



**Magon & 4 others v Gichuhi & 2 others; Registrar of Companies (Third party)
 (Civil Suit 502 of 2011 & Environment & Land Case 603 of 2011 (Consolidated))
 [2021] KEHC 12 (KLR) (Commercial and Tax) (2 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 12 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
 COMMERCIAL AND TAX
 CIVIL SUIT 502 OF 2011 & ENVIRONMENT
 & LAND CASE 603 OF 2011 (CONSOLIDATED)**

**A MABEYA, J
 SEPTEMBER 2, 2021**

BETWEEN

**ASHISH MAGON 1ST PLAINTIFF
 GEETA MAGON 2ND PLAINTIFF
 SARIKA MAGON 3RD PLAINTIFF
 RASKA INVESTMENT LIMITED 4TH PLAINTIFF
 NICHOLAS OKWACHO JUMA 5TH PLAINTIFF**

AND

**FRANCIS MAINA GICHUHI 1ST DEFENDANT
 KAMUNYU KAHENYA 2ND DEFENDANT
 ZEPHANIA OGAMBO 3RD DEFENDANT**

AND

REGISTRAR OF COMPANIES THIRD PARTY

**AS CONSOLIDATED WITH
 ENVIRONMENT & LAND CASE 603 OF 2011**

BETWEEN

NICHOLAS OKWACHO JUMA PLAINTIFF

AND



RULING

1. Before court is an application dated 7/9/2020. It is brought under the *Judicature Act* section 5(1) of the High Court Vaction Rules, Order 42 Rule 6, Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 and sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act* cap 21) Laws of Kenya.
2. The application seeks orders for stay of execution of the judgment delivered on 8/7/2020 and the consequential decree pending the filing of an appeal. It is supported by the affidavit of Herbert J. Ashiruma, counsel for the plaintiffs, and was sworn on 7/9/2020.
3. The grounds thereupon are that the applicants were aggrieved with the judgment made on 8/8/2020. On 15/7/2020, they filed a Notice of Appeal and applied for certified copies of the proceedings, judgment, decree and exhibits.
4. The applicants are apprehensive that should the respondents execute the subject judgment; their appeal would be rendered nugatory. That they brought the application without undue delay and have an arguable appeal with high chances of success. That the respondent would not suffer any prejudice if the orders sought are granted.
5. The respondents, although served, did not participate in the application.
6. The applicants filed submissions dated 16/2/2021 in support of their application. It was submitted that the applicants continued to suffer substantial loss as they were unable to collect rent from the suit property leading to loss of income. That the delay in obtaining the documents for their appeal was not occasioned by any negligence on their part. That they were willing to furnish security for due performance of the decree though the suit was not monetary in nature. That the intended appeal raises arguable points with a probability of success.
7. Grant of stay of execution pending appeal is provided for under Order 42 Rule 6 of the *Civil Procedure Rules*. Under that provision, the application must be brought timeously, an applicant must demonstrate that he will suffer substantial loss if the stay sought is not granted and security for the due performance of the decree that will ultimately be binding on the applicant must be provided for. See *Antoine Ndiaye v African Virtual University* [2015] eKLR.
8. In *Butt v Rent Restriction Tribunal* [1979], the Court of Appeal held that firstly, the court's power to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, 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 the appeal court reverse the judge's discretion. Thirdly, 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 appellant at the end of the proceedings. Finally, 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.
9. 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 Appellant 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 Appellant 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.”

10. In the present case, the judgment sought to be appealed against was delivered on 8/7/2020. The instant application was lodged on 7/9/2020. The applicants had however, lodged a Notice of Appeal and applied for proceedings on 15/7/2020. There was a delay of about 60 days. To my mind, that was not inordinate
11. On the issue of substantial loss, the applicants submitted that the suit property attracted rent which was their source of income. That with the judgment, they continued to lose that source of income.
12. I have seen paragraphs 48, 49 and 50 of the judgment. The Court found that the applicants had failed to establish that they were landlords of the suit property. The applicants did not produce any evidence to establish that they were receiving any rent from the alleged tenant. The lease produced before court did not mention any of the applicants as landlords. Indeed, even upon expiry of that lease, it was never renewed as required by the law. It was also found that the applicants stayed for 9 months without visiting the suit property, even when the alleged tenant vacated. Further, the applicants failed to produce a rent book or receipt to support their claim of receipt of rent.
13. Can the applicants now allege that they are losing out on rent? I think not. There was no evidence of receipt of rent, hence the allegation of loss of rent amounting to substantial loss cannot stand. I find that the applicants have not proved that they will suffer any loss that can be termed as substantial.
14. In any case, the dispute between the parties is ownership of the suit property. Should the applicants appeal be successful, it will not be rendered nugatory. The applicants have not established that lack of stay orders will create a state of affairs that will irreparably affect or negate the very essential core of their appeal should it succeed. There is no allegation that the property is in any danger of being dissipated.
15. In any event, there were no positive orders that were made in the decree capable of being executed. The judgment only dismissed the plaintiff's suit. There is nothing to execute.
16. Being of the foregoing frame of mind, I find the application to be unmeritorious and dismiss the same. There will be no order as to costs as the respondents did not appear.

It is so ordered.

DATED AND DELIVERED At NAIROBI THIS 2ND DAY OF SEPTEMBER, 2021.

A. MABEYA, FCI Arb

JUDGE

