Odhiambo v Sarman Group Company Limited (Environment and Land Appeal E028 of 2023) [2025] KEELC 323 (KLR) (23 January 2025) (Ruling)

Neutral citation: [2025] KEELC 323 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

ENVIRONMENT AND LAND APPEAL E028 OF 2023

FO NYAGAKA, J

JANUARY 23, 2025

BETWEEN

TOM MBOYA ODHIAMBO .... APPELLANT

AND

SARMAN GROUP COMPANY LIMITED .... RESPONDENT

RULING

1. The Appellant brought a Notice of Motion dated 12th June 2023, under Order 42 Rule 6(1) as read with Rule 6(4) of the Civil Procedure Rules 2010 and any other provisions of the law. He sought the following prayers: -

    1. ...Spent
    2. ...Spent
    3. The Honorable Court be pleased to issue an order of stay of execution of the decree issued by Honourable J. M. Nangea, Chief Magistrate in the original land suit No. 45 of 2022 at the Magistrates Court at Homa Bay, pending the hearing and determination of this appeal.
    4. The cost of this application to abide the result of the pending appeal.

2. He brought the application on five (5) grounds. The first one was that judgment was delivered on 26th April 2023, the instant appeal filed on 24th May 2023 and served upon the Advocate for the Respondent. The Appeal is arguable and stands overwhelming chances of success. The Appellant stands to suffer irreparable damage and loss which is not capable of being compensated monetarily should the instant appeal succeed but the execution proceeds before it is heard. The suit land and house built thereon is family land and his wife and children had an overriding interest pursuant to Section 28(a) of the *Land Registration Act*. The appeal will be rendered nugatory if execution proceeds.

3. He supported the Application through an affidavit he swore on the 12th of June 2023. He repeated the contents of the application but in deposition form. He added that Judgment was entered against him requiring him to vacate land parcel number Kasunga/Kamreri/4021 within 45 days. He filed an appeal therefrom. He had annexed a copy of the Memorandum of Appeal and marked it TMO1. He had been an occupation of the suit land for a very long period, during which he centralized all his developments on it, and he stood to suffer, irreparably execution proceed. He was willing to offer security to be held by the court.

4. The Respondent filed Grounds of Opposition under Order 51 Rule 14(2) of the Civil Procedure Rules, 2010. They were that the Application was premature, misconceived, incompetent and legally untenable. It did not meet the threshold of provisions of Order 42 Rule 6(2) of the Civil Procedure Rules. The applicant had not made or satisfied and/or established the requisite conditions for stay, inter alia proven substantial loss to warrant the orders of stay being granted. He had not enumerated or highlighted the nature and/ or kind of loss he was bound to suffer consequently the allegations of immense loss were speculative and remote. The application was an attempt to deprive the Respondent of the fruits of successful litigation. The application constituted an abuse of the due process of court and did not raise any reasonable cause of action. It was an attempt to delay, obstruct and otherwise defeat the due process of court and in particular, the vacant possession and use of the disputed portion of the disputed property. At any rate the application was launched with undue delay which had not been explained since the decree was given on 26th of April 2023. The application was devoid of merits.

5. The application was disposed of by way of written submissions. The applicant filed his submissions dated 5th December 2024. In them he raised only one issue for determination, which was whether the stay of execution should be granted pending appeal. He reproduced Order 42 Rule 6(2) of the Civil Procedure Rules and relied on the case of Paul Kamura Kirunge v. John Peter Nganga [2019] eKLR and James Wangalwa & another v. Agnes Naliaka Chesto [2012] eKLR.

6. The respondent filed his submissions dated 3rd December 2024. He too gave one issue for determination, which was whether the Applicant had met or demonstrated the conditions set out for stay of execution of the decree. He stated that these were provided for under Order 42 Rule 6 of the Civil Procedure Rules, which he summarized. He divided them into three. The first one was whether there was substantial loss to be suffered by the applicant. He summarized on this that it was the cornerstone of granting an order of stay of execution pending the determination of an appeal. The applicant needed to place evidence before the court by way of Affidavit to show the kind of loss he alluded to and it ought to be imminent. He added that apprehension of intent to execute the decree given that he had been in occupation of the suit property for a long time was not enough as he did not annex anything by way of pictures (sic) to demonstrate any development he had made on the land. He relied on the case of Machira T/A Machira and Company Advocates versus East African Standard [2002] eKLR, where the court stated that the kind of loss to be sustained must be specified, detailed and/or particulars thereof given. He also relied on the case of Ndegwa Gichine v. Sicily Warware Njira [2018] eKLR.

7. On unreasonable delay, he submitted that the application was brought on 2nd October 2024 yet the decree was given in 26th April 2023, which was more than one year hence there was inordinate delay.

8. On furnishing security, he submitted that the Applicant was under obligation to demonstrate his willingness to furnish security for the due performance of the decree. He cited paragraph 7 of the Affidavit sworn by the Applicant on 12th June 2023 in which the he deposed that he was willing to deposit security in court. He relied on the cases of James Wangalwa (supra) and Focin Motor Cycle Co. Ltd versus Anne Wambui & another [2018] eKLR in which the court stated that it was sufficient

for the applicant to state that he was willing to provide security or propose their kind of security. But it is the discretion of the court to decide the kind of security to be offered. Lastly, he relied on the case of DR. *G.N. Muema P/a Mt View Maternity And Nursing Home v. Miriam Maalim Bishar & Anor. Voi HCCA No. 20 of 2016*.

9. This Court starts by analyzing the first issue, that is to say, whether the Applicant has satisfied the requirements for grant of an order for stay of execution pending appeal. Stay of execution serves only one purpose, to preserve the subject matter pending the hearing of an appeal preferred against the judgment or order. But it is not to be whimsically granted. It has to be balanced with whether the appeal is arguable or frivolous, or the applicant is out to abuse the process of the court by merely appealing and buying time. Thus, in Consolidated Marine v Nampijja & Another, Civil App.No.93 of 1989 (Nairobi), the Court held: -

> " The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory".

10. Further, in RWW -Vs- EKW [2019] eKLR, the Court further, on the purpose of an order for stay of execution pending appeal, as follows:

> " The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs."
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> 9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however must balance the interests of the Appellant with those of the Respondent."

11. The law on stay of execution of judgment is now well settled. A successful applicant in an application seeking orders of stay of execution pending appeal must satisfy the court that he has placed himself within the legal requirements of Order 42 Rule 6 of the Civil Procedure Rules. The provision states as follows:

> " No order for stay of execution shall be made under sub rule (1) unless-
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> (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. This Court is not prepared to reinvent the wheel on the import and interpretation of this provision. It will rely on a number of decided cases that lay the basis for and expound on the conditions the Rule to be satisfied by an Applicant of this nature. Suffice it to say that in the case of Butt v Rent Restriction

Tribunal [1982] KLR 417 the Court of Appeal gave guidance on how a court should exercise discretion in this respect. It held that:

> " 1. 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.
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> 2. The general principle 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.
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> 3. 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.
>
> 4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
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> 5. The Court in exercising its powers under Order XLI rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

13. Building on that, the Court, in Civil Appeal No.107 of 2015, Masisi Mwita -vs- Damaris Wanjiku Njeri (2016) eKLR, held that: -

> " The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another..Vs...Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that: -
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> > " The High Court's discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.
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> > "In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo…Vs… Straman EA Ltd (2013) as follows: -
> >
> > > " In addition, the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory."
>
> These twin principles go hand in hand and failure to prove one dislodges the other."

14. Thus, the Applicant herein has to satisfy the limbs, as a package, as explained above. With that in mind the question is whether the applicant satisfied the conditions for grant of the order sought.

15. As to whether the Application has been brought without unreasonable delay, the Respondent submitted that the application was brought after a period of over one year and there was inordinate

delay. On his part the applicant was of the view that he moved the court timeously having done so within a month.

16. This Court has looked at the record, particularly the Case Tracking System to ascertain the facts regarding the date of filing of the instant application. I notice that contrary to the submission by the Respondent that the applicant brought the application on 2nd October 2024, over a year and almost six months after the judgment, the application was filed in the CTS on 20th June 2023. That was barely two months after the judgment was delivered and less than on month of filing the Memorandum of Appeal. In my humble view the delay was not inordinate.

17. Regarding sufficient cause as envisaged by Order 42 Rule 6(2), courts have endeavoured to explain what it means and is. Thus, in *Salim v Co-operative Bank of Kenya Limited & 2 others (Environment & Land Case 193 of 2021)* [2024] KEELRC 2291 (KLR) (23 September 2024) (Ruling), the learned Judge Naikuni J stated, and I am persuaded by him, that,

> "In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under Order 42 Rule 6. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicants unless stay of execution is granted; and thirdly such security as the court orders for the due performance of such decree or order as may ultimately be binding on them has been given by the Applicant."

18. Further, sufficient cause must entail a genuine reason which must be demonstrated from the totality of the conduct of the applicant. It must be bona fide action and not inaction on his part. Its meaning is easily understood from the expression of the Court of Appeal in Tanzania in the case of The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others wherein the Court voiced the difficulty that may be met in defining the phrase "sufficient cause". However, in Parimal v. Veena, (2011) 3 SCC 545, the Supreme Court of India observed that: -

> "sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously".

19. This imports the idea of good faith, honesty, blamelessness and diligence in action. Therefore, in the case of Halal & Another -vs- Thornton & Turpin [1963] Ltd [1990] eKLR the Court of Appeal has held that:

> ".... thus the superior court's discretion is fettered by three conditions. Firstly, 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. The application must of course, be made without unreasonable delay."

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in the case of Hassan Guyo Wakalo -vs- Straman EA Ltd (2013) as follows:

> " In addition, the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory."

These two principles go hand in hand and failure to prove one dislodges the other."

20. The next condition is whether the Applicant will suffer substantial loss if the orders sought are not granted? To answer this question, would require the Court to compare the judgment of this lower court with the prayers sought in this application and the memorandum of appeal. But as of now the lower court is not yet availed, the proceedings are not and the decree not filed yet.

21. Be that as it may, the applicant averred that he would suffer substantial loss and the appeal will be rendered nugatory if the orders of stay of execution was not granted. He gave the reason that he had made substantial developments which he contrary put together and made a matrimonial home for his wife and children. He stated that he had resided on the land for a very long time. He was ordered to vacate it within 45 days of the judgment. On his part the Respondent was of the view that the applicant had not provided evidence in form of photographs to show that he had invested on the parcel of land in question.

22. Indeed, the onus of proving a fact lies on he who alleges its existence. In the instant application, it was upon the Applicant to prove the substantial loss he would suffer if the court declines to issue the orders sought. As things stand, and gleaning from the grounds of appeal and the facts deposed to in the supporting affidavit, he and his family are on disputed land. The Court only declared that the Respondent is the owner of the parcel of land. It issued an order of eviction.

23. In Bungoma High Court Misc Application No 42 of 2011 - James Wangalwa & Another vs. Agnes Naliaka Cheseto that:

> " 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."

24. The applicant has demonstrated to this Court the nature of the substantial loss he would suffer: eviction of his family from the land upon having established a matrimonial home thereon for a long time. This limb of the Application succeeds. Thus, I now need to consider whether or not the Applicant has offered security in the event of a stay of execution being granted.

25. The Applicant deposed that he was willing to provide security that the court would keep in that respect. The Respondent submitted that he had not done well in articulating the kind of security he would furnish. I agree with the Respondent. It is not enough for a party to state that he was willing to offer security for the due performance of the decree. While security for the due performance of the decree is not meant to punish the judgment debtor or hinder him from accessing justice, it should be borne in mind by him that there is a decree holder who should not be denied the fruits of his judgment. Thus, the applicant/ judgment debtor should weigh his precarious position that is created by the final finding of the trial court that he does not deserve the orders sought, and not only offer security but demonstrate specifically how he has done so and also it be meaningful in comparison to the decree being stayed. Thus, doing the best I can herein I am of the view that since the applicant is willing to offer security, and he has been willing to do so for one year and seven months now, he be given chance to do so.

Therefore, the court grants the prayer for stay of execution of the decree issued in Homa Bay Chief Magistrate's Court land case No. 45 of 2022 on condition that the applicant deposits in court a sum of Kenya Shillings four hundred thousand (Kshs 400, 000/=) only within the next twenty-one (21) days, in default of which the condition lapses automatically. The second condition is that the applicant should file the certified copy of the decree appealed from within the next fourteen (14) days in terms of Order 42 Rule 2 of the Civil Procedure Rules and place this appeal before the Judge for consideration under Section 79B of the *Civil Procedure Act*, in default of which this appeal shall be mentioned on 6th March 2025 for Notice to Show Cause why it should not be dismissed for want of prosecution since this appeal has lain here for one year and eight months now.

26. Costs of the application to abide the outcome of the appeal.

27. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM THIS 23RD DAY OF JANUARY, 2025.

HON. DR. IUR F. NYAGAKA

JUDGE

In the presence of

1. Mr. G. S. Okoth Advocate for the Appellant

2. Mr. Mulisa Advocate for the Respondent