



**Wambua v Kenya Railways Corporation (Environment & Land Case 52 of 2018) [2022] KEELC 14650 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14650 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 52 OF 2018  
EK WABWOTO, J  
NOVEMBER 3, 2022**

**BETWEEN**

**JACINTA MUTHONI WAMBUA ..... PLAINTIFF**

**AND**

**KENYA RAILWAYS CORPORATION ..... DEFENDANT**

**RULING**

1. The Defendant filed a Notice of Motion Application dated September 20, 2022 which was accompanied by a supporting affidavit sworn by Christine Macharia. The sought the following orders:
  - i. That this Application be certified urgent and service thereof be dispensed with in the first instance.
  - ii. That pending the hearing and the determination of this Application herein, an order of stay of execution do issue against the judgement delivered by this Honourable Court on August 30, 2022.
  - iii. That pending the hearing of the intended Appeal to the Court of Appeal, there be a stay of execution of the judgement delivered by this Honourable Court on August 30, 2022
  - iv. That the Applicant be at liberty to apply for further Orders and/or directions as the Honourable Court may deem fit and just to grant
  - v. That the costs of this Application be provided for
2. The application was based on several grounds including that:
  - a. The Plaintiff has initiated extraction of the Decree and therefore the prospects and threat of execution against intended Appellant is real and imminent.



- b. The intended Appeal from the judgement/orders of this Honourable Court delivered on August 30, 2022 will be rendered nugatory unless a stay is granted.
  - c. The Applicant and the taxpayer stand to suffer irreparable harm and damage if the application herein is not heard and a stay of execution is granted pending the hearing of the intended appeal, noting that any funds payable by the Applicant are proceeds of public funds.
3. In opposition to the application, the Plaintiff filed a replying affidavit sworn on October 5, 2022 by Jacinta Muthoki Wambua. It was averred that granting stay would deny her the fruits of the judgement for which she had waited for years.
  4. It was further asserted that the Appeal did not have a probability of success since the court did not err in awarding special damages and thus did not issue the orders in vain. Furthermore, it was argued that the substantial loss to be suffered was unsupported by evidence.
  5. It was reiterated that the loss was actually to the Plaintiff who would additionally lose the true value of the goods on account of inflation. Being a money decree it was argued that in the event of a successful appeal the money could be paid back.
  6. Relying on Section 3A of the *Civil Procedure Act*, Order 42(Rule 6) and Order 22(Rule 22) of the *Civil Procedure Rules*, the Defendant enumerated several grounds in support of the application. It was further submitted that being a state owned corporation, it was willing and will be able to abide by the orders issued upon conclusion of the Appeal.
  7. Having considered the application and supporting documents, it is clear that the issues for determination before this court is whether the Applicant has met the threshold for grant of stay pending appeal.
  8. The Court is guided by Order 42 rule 6 of the *Civil Procedure Rules, 2010* which provide as follows;

“...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 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.

No order of stay 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 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 *Machira t/a Machira & Co Advocates vs. East African Standard* (No. 2) [2002] KLR 63 it was held that:

“...to be obsessed with the protection of an appellant or intending appellant in total disregard or fitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial



discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court...”[Emphasis Added]

10. This Court must balance the rights of the respective parties right to appeal versus the right enforce the orders of the said Court. In Paragraph 13 of the replying affidavit the Plaintiff deposes that if the Appeal is successful and this being a money decree the same can be paid back since she is a banker working with CFC Bank.

In Paragraph 20 of the supporting affidavit, the Defendant averred:

“The Applicant is a respected government-owned corporation which is able to abide by such orders on payment as may be issued upon conclusion of the Appeal.”

11. This Court is further guided by the case of *Carter & Sons Ltd vs. Deposit Protection Fund Board & 2 others* Civil Appeal No. 291 of 1997, at Page 4 as follows:

“... the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . . the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”[Emphasis Mine]

12. I have considered that the Appeal process is a seemingly long process and the orders sought would further deny the Plaintiff of her long awaited relief. No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that does not in itself amount to substantial loss under Order 42 Rule 6 of the *Civil Procedure Rules*. This is so because execution is a lawful process. 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.
13. I also take cognizance of following; First, that this court had already granted the Applicant a stay of 21 days pending the filing of its appeal. Secondly, the Defendant has already declared capacity and willingness to adhere to any orders that would be issued by this court, therefore the mere declaration that the Defendant would use public funds in settling the decree does not suffice to prove substantial loss. Lastly, security for costs has not been expressly offered by the Defendant/Applicant. Consequently, I am not persuaded that if the application is for granting. To my mind, the order for stay would hinder the Plaintiff’s quest for justice and act contrary to the laws of equity.
14. In the foregoing, the Court finds that the Application dated September 20, 2022 is unsuccessful and the same is hereby dismissed with no orders as to costs.
15. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF NOVEMBER 2022.**



**E. K. WABWOTO**

**JUDGE**

**In the presence of: -**

**Mr. Eric Mutua S.C for the Plaintiff/Respondent.**

**Mr. Ondari for the Defendant/Applicant.**

**Court Assistant; Caroline Nafuna.**

**E. K. WABWOTO**

**JUDGE**

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