



Kasimu v Kasimu (Represented by Collins Musyimi Muthangya as administrator of the Estate of the John Muthanga Kasimu) & another (Environment and Land Appeal 37 of 2021) [2024] KEELC 238 (KLR) (23 January 2024) (Ruling)

Neutral citation: [2024] KEELC 238 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL 37 OF 2021
LG KIMANI, J
JANUARY 23, 2024**

BETWEEN

DAVID MWANIKI KASIMU APPELLANT

AND

JOHN MUTHANGA KASIMU (REPRESENTED BY COLLINS MUSYIMI MUTHANGYA AS ADMINISTRATOR OF THE ESTATE OF THE JOHN MUTHANGA KASIMU) 1ST RESPONDENT

TOWN COUNCIL OF MWINGI 2ND RESPONDENT

(Being an Appeal from the Judgment of the Acting Senior Principle Magistrate Honourable H. M. Nyaberi in Mwingi SRMCC No. 56 of 2002 delivered on 21st November, 2002)

RULING

1. The Applicant has filed the Notice of Motion dated 9th February 2023 seeking the following orders:
 1. Spent
 2. Spent.
 3. There be a stay of execution of the Judgment and Decree of the Senior Resident Magistrate at Mwingi dated and delivered on 1st November 2012 in Mwingi SRMCC No.56. of 2002 and upheld by this Court on appeal in the Judgment dated and delivered on 3rd October 2023 pending the hearing and determination of the Appellant's intended appeal to the Court of Appeal.
 4. That the costs of this application abide by the intended appeal.



2. The application is supported by the affidavit of the Appellant/Applicant and is founded on the grounds that judgment was delivered by this court on 3rd October 2023 where his appeal was dismissed. Being dissatisfied with the judgment, he has lodged a notice of appeal dated 6th October 2023, signalling his intention to appeal to the Court of Appeal.
3. He deposes that unless this application is heard expeditiously and a stay of execution is granted, there is a likelihood that his shop on the suit premises shall be demolished in execution of the judgment causing him to lose his livelihood and occasioning him irreparable harm, loss and damage.
4. The Applicant also deposes that he had deposited in Court Title Numbers Migwani/Kyamboo/2014 and Migwani/Kyamboo/1716 as security for costs which he is willing to keep deposited in court as security for the performance of any decree or order as to costs that may eventually become binding upon him and that he has an arguable appeal and which will be rendered nugatory if the order for stay of execution is not granted.
5. The Applicant swore a further affidavit in response to the 1st Respondent's replying affidavit denying the allegation that he has tactfully delayed the conclusion of this appeal. He also denied receiving rent from the suit property but stated that he runs a hotel business, which is his only source of livelihood at his advanced age. He is also of the opinion that the title deeds to the two properties he has offered as security are sufficient as it is not a money decree.

The 1st Respondent's Replying affidavit

6. Collins Musyoni Muthangya, the 1st Respondent swore a replying affidavit in response to the application, deposing that the appellant has been unlawfully occupying the suit property since 2002 and that any further stay or delay in granting the Respondent access to the property will be prejudicial.
7. The 1st Respondent accused the applicant of abusing the previous stay orders that were in place by tactfully delaying the conclusion of the appeal and that his advocates who had pushed for the conclusion of the appeal while the appellant had been placing all manner of obstacles on the path of the prosecution of the same.
8. Further, it is deposed that the Applicant has been collecting rent from the suit property and therefore the security that he offers as title deed is not sufficient since the Respondent has lost income for the last 21 years whereas the Applicant has been enjoying income from property that he does not own.
9. He also deposes that the law does not provide for a stay of execution in the manner the applicant is anticipating to have.

Applicant's submissions.

10. The Applicant filed written submissions, relying on Order 41 rule 6(2) of the [Civil Procedure Rules](#) and the elements necessary for the grant of a stay of execution order being that substantial loss, that the application has been made without unreasonable delay and such security as the court may order for due performance of a decree that may ultimately be binding upon the applicant. They relied on the holding in the case of [Butt vs Rent Restriction Tribunal](#) (1979) eKLR.
11. On substantial loss, the Applicant states that he has a hotel business on the premises and that execution of the impugned judgment would result in the premises being demolished rendering the appeal nugatory.
12. On security, the Applicant submits that this is not a money decree and that the title deeds to the two properties suffice.



The 1st Respondent's submissions

13. Counsel for the 1st Respondent filed written submissions relying on Order 42 rule 6 of the [Civil Procedure Rules](#), submitting that the rule governs the stay of execution of the decree or order of the court from which the appeal is preferred and not the one delivered by the lower court.
14. Further, it was submitted that this court did not grant any orders to the respondent which are capable of being stayed while relying on the holding in the case of *Jennifer Akinyi Osodo vs Boniface Okumu Osodo & 3 Others* (2010) eKLR, submitting that the Appellant should move to the Court of Appeal under Rule 5(2)(b) of the [Court of Appeal rules](#).
15. On substantial loss, the 1st Respondent submits that will suffer a substantial loss as he has lost 21 years which is yet to be quantified while the Applicant has 2 other properties that he has offered as security. He proposes the ideal security for the appellant to deposit monthly rent for the property he is occupying in an interest-earning account held by the advocates for the parties.
16. The 1st Respondent also submits that being a second appeal, the same can only be on a point of law and not facts and that ownership of the land is a question of fact and will therefore not be a subject of the appeal.
17. On undue delay, the 1st Respondent submits that the Applicant has for the last 10 years or so abused the previous orders of stay by delaying the hearing of the appeal and that all efforts in progressing the appeal were by the 1st Respondent. It is therefore the 1st Respondents' submission that the applicant is not deserving of the discretionary orders of the court and relied on the case of [Peter Maosa Nyang'au vs National Bank of Kenya Ltd & Another](#) (2021) eKLR.

Analysis and Determination

18. The issue for determination in this application is whether the Court should grant the Appellant stay of execution of the Judgment and Decree of Hon. H.M Nyaberi Senior Principal Magistrate at Mwingi dated and delivered on 1st November 2012 in Mwingi SRMCC No. 56 of 2002 and upheld by this Court on appeal in the Judgment dated and delivered on 3rd October 2023.
19. The Application is made under Order 42 Rule 6 and Order 51 Rule 1 of the [Civil Procedure Rules](#). The 1st Respondent opposes the application and contends that the Applicant should have made the application under Rule 5(2)(b) of the [Court of Appeal rules](#), which provides that:

“Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may -in any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”
20. However, order 42 Rule 6(1) of the [Civil Procedure Rules](#) (2010) provides that:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 the application being made, to consider such application and to make such order thereon as may to it seems 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.”

21. Based on the above provisions, the court finds that this application is properly before it for determination.
22. The trial court dismissed the Plaintiff's suit with costs and allowed the 1st Defendant's counter-claim in terms of the prayer seeking vacant possession of plot number 15A, finding that the allegations of fraud and collusion between the Respondents were not supported by any material facts.
23. On the submission by Counsel for the Respondent Counsel that the application herein is for a stay of execution of this court's judgement and that the said judgement did not grant any orders capable of being executed it is noted that the application dated 9th October 2023 seeks stay of execution of the trial court judgement as upheld by this court's judgement. That ground of challenge to the application fails.
24. The purpose of stay orders is to preserve the subject matter of the appeal so as not to render the appeal nugatory. In the famous case of *Butt vs. Rent Restriction Tribunal* [1979] eKLR relied on by the Applicant, the Court of Appeal underscored the considerations for the grant or refuse a stay of execution pending appeal. The court said that 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. Secondly, the general principle in granting or refusing a stay is, that 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 applicant 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.
25. As to what substantial loss is, it was observed in *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, that:

“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.”
26. The Applicant states that he stands to suffer substantial loss since the execution of the impugned judgment would result in the premises being demolished to be given in vacant possession and render the appeal nugatory if he were to succeed. He further states that he is in occupation and actual possession of the suit premises in which he operates a hotel which is his only source of livelihood in his advanced age of 80 years.
27. The trial court in its judgement made the following orders; (a) That the plaintiff gives vacant possession of Plot Number 15A to the 1st Defendant, (b) The Plaintiff's suit is dismissed with costs to the defendants, (c) The 1st defendant's counterclaim is dismissed with costs to the plaintiff. This court agreed with the trial court and dismissed the appeal with costs.
28. The court notes that the Applicant has had possession of the suit property during the pendency of the suit before the trial court which was filed on 2nd August 2002 and the appeal before this court. As noted judgement was entered on 21st November 2012 over twenty-one years. In the court's view, justice must



- look both ways. The 1st Respondent has been kept away from enjoying the fruits of his judgement for the same period and for the period when the suit was pending before the trial court.
29. Further, the Applicant claims that he is in possession of the suit premises where he carries on a hotel business but that he does not receive rent from the same. The 1st Respondent claims that the Applicant has rented the suit premises to tenants from which he continues to receive rent.
30. In paragraph 8 of the plaint, the Applicant claimed that when the plot, the subject matter of the dispute herein, was subdivided into parcel numbers 15A and 15B, parcel number 15A was a shop rented to Anna Kawee and parcel number 15B was a shop rented to Mwangangi Kang'ere. During the hearing of the suit on 12th November 2008, the Applicant in his evidence in chief testified that "To date, I am staying on the said plot. I have rented out some of the rooms."
31. The 1st Respondent on his part, during the hearing of the suit before the trial court testified that "the rent was being collected by the plaintiff but I was the one who was paying rates". The trial court found that the 1st defendant did not adduce sufficient evidence to support the claim of monthly rent of Kshs. 9,000/- and dismissed the 1st Respondent's counterclaim for the rent collected.
32. For purposes of the application before this court, the court is satisfied that the 1st Respondent, being the beneficiary of the judgement of this court and the trial court, stands to suffer greater loss by being kept away from the fruit of his judgement while rewarding the applicant to continue with possession of the suit premises while at the same time receiving rental income from the same as he awaits hearing and determination of the appeal to the court of appeal.
33. In the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR, Hancox JA was of the view that:
- "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."
34. As noted above, the right of appeal must be balanced against an equally weighty and rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Mohammed Salim t/a Choice Butchery vs Nasserpuria Memon Jamat* (2013) eKLR where the court upheld the decision of *Portreitz Maternity vs James Karanga Kabia* Civil Appeal No. 63 of 1991 and stated that:-
- "That right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right."
35. In balancing the rights of the Appellant to apply for a stay of execution and those of the 1st Respondent who has a judgment in his favour and would like to see an end to litigation, the law provides that a stay may be granted on condition that the Appellant deposit security. Security as the court orders is for the due performance of such decree or order as may ultimately be binding on the applicant should the appeal fail.
36. The Applicant states that he had already deposited the title deeds of his parcels of land, Title Numbers Migwani/Kyamboo/2014 and Migwani/Kyamboo/1716 as security for costs which he is willing to keep deposited in court security for the performance of his obligations under the judgement and/or decree. The 1st Respondent is of the view that this is not sufficient for the reason that the Applicant



has been collecting rent in the hotel business that is on the suit premises, which is income that he has lost so far.

37. From the persuasive decisions referred to above, it is clear that the issue of security is discretionary and it is upon the court to determine the same. The court has considered the security offered by the Applicant to be some title deeds and agrees with Counsel for the Respondent that the said security is not sufficient for the reason that it does not address the 1st Respondent's concern that he has been kept away from the fruits of his judgement for a long period and is likely to be kept away from the same if the stay is granted. In the present circumstances, if stay of execution is granted the applicant will continue to benefit from the suit premises either by continuing to run the business or collecting rent.
38. The Respondent suggests that the applicant be ordered to deposit rent into a joint interest-earning account. However, the court notes that the trial court found that sufficient evidence was not adduced of the rental income from the premises and this court would be hard-pressed to determine the details of the rental income to be deposited.
39. I am satisfied that such an order for stay of execution would work a grave injustice on the Respondent and depositing of the title deeds offered as security for the performance of the terms of the decree will not assist the 1st Respondent to recover the loss he would incur if the appeal to the Court of Appeal fails. In the court's view the applicant has benefited from possession of the suit plot and the same ought not to be allowed to continue to the detriment of the 1st Respondent.
40. Further, the applicant's contention that if an order of stay of execution is not granted there is a likelihood that the shop on the suit premises will be demolished is not supported by any evidence. In the court's view, it is not enough for the applicant to make such an allegation the same ought to have been supported by evidence.
41. Further, as shown above, the allegation by the applicant that he operates a hotel on the suit premises is denied by the 1st Respondent who states that the applicant has been collecting rent from the suit premises. In any event, the court finds that the ground that the hotel on the suit premises is the applicant's only source of income is not sufficient ground to order a stay of execution since the said hotel business can be relocated to other rented premises.
42. It is further the court's view that the applicant has not shown that the appeal to the court of appeal will be rendered nugatory since the trial court ordered possession to be granted to the 1st Respondent. In the event that the appeal is successful possession of the suit premises will revert to the applicant. In the court's view, there is no just cause for denying the 1st Respondent the fruits of his judgement.
43. From the foregoing, the court finds that the application dated 9th October 2023 has no merit and the same is hereby dismissed with costs to the 1st Respondent.

DELIVERED, DATED AND SIGNED AT KITUI THIS 23RD DAY OF JANUARY, 2024.

L. G. KIMANI

JUDGE ENVIRONMENT AND LAND COURT

The ruling read virtually and in open court in the presence of-

J. Musyoki Court Assistant

Muigai for the Appellant/Applicant

B. M Musyoki for the 1st Respondent

No attendance by 2nd Respondent

