



Jomo Kenyatta University of Agriculture & Technology v Kwanza Estate Limited (Environment & Land Case E19 of 2020) [2022] KEELC 13376 (KLR) (4 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13376 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E19 OF 2020
FM NJOROGE, J
OCTOBER 4, 2022**

BETWEEN

**JOMO KENYATTA UNIVERSITY OF AGRICULTURE &
TECHNOLOGY PLAINTIFF**

AND

KWANZA ESTATE LIMITED DEFENDANT

RULING

1. This is a ruling with respect to the plaintiff's notice of motion application dated May 17, 2022. It has been brought under sections 3A, 53 and 66 of the *Civil Procedure Act*, order 42 rule 6(2) and order 51 rule 1 of the *Civil Procedure Rules 2010* which seeks the following orders:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That pending the full and final determination of the intended appeal, this honorable court be pleased to grant stay of execution against the whole of the judgement, decree and order of this court delivered by Hon Justice DO Ohungo on April 27, 2022
 - e. That this honorable court be pleased to grant any other orders and/or directions as it may deem fit and just to grant.
 - f. That costs of this application be provided for.
2. The application is supported by the grounds on the face of the application and the affidavit sworn by Richard Wokabi Kariuki on May 17, 2022. In the affidavit he deposes that the court delivered its judgement on April 27, 2022 in favor of the defendant where it dismissed the plaintiff's suit with costs



and the defendant's counterclaim allowed; that the judgement was tainted with illegalities and for that reason the plaintiff intends to appeal against the said decision; that the plaintiff has prepared a draft memorandum of appeal that it intends to file in the superior court which raises critical grounds of appeal with a high probability of success; that the defendant has already filed and requested for the decree in the matter for the awarded sum of Kshs 111,965,138.7/= and therefore there is an imminent threat of execution; that the plaintiff is apprehensive that the defendant will commence execution immediately it obtains the decree; that the defendant is an entity of unknown means and is likely to be unable to repay the decretal sum in the event that the appeal is successful and that the plaintiff will suffer undue prejudice and substantial loss if the execution proceeds; that the application is made within a reasonable time and that it is willing to furnish the court with appropriate security and abide by any other condition that the court shall give in order to grant the prayers sought.

3. In response to the application, the defendant's managing director Geoffrey Makana Asanyo filed a replying affidavit sworn on June 6, 2022 and filed on the same date. He deposed that he has the authority of the board of directors of the company to swear the affidavit; that the judgement delivered by the court on April 27, 2022 was based on the lease agreement entered into by the parties, well grounded in law and not tainted with illegality; that the sum due to the defendant is Kshs 71,965,138.70 with VAT at 16% and costs of the suit and counterclaim the plaintiff having paid the sum of Kshs 40,000,000/= pursuant to the consent dated June 2, 2021 which is contrary to the plaintiff's assertion that the defendant is intending to recover the sum of Kshs 111,965,138.70/=; that the plaintiff's averment that the defendant is an entity of unknown means is made in bad taste as the defendant is the registered owner of land parcel No Nakuru Municipality Block 9/90 on which Kwanza House is erected that is valued over kshs 30,000,000/= and that the plaintiff has been the defendant's tenant for a period of over ten years and has paid a sum of Kshs 450,000,000/= as rent over that period; that the defendant owns other properties that are worth over Kshs 5,000,000,000/= and is therefore capable of repaying the decretal sum in the unlikely event that intended appeal succeeds; that the plaintiff has left some of its items in the suit premises contrary to the assertions that it had exited the suit property; that the defendant has therefore not been able to restore the premises to its original state for purposes of renting it out and is holding the plaintiff liable for mesne profits at the rate of Kshs 5,328,188.10 per month exclusive of VAT from May 1, 2022 until the premises are handed over; that the plaintiff's conduct is inequitable and should disentitle it from the orders sought herein; that in the event that the court grants the orders sought, the defendant has on a without prejudice basis offered a compromise that a consent be recorded that there be a stay of execution on condition that the decretal sum of Kshs 71,965,138.70 plus 16% of Kshs 11,514,422.10 and the taxed costs is deposited in an interest earning account in the names of the advocates of both parties pending the hearing and determination of the intended appeal.
4. The application was canvassed by way of written submissions. The plaintiff filed its submissions dated June 19, 2022 on September 1, 2022 while the defendants filed their submissions dated August 29, 2022 filed on August 31, 2022.
5. The plaintiff in its submissions identified the following issues for determination; whether the applicant has an arguable appeal with a high probability of success, whether the applicant will suffer substantial loss and if the respondent will suffer any prejudice if the prayers sought are granted, whether the application for stay pending appeal was made without unreasonable delay, whether the applicant is willing to provide any security for the due performance of the decree and/or any further orders of this court and who should bear the costs of the application.
6. On whether it has an arguable appeal with a high probability of success, the plaintiff relied on the cases of *Regnoil Kenya Limited vs Winfred Njeri Karanja Civil Application No 329 of 2018 (Ur 266 of*



- 2018), *Kenafric Matches Limited vs Match Masters Limited and Another (Civil Application No E092 of 2021)* and submitted that its memorandum of appeal raises serious points of law on the judge's interpretation of various provisions of the law which are arguable points that deserve the consideration of the court.
7. On whether the applicant will suffer substantial loss and if the respondent will suffer any prejudice if the prayers sought are granted, the plaintiff submitted that the power to grant orders of stay of execution pending appeal is discretionary once sufficient cause is shown and where the applicant may suffer substantial loss. The plaintiff submitted that it has demonstrated sufficient cause for the court to grant the orders sought. The plaintiff further submitted that the judgement of the court has great economic and financial impact on it since it is a public institution of higher learning and unless stay of execution pending appeal is granted, the intended appeal will be rendered nugatory. The plaintiff relied on the cases of *Kiplagat Kotut vs Rose Jebor Kipngok [2015] eKLR* and *Antoine Ndiaye v African Virtual University [2015] eKLR* among other cases in support of their arguments.
 8. On whether the application for stay pending appeal was made without unreasonable delay, the plaintiff submitted that the issue of inordinate delay does not arise because the judgement was delivered on April 27, 2022 and the application filed on May 17, 2022 while the appeal was filed on May 10, 2022 and subsequently the record of appeal was also filed.
 9. On whether the applicant is willing to provide any security for the due performance of the decree, the plaintiff relied on order 42 rule 6(1) (2) of the Civil Procedure Rules and submitted that it is ready to furnish such security as the honorable court may deem fit to grant.
 10. The defendant in its submissions identified two issues for determination which are whether the plaintiff has made a case for grant of an order of stay of execution and who should bear the costs of the application.
 11. On the first issue, the defendant relied on order 42 rule 6 of the Civil Procedure Rules and submitted that the plaintiff has to satisfy all the three conditions set out in order 42 rule 6(2) which are that substantial loss may result to the applicant unless the order is made, the application has been made without unreasonable delay and that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant is given.
 12. The defendant also relied on the cases of *Housing Finance Company of Kenya vs Sharok Kber Mohamed Ali Hirji & Another [2015] eKLR* and *Victory Construction v BM (a minor suing through next friend, one PMM) [2019] eKLR* among other cases and submitted that there was an unreasonable delay in filing the present application as the judgement was delivered electronically on April 27, 2022 and that the plaintiff filed the application on May 18, 2022.
 13. The defendant also relied on the cases of *Jaber Mohsen Ali & another v Priscillah Boit & another E & L No 200 of 2012 [2014] eKLR* and *ABN Amro Bank NV vs LeMonde Foods Ltd Civil Application No Nai 5/2002* and submitted that it has discharged its burden of proving that it can be able to repay any sums paid to it if the intended appeal succeeds.
 14. The defendant further relied on the cases of *Kenya Shell Ltd v Kibiru & Another [1986] KLR 40* and *Kenya Hotel Properties Limited vs Willesden Investments Limited [2007] eKLR* on the issue of substantial loss. The defendant submitted that the plaintiff has not shown sufficient cause to warrant the grant of stay of execution. On the issue of costs, the defendant submitted that the plaintiff should bear the costs of the application and relied on the case of *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others [2014] eKLR*.



Analysis and determination

15. After considering the application, replying affidavit and the submissions, the only issue that arises for determination is whether the court should grant stay of execution pending appeal.
16. Order 42 rule 6 (1) and (2) of the Civil Procedure Rules 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.
17. In *Civil Appeal No 107 of 2015, Masisi Mwita -vs- Damaris Wanjiku Njeri (2016) eKLR*, the Court held that:-

' The application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & Another Vs Thornton & Turpin Ltd*, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag JA) held that:-

'The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely; - sufficient cause, substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay.'

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in [*Hassan Guyo Wakalo Vs Straman EA Ltd \(2013\)*](#) as follows:-

' In addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory.'

These twin principles go hand in hand and failure to prove one dislodges the other.'

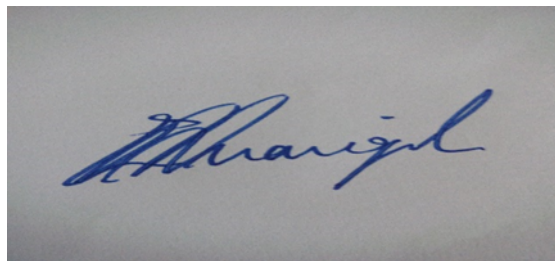
18. On whether the application was lodged expeditiously, the plaintiff filed the present application on May 18, 2022 while judgement in the matter was delivered on April 27, 2022. There is a notice of appeal on the court record dated May 10, 2022 and it is therefore my view that for the purposes of this application, there is an appeal in place and the application was filed without unreasonable delay.
19. On whether the plaintiff will suffer substantial loss if the orders sought are not granted, the plaintiff stated that the respondent is an entity of unknown means and is likely to be unable to repay the decretal sum in the event that the appeal is successful. The defendant on the other hand stated that it owns several properties worth over Kshs. 5,000,000,000/= and is therefore capable of repaying the decretal



sum in the event that the appeal succeeds and therefore the intended appeal will not be rendered nugatory.

20. The defendant also stated that it had on a without prejudice basis offered a compromise that there be a stay of execution on condition that the decretal sum of Kshs 71,965,138.70 plus 16% VAT of Kshs 11,514,422.10 and the taxed costs be deposited in an interest earning account in the names of the advocates of both parties pending the hearing and determination of the intended appeal.
21. The plaintiff has expressed itself to be willing to offer security for costs. The court in its judgement delivered on April 27, 2022 entered judgement against the defendant for a sum of Kshs 71,965,138.70 being rent for the period between February 1, 2021 to April 30, 2022.
22. This court has noted that it is not in dispute that the substantive appeal has been filed. All that remains is for it to be heard and determined, and this course of events is expected to take a relatively shorter period than would have been taken before since there is a permanent Court of Appeal bench resident at Nakuru.
23. In conclusion therefore, the plaintiff's application dated May 17, 2022 is allowed and a stay of execution of the judgment in this suit is granted on condition that the plaintiff deposits in a fixed joint interest earning account in the names of both counsel for the parties the taxed costs of the suit within 30 days of the issuance of a certificate of taxed costs.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 4TH DAY OF OCTOBER, 2022.

A photograph of a handwritten signature in blue ink on a light-colored background. The signature is cursive and appears to read 'Mwangi Njoro'.

**MWANGI NJOROGE
JUDGE, ELC, NAKURU.**

