



REPUBLIC OF KENYA



**KENYA LAW**  
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**Paul v Mutua (Environment and Land Appeal E013 of 2022)  
[2022] KEELC 13439 (KLR) (5 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13439 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT AND LAND APPEAL E013 OF 2022  
LG KIMANI, J  
OCTOBER 5, 2022**

**BETWEEN**

**PETER KYENE PAUL ..... APPELLANT**

**AND**

**GABRIEL MUNYOKI MUTUA ..... RESPONDENT**

*(Being an Appeal against the Ruling of the Chief Magistrate's Court in Kitui  
delivered by the Honourable M. Kasera on 18th January 2022 CMCC No.198 of 2011)*

**RULING**

1. The appellant/applicant filed a notice of motion application dated July 15, 2022 under order 42 rule 6 of the [Civil Procedure Rules 2010](#) seeking the following orders-
  1. Spent.
  2. That there be a stay of execution on the Ruling of the Chief Magistrate's Court in Kitui CMCC No 198 of 2011 delivered by the Honourable M Kasera on January 18<sup>th</sup>, 2022 as well as on all the other consequential proceedings ensuing from the said ruling, pending the hearing and the final determination of the applicant's appeal herein.
  3. That the costs of this application be provided for.
2. The applicant relies on the grounds on the face of the application and the supporting affidavit where he claims that the subordinate court delivered a ruling in respect of the respondent's application dated February 25, 2021 which sought orders of contempt of court against the appellant of the decree dated September 12, 2013 and issued on November 30, 2020. The applicant and further to put the respondent in vacant possession of Plot No 4096/R 302(76) Zone 03. The applicant states that the ruling was delivered and orders issued without notice to either of the parties and that in the impugned ruling, the applicant was found to be in contempt of court orders which he disputes.



3. According to the applicant the land on which he was constructing borders the river and the same is Plot No 4096/328 Kitui Municipality (which has now been converted to be Kitui/block1/298). He states that the plot is entirely different from and not on the same row of properties as the suit property and that he had produced a survey map to that effect. He avers that he inherited this property from his late grandmother.
4. The applicant states that the subordinate court disregarded and failed to consider and/or make a determination as regards the applicant's protestations concerning the difference in the two properties as well as the applicant's invitation for a site visit for purposes of ascertaining the true position on the ground. The applicant states that he has an arguable appeal and that it is crucial that stay orders be granted pending the hearing and determination of the appeal to avoid suffering irreparable loss and damage as well as to not render the appeal nugatory. The applicant insists that there will be no loss or prejudice to the respondent as a result of granting the orders.
5. In his written submissions, the applicant submitted that the respondent arrived at security in the sum of Ksh 1, 000,000/= arbitrarily as the same is not lawfully quantifiable. They submitted that the security envisioned by order 42 rule 6 of the Civil Procedure Rules (2020) should be reasonable and should not have the effect of denying an aggrieved party the constitutionally guaranteed right to be heard by a court of law on the merits of their case as they relied on the holding in the case of Arunc Sharma v Ashana Raikundalia T/A Raikundalia & Co A dvocates & 2 others(2014)eKLR where the court held that the purpose of the security is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant and it is not to punish the judgment debtor and that any security acts as security for due performance of such decree. The appellant/applicant proposes that the same should not exceed the sum of Ksh 35, 000/= being an estimate of the taxable costs that may be ordered, taking into account that the appeal herein merely relates to an impugned ruling over an application and not a liquidated judgment.
6. The applicant submits that it is an appeal from a ruling in respect of an application wherein there was no liquidated award save for the costs of the application.
7. The applicant denied making any court file disappear and he urged the court to place the file in a strong room safe. They urged the court to allow the application to avert a situation where the applicant is forcefully evicted from their property different from the suit property.

### **The Respondent's Case**

8. In response thereof, the respondent filed their grounds of opposition dated July 20, 2022 stating that the applicant has not offered any appropriate proportionate security for the costs that may be necessary for the due performance of such decree or order of the court as may ultimately be binding upon the applicant. The respondent further claimed that there is need for the substantial proportionate security, given that based on past experience, there is apparent great risk of the records and the proceedings relating to this matter disappearing, and now that, there is eminent possibility of execution, it is even more likely that, by design, the court records may be made to disappear in order to defeat the attainment of justice for the respondent.
9. The respondent proposed security of Ksh 1, 000,000/= or thereabouts, be deposited in order to secure fair and just justice for both parties.
10. The respondent submitted that the issue of security for costs pending appeal is a matter of law, statute and judicial pronouncements and that even though it is not a clear-cut matter; it depends on the peculiar circumstances of each case.



11. The respondent submitted that he is not opposed to the grant of the orders for stay, but substantial proportionate security for costs must or ought to be deposited in the circumstances of these proceedings being that the process of execution of the decree by eviction has already been put in motion and is an expensive process in such a fully developed town involving multi-agency offices e.g the police, auctioneers, court bailiffs, chiefs/assistant chiefs while relying on this Court’s own ruling of *Mwathi Muthami v Mbeere Muthami & another*(2022) eKLR. Secondly, the respondent raised the issue that the judgment and decree was issued way back in 2013 and that the appellant herein appealed from it and failed to prosecute the appeal, resulting in the appeal being dismissed on September 26, 2017 and the appellate files disappeared from the registry completely stating that if the applicant procures a free stay or with a very low security level, he may as well forget the appeal. The respondent therefore submits that his suggestion of Ksh 1, 000,000/= was not baseless or unfounded.
12. The respondent submitted that the applicant seems to be ignorant of what the security for costs would cover that is; party and party costs in the lower court, party and party costs in HCCA No 192 of 2013 and party and party costs for this application. The respondent relied on the case of *Paul Kamura Kirunge v John Peter Ng’ang’a*(2019)eKLR Justice L Gacheru ordered a security of Ksh 500,000/=.

### **Analysis and Determination**

13. The application for stay of execution of the trial court’s ruling of January 18, 2022 is brought under order 42 rule 6(2) of the *Civil Procedure Rules(2010)* which provides that:

“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.
14. It is noted from the grounds of opposition filed by the respondent’s counsel that they are not opposed to the grant of orders of stay of execution pending appeal save that the applicant be ordered to comply with order 42 rule 6 (2) (b) –that is, substantial proportionate security for costs must or ought to be deposited
  15. The purpose of security was clearly enunciated in *Arun C Sharma v Ashana Raikundalia t/a Rairundalia & Co Advocates & 2 others* [2014] eKLR, where the court stated:-

“The purpose of the security needed under order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. it is not to punish the judgment debtor.... civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

16. I have considered the particular circumstances of this case that may assist in determination of the quantum of and/or nature of security to be ordered for the due performance of the orders of the trial court should the appellant not be successful in the appeal. The considerations are that the judgment of the trial court was on September 12, 2013 and the decree issued on November 30, 2020 and yet there is no evidence of compliance with the said decree by the applicant. I have also considered that the application before the trial court was for enforcement/ execution of the decree. Further, that there



is no pending appeal against the judgment of the court. I have also considered that the applicant has not made any offer for any security that would be sufficient in his view for due performance of his obligations under the order of the trial court. I have also considered that the process of execution of the decree by eviction was the subject matter of the application before the trial court and the same has been put in motion and is an expensive process involving various offices e.g the police, auctioneers, court bailiffs, chiefs/assistant chiefs.

17. I have also considered that in granting orders for security of costs the court must bear in mind that they should not be punitive to any party nor disadvantage them and impede access to justice. Further that the issue at hand is not a money decree but a contempt of court order. The security that commends itself to the court need not be very high. It is also prudent for the court to set a strict timeline for the hearing of this appeal, in order that the respondent is not kept away from enjoying the fruits of his decree and/or order.
18. Having considered all factors herein determined, I allow The application dated July 15, 2022 in the following terms:-
  1. That there be a stay of execution on the ruling of the Chief Magistrate's Court in Kitui CMCC No 198 of 2011 delivered by the Honourable M Kasera on January 18, 2022 as well as on all the other consequential proceedings ensuing from the said Ruling, pending the hearing and the final determination of the appeal herein.
  2. Within 30 days from the date of this ruling, the applicant to deposit in court the sum of Kshs 200,000/- being security for the due performance of his obligations under the orders of the court.
  3. The appeal to be heard and determined within 90 days from the date of this ruling.
  4. Costs of this application are awarded to the respondent

**DELIVERED, DATED AND SIGNED AT KITUI THIS 5<sup>TH</sup> DAY OF OCTOBER 2022.**

**HON. L. G. KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE**

Ruling read in open court and virtually in the presence of-

Musyoki: Court Assistant

Kinoti Advocate for the Appellant/Applicant

Kilonzi Advocate for the Respondent.

