



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**E.L.C CASE NO. 48 OF 2013**

**HELLEN CHERONO W/O JOEL KIMUTAI KEINO.....PLAINTIFF/APPLICANT**

**VERSUS**

**JOHN KIPKEMOI MUTAI.....1ST DEFENDANT/RESPONDENT**

**ANNE NGEMA MWANGI.....2ND DEFENDANT/RESPONDENT**

**PRINCIPAL SECRETARY MINISTRY OF LANDS**

**HOUSING AND URBAN DEVELOPMENT.....3RD DEFENDANT**

**DAVID KIPLIMO.....4TH DEFENDANT**

**RULING**

**Introduction**

1. What is before me is a Notice of Motion dated 18th April 2018. The said application is brought pursuant to sections 1A, 1B, 3, 3A & 63(e) of the Civil Procedure Act, Order 42 Rule 6(1) & (4) and Order 51 rules (1) (3) & (4) of the Civil Procedure Rules 2010. The Applicant seeks the following orders from this Court: THAT

*(a) Spent*

*(b) Spent*

*(c) Pending the hearing and determination of this application, there be a stay of execution against the Applicant.*

*(d) Pending the hearing and determination of the Plaintiff/Applicant's appeal, there be a stay of execution against the Applicant.*

*(e) The costs of this application be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents.*

2. The application is premised on the following grounds:-

*(a) The Applicant has already complied with the provisions of Order 42 of the Civil Procedure Rules, 2010 and all the tenets necessary for granting a stay of execution.*

*(b) The Appeal lodged by the Applicant is meritorious and has overwhelming chances of succeeding.*

*(c) Security has already been provided by the Applicant and she is ready to obey any other or further directions that the court may issue.*

*(d) If the orders sought are not granted, the Applicant who is an elderly mother and also mother to the 1<sup>st</sup> Respondent shall suffer great prejudice.*

*(e) The applicant is apprehensive that at any time, the Respondents' agents/auctioneers shall attach and sell her few cows. The Respondents have already instructed auctioneers to proclaim the Applicant's property and therefore stay orders are necessary so as not to render the appeal nugatory.*

3. The Application is supported by the Affidavit of Hellen Cherono Keino sworn on 18th April 2018 in which she restates the above-mentioned grounds.

4. It is opposed by the Respondents through the Replying Affidavit sworn by learned counsel Mr. Franklin Obondo Koko. He states that the said application is fatally and incurably defective, incompetent and lacking in merit and is meant to deny the defendants their rights. He depones that the application dated 13th July 2016 in which the applicant sought a stay of execution was rightfully dismissed through a court ruling dated 6th April 2017 as she failed to comply with the court orders.

5. He states that the applicant has not given sufficient grounds to demonstrate that she deserves the orders of stay as she has not shown the intended appeal is arguable and has any chance of success as required under Rule 5 (2) (b) of the Court of Appeal Rules. He avers that the mere attachment of a Memorandum of Appeal to an application is no guarantee for an issuance of an order of stay. It is his contention that the application does not meet the threshold for grant of stay orders under Order 42 Rule 6 (1) of the Civil Procedure Rules.

6. Counsel states further that the applicant has not demonstrated that the Respondents are men of straw and therefore if the appeal succeeds, the Respondent will be unable to refund the applicant rendering the appeal nugatory. He further states that he shall be relying on the principle set out in the case of **Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR**. In the circumstances, he prays that the application be dismissed and that the 1st and 2nd Defendants be allowed to proceed with execution.

7. On 14th June 2018, the court directed that the application be canvassed by way of written submissions and counsel for the applicant filed his but the respondent's counsel did not file any.

### **Plaintiff's Submissions**

8. In his submissions, Mr. Siele Sigira Learned Counsel for the Plaintiff/ Applicant sets out the principles that the court should consider while granting a stay of execution pending appeal as hereunder:-

#### **(a) Undue delay**

9. On this issue Mr. Siele submits that the Ruling was delivered on 6th April 2018 and that the applicant timeously filed her application on 19th April 2018 thereby confirming that she brought her application without undue delay.

#### **(b) Arguable appeal**

10. Mr. Siele submits that the applicant has an arguable appeal. He refers to the Notice of Appeal annexed and marked as "HC 3". He submits that whereas the applicant has not attached her Memorandum of Appeal, she has satisfied the provisions of Order 42 Rule 5 (4) of the Civil Procedure Rules 2010.

#### **(c) Interest of Justice**

11. Counsel Submits that it is in the interest of justice to grant the orders sought in order to preserve family harmony. He further submits that the plaintiff/applicant is the mother of the 1st Respondent and the mother in law of the 2nd Respondent. He submits that the subject matter of the suit which is land has brought a lot of tension between the 1st Respondent and his siblings.

12. Counsel submits further that the applicant is an old woman with health challenges and is crying for justice since her son fraudulently subdivided family land.

#### **(d) Security**

13. Counsel submits that the Applicant had earlier deposited Kshs. 50,000/- in court and asks the court to treat the same as security for costs.

14. Counsel submits that Replying Affidavit sworn by Franklin Obondo Koko, Advocate ought to be struck out as it is full of facts touching on contentious issues.

He cites the case of **James Kiplimo Rotich v Taprandich Chumo ELC No. 45 of 2013** wherein this court considered a similar issue.

### **Issues for determination**

15. The following issues arise for determination:-

(a) Whether the Applicant has met the threshold for grant of stay of execution pending Appeal and

(b) Who should bear the costs of the Application

### **Analysis and determination**

#### **Whether the Applicant has met the Threshold for Grant of Stay of Execution pending Appeal**

16. The issue of grant of stay pending appeal is by no means foreign to the courts. The principles guiding the courts while considering such an application are now well settled. The substantive provision for grant of stay pending appeal is to be found under Order 42 Rule 6 of the Civil Procedure Rules.

17. Order 42 Rule 6 provides in part as follows: -

*6.(1) 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.*

*(2) 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.*

*(3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.*

*(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court a Notice of Appeal has been given.*

18. It is trite law that a successful party is entitled to the fruits of their judgment and the court cannot disregard this fact and continue flirting with a party whose inertia in prosecuting their matter speaks volumes. The court in the case of **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** stated as follows:

*“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting 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”.*

19. The Court of Appeal in the case of **Housing Finance Company of Kenya Limited v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR** was cautious of the need to balance between the rights of the parties as well as interfere in instances where an appeal would be rendered nugatory. The Court stated as follows: -

*“16. In seeking to balance the interests of the respective parties, the approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruit of judgment in their favour and their rights are safeguarded.*

20. Havelock J in the case of **Micro Enterprises Support Programme Trust Registered Trustees v Mayford Savings & Credit Cooperative Society Limited & 5 others [2013] eKLR** noted that the principal authority in considering whether to grant a stay of execution pending appeal was the case of **Butt v Rent Restriction Tribunal**. He observed as follows:

*“Of course, the principal authority as to the granting of a stay of execution pending Appeal is the Ruling of Madan JA (as he then was) in the case of Butt v Rent Restriction Tribunal 1979 eKLR where the learned Judge found:*

*“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being rendered nugatory, per Brett, LJ in Wilson v Church (No 2) 12 Ch D (1879) 454 at page 459. In the same case, Cotton LJ said at page 458:*

*‘I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory’.*

*Megarry J, as he then was, followed Wilson (supra) in Erinford Properties Limited v Chesire County Council [1974] 2 All ER 448 at page 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal’s decision being rendered nugatory should that court reverse the judge’s decision. The court will grant a stay where special circumstances of the case so require, per Lopes LJ in the Attorney General v*

*Emerson and Others 24 QBD (1889) 56 at 59. The special circumstances in this case are that there is a large amount of rent in dispute between the parties and the appellant has an undoubted right of appeal”.*

21. The Court of Appeal in the case of **Butt v Rent Restriction Tribunal [1979] eKLR (Madan, Miller and Porter JJA)** had this to say on the issue of stay pending appeal:-

*i. 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.*

*ii. 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.*

*iii. 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.*

*iv. 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.*

22. The court in the case of **Migotio Plantations Limited v Paul Wanyama Wafula [2015] eKLR** stated as follows in considering a similar issue:-

***“The powers of the court to grant stay of execution of the decree are discretionary. The ultimate goal of the court is to preserve the appeal and ensure that the rights of the Appellant are not defeated pending its determination. (Butt v Rent Restriction Tribunal [1962] KLR 417)***

***Therefore, whether the Appellant stands to suffer substantial loss is the cornerstone of the application of stay. However, the court must also consider special circumstances and unique requirements of the case. (See Butt V Rent Restriction Tribunal supra at pages 419-420). At this point, there is a valid judgment in force and the court must weigh the Appellant’s right to appeal against the equally weighty right of the successful party to enjoy the fruits of his judgment. Redland Enterprises Limited v Premier Savings & Finance Limited [2002] 2 KLR 139”***

23. The Learned Kamau J in the case of **M.O.M Amin Transporters Limited & another v Alexander Ndung’u Mbugua & 2 others [2017] eKLR** was of the opinion that all the three conditions had to be met and satisfied simultaneously in order for the court to exercise its discretion and grant a stay of execution. The court stated as follows: -

***“13. In the cases of Kiplagat Kotut vs Rose Jebor Kipngok [2015] eKLR, Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR and Kenya Shell Limited vs Kibiru (Supra), the common thread was that a stay of execution will not be granted unless the conditions in Order 42 Rule 6 of the Civil Procedure Rules are satisfied.***

***14. Order 46 Rule 6 (2) of the Civil Procedure Rules, 2010 provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following: -***

***1. Substantial loss may result to the applicant unless the order was made;***

***2. The application was made without unreasonable delay; and***

***3. 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.***

***15. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously.”***

24. Having set out the conditions for grant of stay, I shall proceed to consider whether the three conditions have been satisfied by the applicant.

**i. Whether the Application has been brought without undue delay**

25. Counsel for the Applicant submitted that the ruling was delivered on 6th April 2018 and that the application was filed on 19th April 2018. In the circumstances, it is his submission that the application was made without any delay. On this point I agree with the submission of the applicant’s counsel that there was no delay in filing the application.

**ii. Whether the Applicant has demonstrated that she will suffer substantial Loss if the Orders sought are not Granted**

26. On whether the applicant has demonstrated that she will suffer substantial loss I am guided by the case of **Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR** where the court considered the question of what constitutes substantial loss. Mativo J stated as follows:-

***“The corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would***

result to the applicant unless a stay of execution is granted. What constitutes substantial loss was broadly discussed by Gikonyo J in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto where it was held inter alia 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”*

*In the present application, the applicant has not demonstrated that he would suffer substantial loss. It has not been shown that the Respondent is a person of straw and that he may not repay the said sum in the event of the appeal succeeding. In Equity Bank Ltd vs Taiga Adams Company Ltd, the court stated a follows:-*

*“In the application before me, the applicant has not shown or established the substantial loss that would be suffered if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is, execution is carried out in the event the appeal succeeds, the respondent would not be in a position to reimburse- as he is a person of no means. Here, no such allegation is established by the appellant.”*

*In Elena D.Korir vs Kenyatta University Justice Nzioki wa Makau had this to say:-*

*“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 & Cockar Ag JA) held that “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.*

*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”.*

27. Similarly, in the instant application, it is my finding that the applicant has not demonstrated that she will suffer substantial loss. It has not been shown that the Respondents are persons of straw and that they may not repay the decretal sum in the event the appeal succeeds.

**iii. 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.**

28. Counsel for the Applicant submitted that the Applicant has already deposited Kshs 50,000 in court and urges the court to treat the said amount as security for costs.

29. As stated by Mutungi J. In the case of **Equity Bank Limited v Taiga Adams Company Limited [2006] eKLR** it is not enough to satisfy 1 or 2 of the requirements under 42 Rule 6. All of the requirements must be met for the court to grant orders of stay pending appeal. The court in that case stated as follows:-

*“ The pre-amble to sub-rule (2)of Rule 4 of Order 42 is couched in very clear language and words: “No order for stay of execution shall be made under sub-rule (1) unless.....” then follows the requirements, above, which have not been met by the applicant herein.*

*Let me conclude by stressing that all the four, not one or some, must be met before this court can grant an order of stay.”*  
(Emphasis mine)

30. In the circumstances the instant application cannot succeed as the applicant has not satisfied all the conditions set out under Order 42 Rule 6 of the Civil Procedure Rules. Accordingly the application is dismissed.

Each party shall bear their own costs.

**Dated, signed and delivered at Kericho this 11<sup>th</sup> day of September, 2018.**

.....

**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Mr. Siele Sigira for the Plaintiff
2. Miss Ngetich for Mr. Koko for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants
3. N/A for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants
4. Court assistant - Rotich