



**Njuguna v Mohammed (Environment and Land Appeal 33 of 2018)
[2022] KEELC 14526 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14526 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 33 OF 2018**

JG KEMEI, J

NOVEMBER 3, 2022

BETWEEN

SAMSON KARANJA NJUGUNA APPELLANT

AND

KHAMIS ALI MOHAMMED RESPONDENT

RULING

1. The appellant filed this Motion dated 15/2/2022 seeking the following orders;-
 - a. Spent
 - b. Stay of execution against the said Judgment of 13/3/2021 and the trial court's decree issued on October 30, 2018 pending the hearing and determination of his second appeal.
 - c. Costs of the application
2. The application is premised on the grounds annexed thereto and the supporting affidavit of Samson Karanja Njuguna, the appellant/applicant as thus; the Judgment dated 18/3/2021 disfavoured him; aggrieved by the said Judgment and has sought for the certified copies of the proceedings and Judgment in vain hence delaying the filing of his record of appeal; the respondent is intent on commencing execution of the decree (see the letter dated the November 22, 2021) and the appellant may suffer loss and damage; has an arguable appeal with high probability of success; appeal will be rendered nugatory if the orders are not granted occasioning him irreparable harm and losses.
3. The Application is opposed. The respondent, Khamis Ali Mohamed swore his replying affidavit on 24/2/2022. He averred that through his Advocates, he drew a letter to the applicant's Counsel forwarding a cheque for the balance of the purchase price as ordered by the Chief Magistrate's Court and requested the applicant to execute the transfer forms in vain. Copy of the letter is annexed as KAM1. That he and his family have been in occupation of the suit land having taken possession



29/8/2005 and considerably developed the land. That the applicant has not attached a copy of his intended Appeal for the Honorable Court to consider any arguable issues. Be that as it may he deposed that he has been able and willing to complete the purchase but the applicant has adamantly refused and now the court ought to allow the respondent enjoy fruits of his Judgment. He beseeched the court to dismiss the application with costs.

4. The application was canvassed by way of written submissions. The firm of Nganga Ngigi & Co. Advocates filed submissions dated 20/5/2022 on behalf of the applicant while the Respondent's submissions dated 17/6/2022 were filed by M/s Wambui Ngugi & Co. Advocates.
5. The applicant rehashed the provisions of Order 42 Rule 6 *Civil Procedure Rules* on stay of execution and the case of *Jamii Bora Bank Ltd & another v Samuel Wambugu Ndirangu* on the discretionary power of the Court to entertain such an application. That unless there is an overwhelming hindrance, stay of execution must be granted so that an appeal is not rendered nugatory taking into account the special circumstances of each case. On the issue of substantial loss, the applicant relied on the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR that where execution has been levied and completed in itself does not amount to substantial loss. He urged the court to allow his application with costs.
6. On the other hand, the respondent outlined the background of the suit and drew two issues for determination; whether an order for stay of execution should be granted and who bears the costs of the application. On the first issue, he submitted that applicant has not demonstrated what loss he stands to suffer if the application is not granted. That he failed to annex a copy of the intended appeal for this court to consider whether any arguable issues have been raised. That the suit has been subsisting since 2009 and the respondent is yet to enjoy the fruits of his Judgment and beseeched the court to dismiss the Application with costs.
7. Having considered the application the affidavit evidence both in support and in opposition of the application and the submissions filed by both parties, the key issue for determination is whether the applicant is deserving of the orders of stay of execution.
8. Order 42 Rule 6 of the *Civil Procedure Rules* states thus; -

“6. Stay in case of appeal [Order 42, rule 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.”



9. In the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal namely; -
 - a. 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.
 - b. 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 appealcourt reverse the judge’s discretion.
 - c. 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 theapplicant at the end of the proceedings.
 - d. 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.

10. With respect to substantial loss, it is trite that anapplicant must lead evidence to demonstrate the substantial loss that s/he is likely to suffer if the Application is not granted. The applicant submitted that the danger of his appeal being rendered nugatory constitutes substantial loss on his part. The courts have been consistent that execution alone does not constitute substantial loss. See the case of *James Wangalwa* (*supra*) and *Machira T/A Machira & Company Advocates v East African Standard* (No 2) 2002 2 KLR where the court held that substantial loss must be specified, details or particulars thereof must be given and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further. In this case, the appeal was dismissed with costs to the respondents and the trial court Judgment upheld.

11. Was the instant application filed timeously? The applicant did not address this limb in his Application. The Judgment herein was delivered on 18/3/2021 and the Application was filed over one year later on 12/4/2022. No plausible explanation for this inordinate delay has been proffered and, in my opinion, the limb is not satisfied. Instead the applicant emphasized the delay on receiving typed proceedings which in my view is not necessary for filing such an Application nor is a prerequisite under Order 42 CPR.

12. In the case of *Utalii Transport Company Limited & 3 others v Nic Bank Limited & another* [2014] eKLR the court held thus;

“Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court’s mind on the delay, caution is advised for courts not to take the word ‘inordinate’ in its dictionary meaning, but in the sense of excessive as compared to normality.”

13. It has also been held that even one day can be termed as inordinate delay and one year can be construed not to be inordinate delay. See the case of *Vincent Amolo Ambani t/a Fast Track Investment v National Bank of Kenya Ltd* [2021] eKLR.



14. In the end, I find that the applicant has failed to meet the threshold to grant an order for stay of execution as prayed.
15. The application is unmerited and the same be dismissed with costs to the respondent.
16. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 3RD DAY OF NOVEMBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of

Ms Thuo HB Kimani for Plaintiff

Defendant – Present in person

Court Assistants – Phyllis Mwangi / Oliver

