



**Susat v Canobbio (Miscellaneous Application 106 of 2022)
[2023] KEHC 22413 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22413 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS APPLICATION 106 OF 2022
SM GITHINJI, J
SEPTEMBER 20, 2023**

BETWEEN

GABRIELLA SUSAT APPLICANT

AND

PIETRO CANOBBIO RESPONDENT

RULING

1. Before this court for determination is the Applicant's notice of motion application dated December 18, 2022 brought under section 1A, 1B and 3A of the Civil Procedure Act; Order 22 rule 22, Order 42 rule 6(2), and Order 46 rule 6 of the Civil Procedure Rules, 2010. The applicant seeks the following orders; -
 1. Spent.
 2. Spent.
 3. That upon inter parties hearing this Honourable court do issue a stay of execution of the decree issued by the subordinate court dated May 20, 2022 Malindi CMCC No. 415 of 2009 Pietro Cannobio v Gabriella Susat and another and all consequential proceedings pending the hearing and determination of this application and appeal.
 4. That the cost of this application be borne by the Respondents.
2. The application is supported by the affidavit of Gabriella Susat, the applicant herein, dated December 18, 2022 and based on the grounds listed on the face of it.
3. The basis of the application is that following ex-parte judgment delivered against the applicant in Malindi CMCC No. 415 of 2009 on May 20, 2022, the applicant was ordered to pay the respondent KShs. 900,000/- special and general damages. On July 4, 2022, she filed an application before the



subordinate court seeking to set aside the said judgment and be granted leave to defend the suit. That application was dismissed vide a ruling dated November 1, 2022. Dissatisfied with that ruling, the applicant preferred an appeal before this court by filing a memorandum of appeal dated November 30, 2022. The applicant is apprehensive that the respondent will commence execution process of the decree of the lower court. To her, that will amount to being condemned unheard.

4. The respondent opposed the application. He filed a replying affidavit dated January 31, 2023 wherein he deposed that the application was *res judicata* the application dated July 4, 2022 filed before the subordinate court. He added that the allegation that the applicant was not aware of the hearing date is untrue since she was served with the hearing notices.
5. Parties agreed to canvass the application by way of written submissions. I have looked at the submissions that have been filed. The issues for determination are;
 - i. Whether the application dated December 18, 2022 is *res judicata*.
 - ii. Whether the application is merited.
6. Section 7 of the [Civil Procedure Act](#) provides that;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

7. There is no doubt that an almost similar application had been filed before the subordinate court. The learned magistrate Hon. J. Ongondo, SPM dismissed that application on November 1, 2022 for lack of merit. The applicant, before that court, had sought stay of execution of the decree pending the determination of the suit and setting aside of the *ex-parte* judgment. The pending appeal is against that ruling and the present application seeks stay of execution of the decree pending the determination of the pending appeal. In my view, although the parties are the same, the issue is quite different. I find that the application dated December 18, 2022 is not *res judicata*.

“The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides:

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.”
8. Further to the above, stay may be granted for any other sufficient cause and that the court in deciding whether or not to grant the stay will be guided by the overriding objectives stipulated in sections 1A and 1B of the [Civil Procedure Act](#).
 9. It follows therefore that the applicant was obliged to satisfy the conditions set out above. That is, (a) substantial loss may result to the applicant unless the order is made, (b) that the application has



been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

10. As to what substantial loss is, it was observed in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“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 is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. 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 ... 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.”

11. Further, in *RWW -v- EKW* [2019] eKLR, the court considered the purpose of a stay of execution order pending appeal, in the following words;

“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.

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.”

12. In the instant case, the application was filed without unreasonable delay. However, save for stating that if execution is not halted, she stands to suffer condemnation unheard, the Applicant did not demonstrate how execution, a lawful process, would cause her substantial loss. The applicant did not even aver that the Respondent may not be able to repay the decretal amount if paid. In any case, the decree being a money decree, the same can be refunded in the event that the outcome of the case is against the Respondent. In the circumstances, I am not satisfied that the applicant has demonstrated that she stands to suffer substantial loss if stay is not granted.

13. Accordingly, as it was held in the James Wangalwa case [supra], substantial loss is the cornerstone of this court’s jurisdiction. Therefore, having failed to demonstrate how she stands to suffer substantial loss, I find no sufficient reason to interfere with the rights of the respondent to enjoy the fruits of his judgment.

14. The upshot is that the application dated December 18, 2022 is unmerited. It is hereby dismissed.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 20TH DAY OF SEPTEMBER, 2023.

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S.M. GITHINJI

JUDGE



In the Presence of; -

Mr Kinaro for the Respondent

Miss Oloo holding brief for Mbura for the Applicant

