



REPUBLIC OF KENYA



Nyamoita & another v Sayo & another (Environment and Land Appeal E008 of 2022) [2022] KEELC 14717 (KLR) (7 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14717 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL E008 OF 2022
JM ONYANGO, J
NOVEMBER 7, 2022**

BETWEEN

ALICE NYAMOITA 1ST APPELLANT

FREDRICK MAGUTO ATANDI 2ND APPELLANT

AND

MERCY MALOMBO SAYO 1ST RESPONDENT

JOHN MOKORA KENANDA 2ND RESPONDENT

RULING

1. What is before me is the appellant/applicant's notice of motion dated April 20, 2022 seeking a stay of execution pending appeal. The application is premised on the supporting affidavit of Alice Nyamoita Atandi, the 1st appellant herein sworn on the April 20, 2022.
2. The main ground for the application is that the applicants are faced with imminent eviction from their home before their appeal is heard and determined.
3. The applicants filed a similar application in the lower court following an ex-parte judgment in favour of the respondents but the same was dismissed.
4. The application is opposed by the respondents through the replying affidavit of Mercy Malombo Sayo, the 1st respondent herein sworn on the June 4, 2022. In the said affidavit she depones that the applicants failed to convince the lower court to grant a stay of execution as they were unable to challenge the affidavit of service which indicated that they had been served with summons. She further depones that since the applicants' application in the lower court was dismissed, the court cannot stay a negative order. It is her further averment that the application is untenable as applicants are not the registered owners of the suit property and that they are mere trespassers thereon.



5. The court directed that the application be canvassed by way written submissions and both parties filed their submissions.

Issues for Determination

6. The sole issue for determination is whether a stay of execution pending appeal ought to be granted.

Analysis and Determination

7. I will determine the competence of the application in line with order 42 rule 6(1). The court needs to satisfy itself that the applicants have exhausted their rights before the trial court before approaching this court. The law reads:-

' 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 be granted or refused by the court appeal 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 orders thereon as may to it seem just, and any person aggrieved by an order of stay made by court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.' (Emphasis provided)

8. I understand the rule to dictate that the first port of call by an applicant for stay pending appeal is the trial court and that once it considers and determines the application then an aggrieved party has the liberty to approach this court and have the orders so issued set aside.
9. Put in the context of the matter before me, the applicants have approached this court for orders of stay because their application in the trial court was declined
10. In order to grant an order for stay of execution pending appeal I must be satisfied that the applicants have discharged their obligations imposed by order 42 rule 6 (1) and (2) of the Civil Procedure Rules.
11. The principles that guide the court in the exercise of its discretion to grant a stay of execution are now well settled. The substantive provision for grant of stay pending appeal is to be found under order 42 rule 6 of the Civil Procedure Rules.

Order 42 rule 6 provides in part as follows: -

- 6.(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. In the case of *M.O.M Amin Transporters Limited & Another v Alexander Ndung'u Mbugua & 2 Others [2017] eKLR* the court held that all the three conditions had to be met and satisfied simultaneously in order for the court to exercise its discretion and grant a stay of execution. The court stated as follows: -

' 13. In the cases of *Kiplagat Kotut vs Rose Jebor Kipngok [2015] eKLR*, *Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR* and *Kenya Shell Limited vs Kibiru (Supra)*, the common thread was that a stay of execution will not be granted unless the conditions in order 42 rule 6 of the Civil Procedure Rules are satisfied.'

13. Furthermore, in the case of *Equity Bank Limited v Taiga Adams Company Limited [2006] eKLR* Mutungi J stated as follows:

' It is not enough to satisfy 1 or 2 of the requirements order 42 rule 6. All of the requirements must be met for the court to grant orders of stay pending appeal.'

14. In the instant suit the 1st applicant has mentioned in his affidavit that if a stay of execution is not granted, they will be displaced from their home thus they will suffer substantial loss and prejudice and their appeal will be rendered nugatory.

15. In the case of *Wangalawa & Another v Agnes Naliaka Cheseto (2012) eKLR* the court observed as follows:

' The applicant 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, a question that was aptly discussed in the case of *Silverstein N v Chesoni (2002) 1KLR 867* and also in the case of *Mukuma v Abuoga* quoted above. The last case referring to the exercise of discretion by the High Court and Court of Appeal in the granting of stay of execution, under order 42 of the CPR and rule 5 (2) (b) of the Court of Appeal Rules respectively, emphasized the centrality of substantial loss thus:

...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.'

16. Substantial loss has been defined to be the kind of a loss that is assessed by the totality of the consequences awaiting the applicant if stay is not granted. In *Dawie Chebutal Rotich & 2 Others vs Emirates Airlines, Civil Case No 368 of 2001*, Mutunga J deformed substantial:-

'is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.'

17. With regard to timeliness, the applicants first filed an application for stay in the lower court on September 27, 2021 following the entry of judgment against them on the same date. The said application was dismissed by the lower court vide its ruling delivered on April 7, 2022. Following the



said dismissal, the applicants filed the instant application on April 20, 2022. It is therefore clear that the application was filed without any undue delay. With regard to the issue of security, the applicants have not offered any security for costs.

18. The respondents have strenuously opposed the application on the grounds that the applicants were served with summons to enter appearance. They have also pointed out that the applicants have failed to attach the order appealed from. Suffice is to say that the issue of whether or not the summons were properly served upon the applicants is the main subject of the appeal and it would not be proper for the court to make a determination on it at this early stage. As regards the extraction and attachment of the decree, this will no doubt be necessary when the record of appeal is filed but it cannot be the basis for declining an application for stay.
19. I have said enough to demonstrate that the applicants have met the conditions for stay and I am therefore inclined to grant a stay of execution on condition that the applicants deposit Kshs 100,000 as security for costs.

Having granted the order for stay of execution, I do not find it necessary to delve into the issue of injunction pending appeal as granting both would be an overkill.

The upshot is that the application is granted in terms of prayer 4 on condition that the applicant deposits a sum of Kshs 100,000 in court as security for costs within 21 days.

The costs of the application shall be borne by the applicant.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF NOVEMBER, 2022

J.M ONYANGO

JUDGE

