.

20. In the case of *Justus Kyalo Musyoka v John Kivungo* [2019] eKLR it was held that:

Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him being barred from benefiting from the fruits of his judgment. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgment save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher court”

21. The purpose of stay of execution is to preserve the substratum of the case as was held in the case of *Consolidated Marine v Nampijja & another*, Civil App No 93 of 1989 (Nairobi), where the court stated as follows: -

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”.

22. I have considered the application, submission by counsel and find that the applicant has not met the threshold for grant of stay of execution and the application is dismissed with each party bearing their own costs as the plaintiff did not file submissions as ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 7th DAY OF SEPTEMBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

