



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 208 OF 2017

FORMERLY MERU ELC NO. 169 OF 2013

LUCY KARAUKI KIRAMBIA (suing as the legal representative of the estate of

Peter Muriungi Kaunga (deceased).....PLAINTIFF

VERSUS

MUTHENGI M'MWATHI MUTHIGU1ST DEFENDANT

THARAKA DISTRICT LAND ADJUDICATION OFFICER.....2ND DEFENDANT

THE HON. AG.....3RD DEFENDANT

RULING

1. The Notice of Motion upon which this application is grounded states that it has been brought to court under Article 159(2) (d) and (e) of the Constitution, Section 80, 1A, 1B and 3A of the Civil Procedure Act and Order 45 Rules 1, 2 and 3 of the Civil Procedure Rules. The application seeks orders that:

1. This honourable court be pleased to certify this application as extremely urgent and the same be heard ex parte in the first instance.
2. The court extends the time for compliance with the orders issued on 16th January, 2019.
3. The order of the honourable court made on 16th January, 2019 for security of costs of Kshs.1,000,000/= herein be reviewed, and set aside.
4. The applicant be allowed to deposit with the court the original title, title number Tharaka/Chiakariga "A"/1544 as an alternative security.
5. The costs of this application be provided for.

2. The application has the following grounds:

1. The applicant has preferred an appeal against the judgment of this honourable court as delivered on 19th December, 2018.
2. The applicant sought for stay of execution vide Notice of Motion Application dated 14th January, 2019.
3. The application was allowed albeit the applicant was to deposit a security of Kshs.1,000,000/= before the lapse of 30 days i.e the 16th of February, 2019.
4. The applicant being a man of meager means has found it untenable to furnish the said security to this honourable court.
5. The applicant has now been able to get an alternative security in form of title deed to parcel land number Tharaka/Chiakariga "A"/1544.

6. The applicant now prays to this honourable court, being a court of equity to review and alter the terms of the security.
7. The applicant's appeal will be rendered nugatory if his application is not allowed.
8. No prejudice will be occasioned on the respondent if the application is allowed.
9. It is in tandem with the overriding objectives of this case and in the interests of substantive justice to allow this application.

3. The application is supported by the Defendant/Applicant's affidavit sworn on **13th May, 2019** which states:

I, MUTHENGI M'MWATHI MUTHIGU, an adult male of sound mind of C/O P. O. Box [xxxx]-00200 Nairobi in the REPUBLIC OF Kenya hereby make oath and state as follows:

1. That I am the applicant, conversant with the subject matter in this suit and now swear this affidavit.
2. That I reiterate all my averments in my affidavit sworn on 14th January, 2019.
3. That this honourable court allowed my application seeking stay of execution of the judgment delivered on 19th December, 2018 albeit it ordered me to make a deposit in security of costs in the sum of Kshs.1,000,000=.
4. That the said sum was to be furnished to court on or before the lapse of 30 days ie 16th February, 2019.
5. That I have made every effort to source for the said sum all to naught.
6. That I have only been able to get Kshs.100,000= of which am ready and willing to deposit to this honourable court.
7. That I have been able to get an alternative source of security in form of land and if the appeal does not succeed the same will be set off to pay the security. (Attached hereto and marked as exhibit MMM1a – b are copies of the Title and Valuation Report).
8. That the orders so issued on 16th January, 2019 lapsed on 16th February, 2019.
9. That once the orders lapse, my intended appeal against the judgment of this honourable court as delivered on 19th December, 2019 will be rendered nugatory.
10. That it is only fair and just in the circumstances that this honourable court being a court of equity grants the orders so prayed.
11. That it is in the interest of justice and fairness that this application is allowed.
12. That the respondent will suffer no prejudice if this application is allowed.
13. That what is deponed to herein is true to the best of my knowledge and belief save for matters deponed to on information the sources of which I have disclosed.

4. The applicant's supporting affidavit has been answered by the plaintiff/respondent's replying affidavit which states:

I, LUCY KARAUKI KIRAMBIA of C/O P. O. Box [xxxx]-60200 Meru do hereby make oath and state as follows:

1. That I am the respondent herein well versed with the facts of this matter and therefore competent to make and swear this affidavit.
2. That the application is without merit and I urge this court to dismiss it for the following reasons:
 - a) That the applicant has not complied with the orders of this court of 16.1.2019 when he moved it exparte and was ordered to deposit security for the due performance of the decree at Kshs.1,000,000/=.
 - b) That instead of complying with court orders he has chosen to apply for review.
 - c) That I am properly advised by my counsel on record which advice I verily belief to be true that the condition to provide security is anchored in law and a prerequisite to such application.
 - d) That the respondent is not impecunious as he is ready to provide Kshs.100,000/=. He is simply playing with an otherwise serious judicial process.
 - e) That court orders are no negotiating platforms and must be obeyed.

- f) That the applicant cannot give his own conditions for compliance.
- g) That the applicant cannot simply have his cake and eat it.
3. That the applicant has not demonstrated grounds for review.
4. That this court is not interested with the title of his homestead otherwise it would have ordered so.
5. That what is deponed to herein above is true to the best of my knowledge, information and belief, sources of information whereof I have disclosed.
5. The application was canvassed by way of written submissions.
6. The 1st defendant/applicant's submissions are reproduced in full herebelow. Any spelling or other mistakes, if there are any, are solely ascribable to the 1st defendant/applicant's advocate.

THE 1ST DEFENDANT/ APPLICANT'S SUBMISSIONS

Your Lordship,

The 1st Defendant/Applicant humbly submits as follows in support of his two applications dated 14th January 2019 and 13th February 2019 filed on 30th January 2019 and 14th February 2019 respectively. The Plaintiff/Respondent filed a single reply to both Applications dated 12th April 2019 and filed on 15th April 2019.

A. INTRODUCTION

The 1st Defendant/Applicant filed the Application dated 14th January 2019 via a certificate of urgency following a judgement delivered by this Honourable Court on 19th December 2018 seeking the following orders:

1. Spent
2. That the Honourable Court be pleased to order stay of execution of the Judgement/Decision herein pending the hearing and determination of this application.
3. That the Honourable Court be pleased to order a temporary stay of execution of the Judgment/Decree herein pending the hearing and determination of the intended appeal.
4. That the Honourable Court be pleased to grant such other and or better orders as may meet the ends of justice.

This Honourable delivered an ex-parte ruling on this application on 16th January 2019 where it issued the following orders;

- a. Prayer number 2 in the application is allowed subject to the applicant depositing with the court as security the sum of **Kshs. One Million(1,000,000/=)** within the next 30 days failing which the order of stay granted herein will automatically lapse.
- b. The applicant is directed to serve the orders issued today by the court upon the respondents within **14 days of today**.
- c. The Application will be heard inter-partes on **25th March ,2019**.

Following the issuance of the above orders, the Applicant filed the application dated 13th February 2019 for review of the said orders through a certificate of urgency on 14th February 2019 where he sought the following orders;

1. Spent
2. The court extends the time for compliance with the orders issued on 16th January 2019.
3. The order of the Honourable Court made on 16th January 2019 for security of costs of **Kshs. 1,000,000/=** herein be reviewed, and set aside.
4. The Applicant be allowed to deposit with the court the original title, **Tittle number Tharaka/Chiakariga 'A'** as an alternative security.

On 6th May 2019, this Honourable Court ordered, by consent of all parties, that the two applications dated 14th January 2019 and 13th February 2019 shall be disposed off by way of written submissions.

In view of the foregoing, the applicant shall submit as follows on issues for determination by this Honourable Court;

B. ISSUES FOR DETERMINATION

a. Whether this Honourable Court should extend the time for compliance with the orders issued on 16th January 2019.

My Lord,

The applicant humbly prays this court to extend the time for compliance with the orders issued on 16th January 2019.

The applicant humbly submits (sic) that **order 50 rule 5 of the Civil Procedure Rules, 2010** gives this honorable the power to enlarge such time for compliance with orders it has issued, where limited time has been fixed for doing an act or complying such orders.

It is in the interest of justice that this Honorable court extends the time given for the Applicant to comply with the Orders given on January 16, 2019. The Applicant has given a reasonable and sufficient explanation for his failure to comply with the said Orders within the said timeline. The Applicant could not raise the required sum of Kshs. 1,000,000.00/= within the provided period due to financial constraints. However, he is willing to provide security as Ordered by the Court hence the reason why he seeks extension of the time provided under the said Orders.

b. Whether this Honourable Court should review and set aside its orders issued on 16th January 2019 for security costs of Kshs. 1,000,000/=

My Lord,

The application dated 13th February 2019 seeks a review of the orders issued by this court on 16th January 2019, which orders require the applicant to deposit the sum of Kshs. 1,000,000/= within 30 days from the date the orders were issued, as a condition for stay of execution of the judgement delivered on 19th December 2018.

The applicant filed the review application for the said orders because he has not been able to raise the sum of Kshs. 1,000,000/= in the required time.

Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2010 clothe this court with the powers to review its orders, on among other grounds, where there **is sufficient reason**.

My Lord, the applicants are before this court but obviously their application does not satisfy the requirement review on account of for error or mistake on the face of the record. There is no discovery of new and important evidence either. The court can however still determine their application on the basis of any other sufficient reason. But what does any other sufficient reason mean?

In **Pancras T Swai v Kenya Breweries Ltd [2014] eKLR** the Court of Appeal had this to say with regard to **any other sufficient reason** for purposes of review jurisdiction under section 80 of the civil procedure Act and order 45(1) of the rules;

*“Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limbs therein stated or **“for any sufficient reason.”** ... As repeatedly pointed out in various decisions of this Court, the words, “for any sufficient reason” must be viewed in the context firstly of Section 80 of the Civil Procedure Act, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order.”*

My Lord, as was stated by **Musinga JA** in the case of **Equity Bank v West Link MBO limited** (civil Application No. 78 of 2011) ,2013 eKLR,

“courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of the law, to ensure the ends of justice are met.”

What **Musinga JA** meant was that where a party approaches the court albeit with some level of optimism that the court will hear him and grant him some measure of relief, the court should be able to exercise its discretion hear the party make a determination on the case to meet the ends of justice.

In **Shanzu Investments Limited v. Commissioner for Lands (Civil Appeal No. 100 of 1993)** the Court of Appeal also stated;

“any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the Civil Procedure Act; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”

In view of the above decisions, it is the applicant's humble submission that this court has a wide and unfettered discretion to review its judgments, decrees and orders as can be seen from section 80 of the Civil Procedure Act.

Order 42rule 6 of the **Civil Procedure Rules, 2010** requires that a party intending to benefit from Orders of Stay of Execution pending Appeal ought to provide security. The requirement does not specify the form the security should take. It only provides that the security be sufficient.

The Applicant has deponed that of the Kshs. 1,000,000.00 required as security, he is only able to raise Kshs. 100,000.00 in the short term. However, he has proposed to provide alternative security in the form of deposit with this court title number Tharaka/Chiakariga 'A'/1544.

My Lord, in this case, the applicant has demonstrated sufficient reason for the court to review its orders delivered on 16th January 2019. The applicant intends to file an appeal on the judgement delivered by this Honourable Court on 19th December 2018. Unless a stay of execution of the said judgment is granted, with reasonable orders as to the amount of security of costs to be deposited with the court, the appeal will be rendered nugatory. A litigant ought not to be pushed away from the temple of justice where there exists a remedy. This Court can, in exercising its discretionary power to review its Orders, provide the Applicant with the opportunity to ventilate his legal issues as procedurally provided in law while at the same time providing the Respondent with security for costs by reviewing its Orders of January 16, 2019 and allowing the Applicant to provide the proposed alternative security.

It is clear that the reason why the Applicant proposes the alternative security is because he does not have Kshs. 1,000,000.00 in hand but has an asset valued at Kshs. 3,000,000.00 in the form of land which will take time to convert to cash. As such, it is only convenient to allow him to use the alternative security he proposes in the interests of justice. Furthermore, the Respondent has not stated anywhere in his replying affidavit that she will suffer any prejudice if the orders sought by the applicant are granted.

c. Whether this Honourable Court should allow the applicant to deposit with the court the original title, Title number Tharaka /Chiakariga 'A' as alternative security.

My Lord,

The applicant was ordered to pay **Kshs. 1,000,000/=** as security for costs as a condition for stay of execution of the Judgement/Decision delivered by this Honourable Court on 19th December 2019.

My Lord, the Applicant is unable as it is to raise the whole amount of **Kshs. 1,000,000 /=** and deposit as security for costs. However, as indicated in his supporting affidavit dated 13th February 2019, he has been able to raise Kshs. 100,000/=, which he is ready and willing to deposit to this Honourable Court. From Kshs. 1,000,000/=, a balance of Kshs. 900,000 remains. To show further willingness to comply with orders of this court, he is ready and willing to deposit with this court title number Tharaka/Chiakariga 'A'/1544 as an alternative security if so allowed to cover the remaining balance.

My Lord, the applicant is a man of meagre means but he is ready and willing to comply with the order of this court. He prays that this court allows him to deposit with the court the original title, Title number **Tharaka/Chiakariga 'A' 1544** as an alternative security in the interest of justice.

The said land **L.R No. Tharaka/Chiakariga 'A' 1544**, as per the valuation report by one Mr. Edwin Mutwiri, for and on behalf of Ultimate Valuers Limited reported that the freehold interest free from all encumbrances of the said land has an open market value of 75% valued at Kshs. 3,000,000 and in the event of a foreclosure (forced sale), only 60% of the open market value would be realized, which he valued at Kshs. 2,400,000/=.

Order 42rule 6 of the **Civil Procedure Rules, 2010** requires that a party intending to benefit from Orders of Stay of Execution pending Appeal ought to provide security. The requirement does not specify the form the security should take. It only provides that the security be sufficient. In this case, the proposed alternative security is sufficient as its value is way above the amount of Kshs. 1,000,000.00 ordered to be deposited in Court.

The Applicant proposes the alternative security because he does not have Kshs. 1,000,000.00 in hand but has an asset valued at Kshs. 3,000,000.00 in the form of land which will take time to convert to cash. As such, it is only convenient to allow him to use the alternative security he proposes in the interests of justice.

Furthermore, the Respondent does not stand to be prejudiced in any way if the Applicant is allowed to provide the proposed alternative security. He will still have the security required but rather than hard cash, it will be in the form of an asset. The fact that the asset is valued higher than the Kshs. 1,000,000.00 ordered by Court covers for any hardships which may arise in converting the said asset to cash.

C. CONCLUSION

My Lord,

It is our submission that the applicant has proven his case on a balance of probabilities and in the circumstances prays that this Court allows his applications dated 14th January 2019 and 13th February 2019 filed on 30th January 2019 and 14th February 2019 respectively in the interest of justice.

We humbly submit.

Dated at Nairobi this 13th day of May, 2019

ADVOCATES FOR THE 1ST DEFENDANT/APPLICANT

7. The plaintiff/respondent's submissions are reproduced in full herebelow. Any spelling or other mistakes, if there are any, are solely ascribable to the plaintiff/respondent's advocates.

RESPONDENT'S SUBMISSIONS

A. ON PLEADINGS

Your lordship before you are two applications. The former is dated the 14.1.2019 while the latter is dated 13.2.2019 both by the applicant seeking stay of execution and Review of the attendant order allowing the same giving and conditional stay of execution by this court.

The applications are opposed by way of Replying affidavit by the plaintiff/respondent dated 12.4.2019.

B. ON THE FACTS AND LAW APPLICABLE

My lord, the applicant moved this court under certificate of urgency on 14.1.2019 and this court graciously without hearing the Respondent gave a stay as sought by the applicant albeit with condition.

The condition was for the Applicant to provide security for the due performance of the decree.

Your lordship, the facts are that instead of complying with the order the Applicant has moved this court for review of the order arguing that he can only raise Ksh. 100,000/=.

i.) Stay of execution

My lord, the principle order governing the primary application for stay of execution is Order 42 Rule 6. In the said Rules this court is enjoined to order the applicant to furnish such security for the due performance of the decree. This court has wide discretion.

It is only the government that is exempted from furnishing security by dint of Order 42 Rule 8.

My lord, court orders are not negotiating plat forms. The law is clear on conditions that must be met in an application for stay of execution pending appeal and one of them is furnishing of security.

Your lordship, the applicant cant have his cake and eat it.

The applicant depones he is impecunious yet he can engage a valuer to value his other parcel of land and present a report as annexed in his affidavit. He has now substituted that he can raise Ksh. 300,000/=. Simply put, the applicant is not desirous of complying with court orders but the sole aim of this application is to engage the Respondent into endless litigation.

ii.) Review

My lord, the application seeking review of this courts orders of stay is without merit. There is no new matter or evidence that the applicant has come across to warrant review.

The question is, has the applicant demonstrated sufficient reason to warrant review? Certainly not. As submitted herein, court orders must be obeyed and one cannot dictate this court's discretionary reliefs to suite his whims. The same case applies to the Judgment of this court.

My lord, the only avenue for the applicant to challenge the conditional stay is the court of appeal.

This court is *fuctus officio*.

C. CONCLUSION

The application for review is lacking in merit, the same should be dismissed with costs to the Respondent/plaintiff.

DATED AT MERU THIS.....16THDAY OF.....MAY,....2019

FOR: MUIA MWANZIA & CO.

ADVOCATES FOR THE PLAINTIFF

8. I have considered the pleadings and the submissions proffered by the parties to buttress their diametrically opposed assertions. The

authorities cited and proffered by the defendant/respondent's advocate have been extensively elucidated in the written submissions (op.cit) which have been reproduced in full herein. Therefore, I do not need to regurgitate them. I have taken those cases into account in my determination of this application.

9. At the outset, I need to make it clear that I do not consider deposit for security to be a procedural technicality as envisaged by Article 159 (d) of the Constitution of Kenya. It is pellucidly a matter of law anchored by Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules and which is couched in the following manner:

“6 Stay in cases of appeal [order 42, rule 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 subrule (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.”

10. I am not persuaded by the defendant/applicant's assertion that he should be allowed to give a title to land as security or to deposit the sum of Kshs.100,000/= as deposit. Clearly, the sum of Kshs.100,000/= would not ultimately suffice as security should the defendant/applicant lose his appeal. I am also not persuaded that the loss the defendant/applicant may suffer if he wins his appeal is not compensable by way of monetary damages.

11. Regarding the issue of depositing a title as security, this raises the question of how this mode of security would be enforced. For instance, in the case of Banks, titles which form collateral have charges upon them registered in favour of banks. Will the title proposed be registered in favour of the court? I opine that allowing the use of title as deposit for security will not constitute effective and adequate security to ultimately bind the defendant/applicant in case he loses his appeal.

12. In the circumstances, I find that this application lacks merit.

13. In the circumstances, this application is hereby dismissed.

14. Costs are awarded to the plaintiff.

15. It is so ordered.

Delivered in open Court at Chuka this 19th day of June, 2019 in the presence of:

CA: Ndegwa

Miss Ambani h/b Chadianya for the 1st Defendant/Applicant

Muia Mwanzia - absent for the Plaintiff

Lucy Karauki – Plaintiff - present

P. M. NJOROGE

JUDGE