



REPUBLIC OF KENYA



**Mwikya & another v Ngaruiya & another (Civil Suit E014 of 2021)
[2022] KEELC 15663 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15663 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL SUIT E014 OF 2021
JA MOGENI, J
NOVEMBER 3, 2022**

BETWEEN

STEPHEN MBITHI MWIKYA 1ST PLAINTIFF

LUCIA MARY MBITHI 2ND PLAINTIFF

AND

MUNGAI NGARUIYA 1ST DEFENDANT

ELIZABETH WANJIKU NGARUIYA 2ND DEFENDANT

RULING

1. The Court is called upon to determine two applications as follows: -

a. A Notice of Motion dated June 6, 2022 by the Plaintiff/Applicant herein and is brought under the provisions of Order 42 Rule 6 and Order 51 of the *Civil Procedure Rules* and all other enabling provisions of the law. The Plaintiff/Applicant seeks the following orders:

1. Spent
2. That the Court be pleased to stay the execution of the judgment and the orders delivered and issued on June 2, 2022 pending the hearing and determination of this application inter parties.
3. That the Court be pleased to stay the execution of the judgment and the orders delivered and issued on June 2, 2022 pending the hearing and determination of the intended appeal to the Court of Appeal.
4. That costs of this Application be in the cause.



- b. A Certificate of Urgency dated June 14, 2022 was filed in relation to the above-mentioned Notice of Motion Application dated June 6, 2022 seeking for stay of execution.
2. The grounds are on the face of the application dated June 6, 2022 and are listed as in paragraphs (A) to (H). I do not need to reproduce them here. The said application is supported by an affidavit and further affidavit both sworn by Stephen Mbithi Mwikya, the Plaintiff/Applicant herein on June 6, 2022 and June 23, 2022 respectively.
 3. The Application is opposed. There is a Replying Affidavit sworn by Mungai Ngaruiya on June 10, 2022.
 4. When the Application came up before this Court for determination, I gave direction for its disposal by way of written submissions. The Plaintiffs/Applicants filed their written submissions dated June 23, 2022 on the even date. The Defendants filed their written submissions dated September 26, 2022 on the even date. A Ruling date was reserved.
 5. The background of the matter is that the Court delivered its Judgment on June 2, 2022 wherein it dismissed the Plaintiff's claim and ordered for vacant possession and eviction of the Plaintiffs in respect of the suit property LR 12715/5813 among other orders.
 6. The plaintiff/applicant being aggrieved by the said Judgment proceeded to file a Notice of Appeal dated June 6, 2022. He avers that he will suffer irreparable loss and damage if the orders sought are not granted. He also contended that they filed the application without undue delay. It is the Plaintiff's case that they are aware that filing of the notice of appeal does not operate as stay of the execution of the Judgment of June 2, 2022 and the Defendant can proceed to execute and implement the orders of June 2, 2022. He added that if execution proceeds, the appeal would be nugatory and would be tantamount to an academic exercise.
 7. He contends that the Plaintiffs are ready and willing to abide with any conditions that this Court may set for granting the stay pending appeal including furnishing security as the Court may direct for due performance of the decree.
 8. In their further affidavit, they argue that they have been in occupation of the suit property since their purchase in 2008 having quiet and uninterrupted possession thereof. It is their case that the Defendants have not developed in any way on the suit land as they have never been in possession since 2008. They argue that they have an arguable appeal with a high probability of success as can be seen on the attached draft memorandum of appeal (SM-1). That there will be no further infringement of the Defendant's right as alluded by the Defendants as they have never been in occupation of the suit land. That it is the fraud alluded to that forms part of the reason why the Applicants intend to Appeal as they contend that they did not engage in the same. The applicants reiterated that they are ready to abide with any conditions including payment of any security that the court will require as a condition for granting the stay of execution.
 9. It is the Defendant's case that the Plaintiffs' have failed to show any prejudice or loss they stand to suffer if the judgment is not stayed, considering that it is the Respondents who are in possession of the suit property. They added that the applicants have not developed the suit property being that they are not in possession of the same and therefore the judgment issued does not in any way alter the status quo. They argue that the Applicants have not annexed any draft memorandum of appeal to enable the court establish whether their intended appeal contains any triable issues or hold any merit or is merely an abuse of the court process. The Defendants argue that staying the judgment would only further the infringement of the Respondent's right to peaceful possession of their property. lastly, he argues



that the Applicants have not provided any security to the Respondents and the Respondents therefore stand to suffer irreparable harm in the event the Applicant's intended appeal does not succeed.

Analysis and Determination

10. This court has carefully considered the Application and found two issues for determination. These are;
 - a. Whether stay of execution pending appeal is merited?
 - b. Whether there is an arguable appeal to warrant the issuance of the orders sought?
11. The principles that guide the Court when deciding on application for stay of execution pending appeal are clearly set out under Order 42 Rule 6 (1) and (2) of the [Civil Procedure Rules](#), which provides:
 - (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 sub-rule (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.
12. A stay of execution under order 42 of the [Civil Procedure Rules](#) is an interim order to suspend the rights of one party who is aggrieved with the judgment of the trial; court or tribunal and wishes to exercise his or her right of appeal. Its main objective is to protect the substratum of the suit by delaying the execution process like attachment until the determination of the appeal. Being a discretionary remedy, the applicant must demonstrate that he or she has approached the court of equity with clean hands as succinctly stated in the case of *Jajbhay v Cassim* 1939 AD 537-551 the court held on this maxim that: "All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice."
13. The general principle of law is that the successful litigant in possession of a valid court judgement is entitled to the fruits of judgement unless there exist exceptional circumstances to deny him or her that right.
14. In considering an application for stay of execution I am guided by the case of [Butt vs Rent Restriction Tribunal](#) Civil App No. NAI 6 of 1979 (Madan, Miller and Porter JJA) where the following guidelines were given: -

"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.

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. 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. 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.”

15. The first limb of consideration is whether there was unreasonable delay in filing the application for stay of execution. Judgment was delivered on June 2, 2022 and the applicants filed their notice of motion under certificate of urgency on June 6, 2022. I find that the said application is brought without undue delay.
16. In the case of *Kenya Women Microfinance Ltd ...Vs...Martha Wangari Kamau* [2020] eKLR the Court cited the case of *Samvir Trustee Limited ...Vs... Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997 which held that;

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

17. From the cited decision, it is clear that for the Court to grant stay of execution of the Ruling, the Applicants need to satisfy the Court that they will suffer substantial loss. In the case of *Century Oil Trading Company Ltd vs Kenya Shell Limited* Nairobi (Milimani) HCMCA No 1561 of 2007 the court stated;-

“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay



of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue.

The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

18. In Bungoma HC Miscellaneous Application No 42 of 2011 *James Wangalwa and another Vs. Agnes Naliaka Cheseto* the court further discussed what substantial loss entails:

“The application 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. This is what substantial loss would entail.”

19. The applicants should not only state that they are likely to suffer substantial loss but they must also prove that they will suffer loss. The applicants say they will suffer irreparable loss and damage if the orders sought are not granted. They contend that the Defendant can proceed to execute and implement the orders of June 2, 2022. The Plaintiffs added that if execution proceeds, the appeal filed would be nugatory and would be tantamount to an academic exercise.
20. The Applicants bear the burden of proving that by refusal to grant stay of execution they stand to suffer substantial loss. In this instant application the Applicants save for, mentioning that the Defendant can proceed to execute and implement the orders of June 2, 2022 did not tender any evidence to show the nature of loss they are likely to suffer should an order of stay be denied.

Whether there is an arguable appeal

21. The mere filing of a Notice of Appeal does not automatically warrant the issuance of orders of stay of execution of the decree. In the present situation, the Applicant has annexed a copy of the Notice of Appeal dated June 6, 2022, a letter dated June 6, 2022 in which the Applicants herein are seeking copies of typed proceedings, judgment of June 2, 2022 to enable him file an appeal and a draft memorandum of appeal dated June 23, 2022.
22. From my perusal of the draft Memorandum of Appeal on record I am not persuaded that the intended appeal has high chances of success. I find that the Applicants have failed to demonstrate that there exists an arguable appeal with high chances of success nor have they satisfied the pre-requisite conditions set out in Order 42 Rule 6 of the *Civil Procedure Rules, 2010* to warrant grant of stay of execution of decree pending the hearing and determination of the intended appeal.
23. An applicant seeking stay pending appeal is also required to provide security for the due performance of such decree or order as may ultimately be binding on him. I find that Order 42 Rule 6 (2) (b) of the *Civil Procedure Rules* stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. In the case of Aron C Sharma vs Ashana Raikundalia T/A Rairundalia & Co Advocates the court held that:

“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.”

24. Under the provisions of Order 42 rule 6 (1) (2) of the Civil Procedure Rules, a party seeking a stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. In the instant matter, the applicants were required to provide the actual security for consideration by the Court as to its sufficiency. In the case of Equity Bank Ltd -vs- Taiga Adams Company Ltd [2006] eKLR it was held that: -

“of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought ...let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...” which principle was also emphasized in *Carter & Sons Ltd -vs- Deposit Protection Fund Board & 3 Others*.

25. In the instant matter, the applicants have not offered any security. The Applicants merely stated that they are ready to abide with any conditions including payment of any security that the court will require as a condition for granting the stay of execution. The offer for a security should come from the applicant, it should not be inferred or implied or left for the Court to make an order for security for due performance as that would amount to stepping into the arena of dispute.

Disposal Orders

26. In view of the foregoing, the applicants have not met the conditions precedent set out under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules and the application dated June 6, 2022 thus lacks merit and is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED THIS 3RD DAY OF NOVEMBER 2022

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MOGENI J.

JUDGE

In the Virtual Presence of:-

Ms. Irungu for Plaintiffs

Ms. Wanga for Defendants

Ms. Caroline Sagina : Court Assistant

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MOGENI J.

JUDGE

