



REPUBLIC OF KENYA



**Lengapiani & another v Masoud & 4 others (Environment and Land Appeal
37 of 2023) [2024] KEELC 1048 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1048 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 37 OF 2023
LL NAIKUNI, J
FEBRUARY 22, 2024**

BETWEEN

PETER LEMANTON LENGAPIANI 1ST APPELLANT

CYRUS NDIRITU MAINA 2ND APPELLANT

AND

ALI SWALEH MASOUD 1ST RESPONDENT

STEPHEN NYACHOTI OUSO 2ND RESPONDENT

SULEIMAN HAMISI ALI 3RD RESPONDENT

DEVOTA WANDERA 4TH RESPONDENT

OFFICE OF THE ATTORNEY GENERAL 5TH RESPONDENT

RULING

I. Introduction

1. This ruling is in respect to Notice of Motion application dated 25th May, 2023 by the 1st and 2nd Appellants/Applicants herein, Peter Lemanton Lengapiani and Cyrus Ndiritu Maina. They brought the application under the provision of Order 42 Rule 6 (1), Order 51 Rule 1 of the [Civil Procedure Rules](#), 2010 and Sections 1A, 1B, 3A and 63 (e) of the [Civil Procedure Act](#), Chapter 21 of the Laws of Kenya.
2. Despite of the service of the applications being effected onto all the 1st, 2nd, 3rd, 4th and 5th Respondents herein, there was no response elicited to the application whatsoever. It follows that application was unopposed but the Court will still proceed to determine it on merit.



II. The Appellants case

3. The Appellants/Applicants herein sought for the following orders:-
 - a. Spent.
 - b. That this Honourable Court be pleased to stay execution of the Order issued on 19th May 2023 by Hon. D.W. Mburu in MCELC Case No. E153 of 2022 until the determination of this Appeal.
 - c. That this Honourable Court be pleased to stay proceedings of the Chief Magistrate's Court of Kenya at Mombasa in MCELC Case No. E153 of 2022 until the determination of this Appeal.
 - d. That directions be given for the service of the order made herein on the Respondents and for all necessary steps herein.
4. The application was premised on the grounds, testimonial facts and averments made out under the 9th Paragraphed Supporting Affidavit of -Peter Lemanton Lengapiani sworn and dated 25th May, 2023 together with six (6) annexures marked as "PL – 1 to 6" annexed thereto. The 1st Appellant himself averred that:
 - a. On 27th October 2022, the Chief Magistrate's Court at Mombasa in MCELC Case No. E153 of 2022 issued an order of temporary injunction in favour of the 1st, 2nd and 3rd Respondents herein restraining the Appellants/Applicants and the 4th and 5th Respondents from any interference of the dealings on Plot 280/148 Bububu Extension 1 (hereinafter referred to as "the Suit Property").Annexed in the affidavit and marked as "PL – 2" was a copy of the said Order issued on 27th October 2022.
 - b. The Appellants/Applicants herein filed an application dated 21st November 2022 in the aforesaid Lower Court matter seeking orders to set aside the temporary injunction issued as well as to strike out the entire suit on Two (2) main grounds:-
 - i. The suit never disclosed any cause of action or defence in law against the Appellants/Applicants since they were a stranger to the suit property being claimed by the 1st, 2nd and 3rd Respondents herein; and
 - ii. The Chief Magistrate's Court lacked jurisdiction to determine the claims by the Respondents which was based on alleged grounds of historical injustices since the review for such claims was being done by the National Land Commission and the period for such review had since expired.Annexed herewith and marked as "PL – 3" was a copy of the said application dated 21st November 2022.
 - c. The Learned Magistrate delivered a combined Ruling relating to their aforementioned application and the Respondents' application dated 26th October 2022. From the said decision, the Learned Magistrate failed to rule at all on the issue of the court's jurisdiction. Annexed in the affidavit and marked as "PL – 4" was a copy of the said Ruling dated 20th April 2023.
 - d. The Learned Magistrate proceeded to issue injunctive orders in favour of the Respondents who had not provided any title documents relating to the suit property which the Respondents claimed to own. Annexed in the affidavit and marked as "PL – 5" was a copy of the said Order issued on 19th May 2023.



- e. Being dissatisfied with the whole ruling of the lower Court matter, the Appellants/Applicants filed this Appeal and the Memorandum of Appeal dated 19th May 2023 outlining arguable grounds thus making this Appeal to have good prospects of success. Annexed in the affidavit and marked as “PL – 6” was a copy of the said Memorandum of Appeal dated 19th May 2023.
- f. For the foregoing reasons, the Deponent posited that he believed it was necessary, in the interests of justice that stay of execution of the Order issued on 19th May 2023 by Hon. D.W. Mburu in MCELC Case No. E153 of 2022 be granted until this Appeal was determined.
- g. Additionally, he also prayed that the proceedings of the Chief Magistrate’s Court of Kenya at Mombasa in MCELC Case No.E153 of 2022 be stayed until this Appeal was determined otherwise the Appeal would be rendered nugatory.

III. Submissions

5. On 17th July, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 25th May, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and on 11th October, 2023 a ruling date was reserved on Notice by Court accordingly.

IV. Analysis & Determination.

6. I have carefully read and considered the pleadings herein by the Appellants/Applicants, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has framed three (3) issues for its determination. These are:-
 - a. Whether the Notice of Motion application dated 25th May, 2023 seeking to stay execution of the orders issues on 19th May, 2023 pending Appeal is merited?
 - b. Whether the parties herein are entitled to the reliefs sought.
 - c. Who will bear the Costs of Notice of Motion application dated 25th May, 2023.

Issue No. a). Whether the Notice of Motion application dated 25th May, 2023 seeking to stay execution of the orders issues on 19th May, 2023 pending Appeal is merited

7. Under this Sub – heading, the main substratum of the said application is the granting of the stay of execution against a Ruling and orders emanating from the lower Court herein. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the *Civil Procedure Rules*, 2010 which stipulates as follows:

“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 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 1st Applicant.

8. Legally speaking, Stay of execution pending appeal is a discretionary power bestowed upon this court by the law. In the very initial stages of building jurisprudence in this area, the Court of Appeal in the case of “*Butt v Rent Restriction Tribunal* {1982} KLR 417” gave cogent guidance on how a court should exercise the said discretion and held that:

- “ 1. 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.
2. 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.
3. 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. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. 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 for costs as ordered will cause the order for stay of execution to lapse.”

9. Primarily, there are three conditions for granting of stay order pending Appeal under the provision of Order 42 Rule 6 (2) of the *Civil Procedure Rules* to which:

- i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
- ii. The application is brought without undue delay and
- 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.

10. Ideally, I find issues for determination arising therein namely:

- i. Whether the Applicants have satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.



- ii. What orders this Court should make
11. Further on, the purpose of stay of execution is to preserve the substratum of the case. In the case of “Consolidated Marine v Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)”, the Court held that:-
- “The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
12. As such, for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.
13. As for the applicants having to suffer substantial loss, in the case of “Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988)KAR 1018” the Court of Appeal pronounced itself to the effect 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 rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”
14. The Court of Appeal in the case of “Mukuma v Abuoga (1988) KLR 645” where their Lordships stated that;
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
15. The Applicants have a burden to show the substantial loss they are likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Applicant to the Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. {See the case of “Absalom Dora v Turbo Transporters (2013) (eKLR)”}.
16. As F. Gikonyo J stated in the case of:- “Geoffery Muriungi & another v John Rukunga M’imonyo suing as Legal representative of the estate of Kinoti Simon Rukunga (Deceased) [2016] eKLR” and which wisdom I am persuaded with from the following excerpts: -
- “...the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or “rendering the appeal nugatory” within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal...”



17. Now applying these legal principles to the instant case. The Appellants/Applicants herein filed an application dated 21st November 2022 in the aforesaid lower Court matter seeking orders to set aside the temporary injunction issued as well as to strike out the entire suit on Two (2) main grounds;
 - a. The suit never disclosed any cause of action or defence in law against the Appellants/Applicants since they were strangers to the suit property being claimed by the 1st, 2nd and 3rd Respondents herein; and
 - b. The Chief Magistrate's Court lacks jurisdiction to determine the claims of the Respondents which was based on alleged grounds of historical injustices since the review for such claims was being done by the National Land Commission and the period for such review has since expired.
18. The Appellants/Applicants averred that the Appeal will be rendered nugatory if the order of this court is acted upon as the Learned Magistrate delivered a combined Ruling relating to their aforementioned application and the Respondents' application dated 26th October 2022 in which the Learned Magistrate failed to at all rule on the issue of the court's jurisdiction. The Learned Magistrate proceeded to issue injunctive orders in favour of the Respondents who had not provided any title documents relating to suit property which the Respondents claimed to own.
19. In determining whether sufficient cause has been shown, the Honourable court should be guided by the three (3) pre-requisites provided under Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules, 2010. Firstly, the application must be brought without undue delay; Secondly, the court will satisfy itself that substantial loss may result to the Appellants/Applicants unless stay of execution is granted; and Thirdly such security as the court orders for the due performance of such decree or order as may ultimately be binding on them has been given by the Applicant.
20. Regarding the first pre-requisite, the Honorable court has already referred the consideration to be made in the case of:- "Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu (Supra)". From the surrounding facts and inferences of this case, undoubtedly, I am persuaded that the Appellants/Applicants have proved that they will suffer substantially if the orders for stay of the execution are not granted as prayed.
21. The second issue is whether the application for stay of execution was made without inordinate delay. From the record, the order being appealed against was delivered on 19th May, 2023 and the application herein was filed on 25th May, 2023. This was after about 6 days of the order the Appellants/Applicants were dissatisfied with. In this Honourable Court's opinion, the application was made timeously without any delay at all. The application was therefore made and filed expeditiously and without undue delay.
22. On the last condition is on provision of security. Clearly, the provision of Order 42 Rule 6 (2) (b) of the Civil Procedure Rules, 2010 is stipulated in mandatory terms. Hence, it follows that that the third condition a party needs to fulfil so as to be granted the stay order pending Appeal (s)he must furnish security. I have noted that the Appellants/Applicants herein have not at all mentioned the issue of security from their filed pleadings herein. Certainly, therein is a lapse there and which the Court cannot fail to take judicial notice on. Critically, I need to reiterate the importance of placing security by parties in such instances through citing the case of:- "Aron C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates" the court held that:

"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 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.”

23. Be that as it may, I discern that the grant of stay remains a discretionary order that must also take into account the fact that the Court ought not to make a practice of denying a successful litigant the fruits of their judgment. As already indicated above, the Court of Appeal in the “Butt v Rent Restriction Tribunal (Supra) gave guidance on how discretion should be exercised and I need not belabor the point any further.
24. Thus, based on these sound legal principles, this Honourable Court shall exercise its discretion regarding the security of the appeal and orders that the Appellants/Applicants place with the Honourable Court the original Certificate of title to their land within a stipulated timeframe as security for this appeal.

Issue No. b). Who will bear the Costs of Notice of Motion application dated 25th May, 2023.

25. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh v Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo v Barclays Bank of Kenya Limited, eKLR (2014).
26. In this case, this Honourable Court has reserved its discretion in not awarding costs.

V. Conclusion & Disposition

27. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order:-
 - a. That the Notice of Motion application dated 25th May, 2023 be and is hereby found to have merit hence it is allowed in its entirety.
 - b. That this Honourable Court do hereby issue an order to stay the execution of the orders issued on 19th May, 2023 by Hon. D. W. Mburu in MCELC Case No. E153 of 2022 until the determination of this Appeal.
 - c. That this Honourable Court do hereby issue an order of stay proceedings of the Chief Magistrate’s Court of Kenya at Mombasa in MCELC Case No. E153 of 2022 until the determination of this Appeal.
 - d. That an order be and is hereby made for the Appellant/Applicant Within the Next Fourteen (14) days from the date of the delivery of this Ruling to place the original Certificate of Title deed of the land owned by them to form a basis of security for the due performance of the Decree or order of this Court pending the hearing and final determination of the Appeal herein.



- e. That for expediency sake, the matter be mentioned on 7th May, 2024 for purposes taking directions on admission and disposal of the appeal being the 179 pages Record of Appeal dated 3rd August, 2023 & the Memorandum of Appeal dated 19th May, 2023 pursuant to the provision of Section 79B of the Civil Procedure Act, Cap. 21 and Order 42 Rules, 11, 13 and 16 of the Civil Procedure Rules, 2010.
- f. That these Orders to be served upon the Respondents promptly for prompt execution of the same by the 1st & 2nd Appellants herein.
- g. That there shall be no orders as to costs.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 22ND DAY OF FEBRUARY 2024.

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HON. JUSTICE MR. L. L. NAIKUNI
ENVIRONMENT AND LAND COURT AT
MOMBASA

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. M/s. Mbwana Advocate for the 1st & 2nd Appellants.
- c. No appearance for the 1st, 2nd, 3rd, 4th & 5th Respondents.

