



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC NO. E006 OF 2021

JOSEPH MUTURI WAINAINA.....
.....PLAINTIFF

VERSUS

CLEMENT KUNGU WAIBARA.....
.....DEFENDANT

RULING

1. On 9/04/2024, the Court (Hon. Lady Justice Grace Kemei) delivered a Judgment in which it dismissed the Plaintiff's suit and upheld the Defendant's counter-claim with costs for both the suit and counter-claim awarded to the Defendant.
2. Consequently vide a Notice of Motion dated **14/05/2024** the Plaintiff/Applicant brought under Sections 3, 3A and 95 of the Civil Procedure Act, Order 42, Rule 6 of the Civil Procedure Rules and sought the following orders from this Court:
 - i. Spent.
 - ii. THAT this Honorable Court be pleased to order a stay of execution of the Judgment delivered on the 9th April 2024 pending the hearing and determination of this Application.

- iii. THAT this Honorable Court be pleased to order a stay of execution of the Judgment delivered on the 9th April 2024 pending the hearing and determination of the intended appeal.
 - iv. THAT the costs of this Application be provided for.
3. The Application is premised on the grounds stated on the face of the Application together with the Supporting Affidavit of Joseph Muturi Wainaina, the Plaintiff/Applicant herein sworn on 14/05/2024.
 4. The Applicant states that Judgment was delivered on 9th April 2024 and being dissatisfied with the same he filed a Notice of Appeal dated 15/04/2024 with a view of challenging the entire Judgement.
 5. The Applicant is apprehensive that he stands to lose the suit property and the decretal amount if the stay is not issued. Further that the intended appeal will be rendered as nugatory if the stay of execution orders are not granted and it will be an academic exercise. It is the Applicant's contention that this Application has been brought before the Court without undue delay.
 6. The Applicant further adds that the Judgment ordered the Plaintiff to execute the transfer documents without the consideration that consideration had not been paid in full which rendered the agreement null and void.

7. The Application is opposed. There is a Replying Affidavit by Clement Kungu Waibara, the Defendant/Respondent herein, sworn on 25/10/2024.
8. On 22/01/2025, Counsels agreed to file written submissions to the Application and the Court gave directions on the same. At the time of writing this Ruling on 26/02/2025 only the Respondent had filed their submissions dated 24/01/2025. The Plaintiff /Applicant did not file their submissions. I have therefore considered the Respondent's submissions in my decision and the pleadings

Issues for determination

9. The main issue for determination is whether the Applicant has met the prerequisite for grant of stay of execution pending appeal.
10. The principles upon which the Court may stay the execution of orders appealed from are well settled. **Order 42 Rule 6** of the **Civil Procedure Rules** stipulates:-
 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 orders 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 1st 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.

11. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant should satisfy the Court that:

“1. Substantial loss may result to him unless the order is made;

2. That the Application has been made without unreasonable delay; and

3. The Applicant has given such security as the Court orders for the due performance of

such decree or order as may ultimately be binding on him.”

12. These principles were enunciated in **Butt vs Rent Restriction Tribunal [1979]** the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The Court said that:-

“1. The power of the Court 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.

2. 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.

3. 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 Applicant at the end of the proceedings.

4. Finally, the Court in exercising its discretion whether to grant or refuse an Application for stay will consider the special

circumstances and its unique requirements. The Court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon Application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.”

Substantial loss

13. Under this head, an Applicant must clearly state what loss, if any, he/she stands to suffer. This principle was enunciated in the case of **Shell Ltd vs Kibiru and Another [1986] KLR 410 Platt JA** set out two different circumstances when substantial loss could arise as follows:-

“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 this 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 two Courts”

14. The learned Judge continued to observe that:-

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.”

15. Earlier on, Hancox JA in his Ruling observed that:-

“It is true to say that in consideration [sic] 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.

This is shown by the following passage of Cotton LJ in Wilson vs Church (No.2) (1879) 12 ChD 454 at page 458 where he said:-

“I wish to state my opinion that when a party is appealing, exercising his undoubtedly right of appeal, this Court ought to see the appeal, if successful, is not rendered nugatory. “

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a Judgment in his favour without just cause.”

The Application has been made without unreasonable delay.

16. Judgment was delivered on 9/05/2024 and the Applicant has brought the present Application on 14/05/2024. I find that the Application has been filed timeously thus fulfilling one of the conditions under Order 42 Rule 6.

Security of costs.

17. The Applicant ought to satisfy the condition of security. In the persuasive case of **Gianfranco Manenthi & Another vs Africa Merchant Assurance Co. Ltd [2019] eKLR** the Court observed:-

“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 a 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 falls.

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 Judgment involves a money decree. The Court would order for the release of the deposited decretal amount to the Respondent in the appeal....

Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that Courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the Applicant but for the Court to determine. Counsel for the Applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

18. Similarly in **Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others [2014] eKLR** the Court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the Judgment debtor.....Civil process is quite different because in civil process the Judgment is like a debt hence the Applicants become and are Judgment debtors in relation to the Respondent. That is why any security given under Order 42

Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose."

19. From the above persuasive decisions, it is clear that the issue of security is discretionary and it is upon the Court to determine the same. Notably, the Applicant has not demonstrated good faith by stating whether he is ready to abide by the terms that should be set by the Court nor has he offered any security for the Court's consideration.

20. Further from the pleadings I note that the Applicant has not denied receiving Kshs. 23,000,000/- and the subsequent monies that were drawn from the rent. The Plaintiff's suit was dismissed. The Court found in favour of the Defendant and upheld the counter-claim. It not clear the loss that the Plaintiff states that he will suffer.

21. I am of the considered view that the Applicant has failed to demonstrate that he will suffer any substantial loss in the event the orders are not granted.

22. Consequently, I find no merit in this Application.

23. It is hereby dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA VIA MICROSOFT TEAMS ON THIS 3RD DAY OF MARCH 2025.

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MOGENI J
JUDGE

In the presence of:

Ms. Waweru for the Plaintiff

Defendant - Absent

Mr. Melita - Court Assistant

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MOGENI J
JUDGE