



**Rufus v Maina (Environment & Land Case E022 of 2023)  
[2024] KEELC 225 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 225 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE E022 OF 2023  
CK NZILI, J  
JANUARY 24, 2024**

**BETWEEN**

**STANLEY KIMATHI RUFUS ..... APPELLANT**

**AND**

**MARYANN MUTHONI MAINA ..... RESPONDENT**

**RULING**

1. The court is asked to allow the firm of Kuria Karatu & Co. Advocates to come on record for the appellant and stay the execution of the lower court judgment or decree pending the hearing and determination of this appeal.
2. The reasons are contained on the face of the application, and a supporting affidavit sworn on 9.10.2023 by Stanley Kimathi Rufus. It is averred that judgment was delivered on 3.8.2023, and the execution is imminent, which, if done, would cause the applicant irreparable loss and render the appeal nugatory.
3. Further, the appellant states the respondent is a man of straw who may not refund the decretal sum if allowed to execute. The appellant avers a bill of costs, has already been served, and was willing to abide by any orders as to security.
4. By a replying affidavit sworn by Maryann Muthoni Maina, the respondent avers that his late husband had purchased the suit land. It is averred that the suit was heard afresh after setting aside an ex parte judgment. She avers what is sought to be stayed was a money decree which is attracting interest, and she should be allowed to enjoy the fruits of her judgment, as much as the appellant has an undoubted right of appeal.
5. As to the orders sought, the respondent avers as a balancing act of the two compelling rights, the applicant should be directed to deposit the decretal amount in a joint interest-earning account or in the alternative to pay half of the decretal amount to her as a condition to stay.



6. The respondent avers the appeal has no probable chance of success as the appellant did not contend and or deny money was advanced, which he had agreed to refund but declined to honor until the suit was filed in court. Lastly, the respondent avers that the applicant has not offered to deposit or provide security for the due performance of the decree.
7. The applicant relies on written submissions dated 26.10.2023 to support the application. It is submitted that the conditions for stay set under Order 42 Rule 6 (2) of the Civil Procedure Rules have been met. Reliance was placed on RWW v EKW (2019) eKLR, Butt v Rent Restriction Tribunal [1979] eKLR, Nic Bank Ltd v Aquinas Francis Wasike and another (2006) eKLR, ABN Amro Bank N.V v Le Monde Foods Ltd C.A No. 15 of 2002 and Republic v Rosemary Wairimu Munene Exparte Ihururu dairy Farmers Coop Society Ltd [2014] eKLR on costs.
8. To stay the execution of a decree is a discretionary power of the court exercised under Order 42 Civil Procedure Rules, Section 1A, 1B & 3A of the Civil Procedure Rules and Article 159 of the Constitution.
9. In Butt v Rent Restriction Tribunal, (*supra*), the court observed that the circumstances of each case have to be considered. In RWW v EKW (*supra*), the court observed that the rights of the two parties must be balanced to ensure no party suffers prejudice. Again in Butt v Rent Restriction Tribunal (*supra*), the court said that so long as there were reasonable grounds stay may be granted, especially where there are exceptional circumstances in a case.
10. In NIC Bank Ltd v Aquinas Francis Wasike & another (*supra*) and ABN Amro Bank (*supra*), the court said it was upon the applicant to prove the allegations that an appeal would be rendered nugatory and the inability of the applicant to pay back the decretal sum and that the evidential burden shifts to the respondent once an issue of incapacity to refund is raised.
11. The circumstances of this case have been raised in the replying affidavit. It is said that there was an aborted sale agreement dated 6.7.2009 for Kshs.750,000/= regarding LR No. Kirimara/Kithithina/Block 1/281. Kshs.500,000/= was paid to the appellant by the respondent's deceased husband to offset a debt owed to the 2<sup>nd</sup> defendant in the lower court suit. Another agreement was signed on 1.12.2014 to refund Kshs.750,000/=:, including a penalty of Kshs.250,000/=:, by 28.2.2016.
12. In James Wangalwa v Agnes Naliaka Cheseto [2012] eKLR, the court said an applicant must show or demonstrate other vitiating factors except to stay the execution, as a legal process that was on course. In this application, the applicant must demonstrate how his appeal will be rendered nugatory or how the essential core of the appeal will be interfered with if execution was to occur.
13. In Peter Kimani Kairu t/a Kimani Kairu & Co. Advocates v Ann Marie Cassiede & another [2008] eKLR, the court took into consideration an offer of a refund had been made, the embarrassing nature of execution, irreparable loss and damage to the business and profession and the acceptance of a refund by the respondent. Again, in Savings & Loan (K) Ltd v Jayanti & Jagdeep Developers Ltd & others [2003] eKLR, the court granted a stay since there was no evidence that the respondent could refund the decretal sum.
14. In Ikumbu v Wanjiru (C.A) 157 of 2017 [2022] KECA 81 (KLR) (4<sup>th</sup> February 2022) (Judgment), the court observed that it would not fault the trial court for pining responsibility onto the appellants wholly for the breach of the sale agreement which had been executed between the parties.
15. In this application, the applicant says he has an arguable appeal. The respondent does not think so. Instead, she says a second agreement for a refund was not honored, just as in the aborted initial agreement.



16. An arguable appeal need not succeed but is one that a court must consider. See *[Kin & another v Khaemba & 3 others](#)* (C.A (Application E. 270 of 2021 [2021] KECA 318 (KLR) (17<sup>th</sup> December 2021) (Ruling). The respondent has accepted two options if a stay was to be granted by this court. The applicant has not disputed any of them. In *[Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & others](#)* [2015] eKLR, the court said security must be one that shall achieve a due performance of the decree, which might ultimately be kidding to the applicant. In *[Ravji Hali v Thorton & Turpin \[1963\] Ltd](#)* C. Application No. Nai 15 of 1990, the court said orders for security should ensure that the same is adequate for the plaintiff to realize the fruits of his litigation.
17. In this application, the applicant has left it to the court to impose such conditions as security, which he was willing to abide by. Even after the respondent accepted the proposal and gave a counter offer, the applicant did not say he was amenable to either. In *[Arun C. Sharmaa v Ashana Raikundalia](#)* (2014) eKLR, the court said a judgment was like a debt, and security acts as security and should serve that purpose.
18. I think the applicant is entitled to stay. I allow the motion. The conditions are that he deposits Kshs.500,000/= with the court's Deputy Registrar within 14 days from the date hereof; otherwise, the stay orders shall lapse. Lower court file to be availed.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 24TH DAY OF JANUARY 2024**

In presence of

C.A Kananu/Mukami

No appearance

**HON. CK NZILI**

**JUDGE**

