



REPUBLIC OF KENYA



KENYA LAW
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**Ali v Juma (Family Appeal E020 of 2023)
[2023] KEHC 22540 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22540 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E020 OF 2023
G MUTAI, J
SEPTEMBER 22, 2023**

BETWEEN

HUSNA AHMED ALI APPELLANT

AND

SAID MZAMU JUMA RESPONDENT

RULING

1. The Notice of Motion before this court is dated 23rd June 2023. The said Motion is brought under Order 42 rule 6 of the [Civil Procedure Rules](#) and Sections 1A, 1B and 3A of the [Civil Procedure Act](#). The application seeks the following orders:-
 - a. Spent;
 - b. This honourable court do grant a stay of execution of the judgement of the Kadhi's Court delivered on 8th June 2023 pending the hearing and determination of the appeal herein;
 - c. Spent; and
 - d. Costs of this application.
2. The application is premised on the grounds stated therein and also on the Supporting Affidavit of the Applicant sworn on 23rd June 2023. The Applicant deposed that the subject of appeal is the judgement of Honourable Kadhi delivered on 8th June 2023 whose effect is to vest the suit property on the Respondent who had thereafter issued her with an eviction notice. She argued that if stay is not granted she will suffer substantial loss as she will be evicted from the suit property where she has lived in all her life. The Applicant argued that the application had been made without unreasonable delay and that the Respondent would suffer no prejudice as he is assured of getting the suit property in case the appeal is dismissed.



3. She further stated that her appeal has high chances of success and urged the court to allow the application.
4. In response the Respondent filed a Replying Affidavit sworn on 22nd July 2023 and stated that the application is frivolous, vexatious and an abuse of court process. The Respondent urged that the Applicant had not met the threshold for grant of orders of stay of execution pending appeal.
5. He further stated that the applicant is one of the trustees of the Wakf of Iki Binti Faraji who was the absolute proprietor and owner of the parcel of land known as Plot No. Mombasa/BlockXVII/160 with all the developments standing thereon (the suit property). He argued that the same was consecrated as Wakf of Iki Binti Farajifor the benefit of Adi Binti Mohamed Bin Omar and Mkwaju Binti Mtandoo. Mr. Juma deposed that the applicant is merely a trustee with no claim of ownership of the said parcel of land and or property standing thereon.
6. He stated that the Applicant had not proved substantial loss on her part or how the appeal would be rendered nugatory if the orders sought are not granted. Neither had she justified inordinate and or unreasonable delay in bringing the instant application. Further, he submitted, the Applicant had not provided security for the due performance of the decree and or order.
7. He urged the court to order the Applicant to deposit the original title deed of the Wakf property (suit property) in court to avoid defeating the object of the Wakf as well as to preserve the Wakf and the property from disposal if it grants stay of execution. Further to order the applicant to deposit in court all the rent collected and all the income as security for due performance of her obligations in this matter.
8. On 25th July 2023 the court directed that the application be canvassed by way of written submissions. Subsequently the applicant through her advocates Aboubakar, Mwanakitina & Company Advocates filed her written submissions dated 31st August 2023. Counsel relied on Order 42 rule 6 of the Civil Procedure Rules,2010 and submitted that the Applicant has to prove that she shall suffer substantial loss if stay is not granted. Further that the Applicant has an arguable appeal and that if the orders sought are not granted the appeal would be rendered nugatory.
9. Counsel submitted that stay is intended to preserve the property until the appeal is determined thus it is in the interest of both parties that the property be preserved until the appeal is determined. Counsel urged the court to allow the application.
10. I have considered the application, the response therein and the applicant's submission and its now my duty to determine whether stay of execution should issue, and if so, on what conditions.
11. Stay of execution orders are provided for in Order 42 rule 6(1) and (2) of the [Civil Procedure Rules 2010](#) which provides that:-
 - a. 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.
 - b. No order for stay of execution shall be made under subrule (1) unless—



- i. 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
- ii. 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. The first element and or ground for consideration by a court in issuing orders for stay of execution is substantial loss. In this case the applicant has argued that she will suffer substantial loss if the orders sought are not granted as she will be evicted from the suit property in which she has lived all her life. She has further argued that the respondent has already issued her with an eviction notice. The court in the case of *Premier Industries Limited versus Stephen Kilonzo Matiliku* [2021] eKLR stated: -

“...Put differently, the purpose of the jurisdiction to stay execution of judgment pending appeal is to prevent substantial loss being suffered by the party appealing, while protecting the rights of the decree holder. One of the most enduring legal authorities on the question of substantial loss is the case of Kenya Shell Ltd versus Kibiru & Another [1986] KLR 410 cited by the Respondent. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the Shell case are especially pertinent. These are that:

- “1.”
2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”

The decision of Platt Ag JA, in the Shell case, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. Platt Ag JA (as he then was) stated inter alia that:-

“The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in the two courts...”

13. There is a clear and present risk that the Applicant shall be kicked out of the premises she occupies unless this Court issues orders of stay. All indications are that she has resided in the said house all her life. In my opinion that eviction from her dwelling house and being rendered homeless is a substantial loss. Accordingly, it is my finding that the Applicant has met this requirement.



14. The second ground I must consider is whether the Applicant filed the instant application without unreasonable delay. The judgement the subject of the appeal was delivered on 8th June 2023 and the application herein filed on 14th July 2023. The Court in the case of *Jaber Mohsen Ali & another versus Priscillah Boit & another* [2014] eKLR stated:-

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.”

15. A period of slightly over 1 month lapsed between the time the judgment was delivered and the filing of this application. It is my opinion that given the circumstances of this matter a one-month delay is not unreasonable and is thus excusable.

16. The third issue for consideration is security for the performance of decree. the court in the case of *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR stated: -

“Thirdly, the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal.”

17. Although this is not a money decree it is necessary to protect the interest of the Respondent so that in the event the appeal fails he is not made to start from the scratch. In my opinion this Court can craft orders that ensure that the Respondent is not prejudiced.

18. On whether the appeal has high chances of success and if it would be rendered nugatory if the orders sought are not granted I associate myself with what the Court stated in the case of *Beatrice Ndunguri Mwai & another versus Sicily Wawira Titus & another* [2020] eKLR to wit:-

“There is no requirement for a party to prove that he has an arguable appeal or one that has chances of success. Where a party has satisfied the above conditions, the court exercises discretion to order a stay. In the exercise of the discretion the court is supposed to do so in a manner that would not prevent the appeal from being heard and determined on merits. This was so held by the Court of Appeal in the case of *Bhutt v Rent Restriction Tribunal* [1982] KLR 417. The Court of Appeal held that discretion must be exercised in a manner that would not prevent an appeal. The purpose of a stay of execution maybe stated to be a measure to preserve the subject matter so that the right of appeal can be exercised without any prejudice to the applicant as the appeal would be rendered nugatory if stay is



not ordered. An applicant in this kind of application invokes the discretionary powers of the court.”

19. The upshot of the foregoing is that the Applicant has met all requirements of stay of execution as required by the law. I therefore stay execution of the judgement of the Kadhi’s Court delivered on 8th June 2023 on condition, firstly, that the Applicant deposits the original title deed of the Wakf Property being all that parcel of land known as Title Number Mombasa/Block XVII /160 in court within 30 days of the date of this ruling and, secondly, that she deposits in Court all rents collected and all income that shall fall due after the date of this ruling. In the event of default in due observance of the conditions issued herein the stay herein granted shall lapse.
20. Given the nature of the matter I do not think that an award of costs will be useful. I therefore order that each party shall bear own costs.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF SEPTEMBER 2023 VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

No appearance of for the Applicant;

No appearance for the Respondent; and

Mr. John Arthur Odalo – Court Assistant.

