



**Waita v Venture Holdings Ltd (Environment & Land Case 4, 5, 10, 13 & 85 of 2016  
(Consolidated)) [2024] KEELC 1607 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1607 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 4, 5, 10, 13 & 85 OF 2016 (CONSOLIDATED)  
EK WABWOTO, J  
MARCH 20, 2024**

**BETWEEN**

**EMILY MWENDE WAITA ..... PLAINTIFF**

**AND**

**VENTURE HOLDINGS LTD ..... DEFENDANT**

**RULING**

1. The Defendant filed a Notice of Motion Application dated 3<sup>rd</sup> October 2023 which was accompanied by a Supporting Affidavit sworn by Kwame Kariuki. The Application was brought under Section 1A,1B,63(c) and (e) of the Civil Procedure Act and order 22 (rule 22) and 42(rule 6) of the Civil Procedure Rules under which the following orders were sought:
  - i. ...Spent.
  - ii. ....Spent.
  - iii. That the Notice of Appeal dated 3<sup>rd</sup> October 2023 be deemed as duly filed within time upon payment of the requisite fees.
  - iv. That pending the hearing and determination of this Application, the Court be and is hereby pleased to stay the judgement delivered on 21<sup>st</sup> September 2023 and execution on any consequential orders.
  - v. That the Court be and is hereby pleased to stay the judgement delivered on 21<sup>st</sup> September 2023 and execution on any consequential orders, pending the hearing and determination of the Appal from the said judgement.
  - vi. That the costs be in the cause.



2. The Application was based on several grounds including that the Defendant/Applicant intends to file an appeal against the said judgement. The Defendant/Applicant is willing to deposit reasonable security for costs. No prejudice will be occasioned to the Defendant and that the application has been brought without undue delay and has high chances of success.
3. The application was canvassed by way of written submissions. The Applicant filed a supplementary affidavit sworn by Kwame Kariuki dated 17<sup>th</sup> January 2024, Additionally, in submissions dated 17<sup>th</sup> January 2024, the Applicant argued that a decretal sum of Ksh 80,916,230/- was a significant amount that would occasion great financial distress on its part. It was further argued that no prejudice would be suffered by the Respondents since they have the right to remain in occupation even when stay of execution is granted. Making reference to its Director's supporting affidavit dated 3<sup>rd</sup> October 2023, it was submitted that the Applicant was willing to provide security for costs. In line with the given submissions the Court was called upon to consider a reasonable amount as security for costs.
4. In opposition to the application, the Plaintiff/Respondent filed a replying affidavit dated 19<sup>th</sup> October 2023 and submissions dated 11<sup>th</sup> March 2024 in which it was argued that the intended appeal was a delay tactic. Relying on the case involving *Okiya Omtatab Okoiti vs Attorney General* 2015 eKLR, it was argued that integrity of the legal system must be upheld. It was argued that the decisions must be arrived at by legal principles and not influenced by the financial standing of parties in the litigation.
5. Having considered the application, rival affidavits and submissions filed by the parties, it is clear that the main issue for determination is whether the application dated 3<sup>rd</sup> October 2023 is merited.
6. The Court is guided by order 42 rule 6 of the *Civil Procedure Rules, 2010* which provide 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 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.

No order of stay shall be made under sub rule (1) unless-

  - a) The court is satisfied that substantial loss may result to the applicant unless the order is made and 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.”
7. The Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 stated as follows:
  - “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, 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."
8. In Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63 it was held that:
- "...to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court..."
9. This Court is cognizant of the delicate balance of the right to appeal vis a vis the right to enjoy the fruits of the Judgement. I echo the sentiments in the case of Carter & Sons Ltd vs Deposit Protection Fund Board & 2 others Civil Appeal No. 291 of 1997:
- "... the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . . the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay." [Emphasis Mine]
10. I have considered of following; firstly, that this application was filed within one month of delivery of the judgement therefore the threshold for unreasonable delay is met. Secondly, security for costs has been offered by the Applicant.
11. In the foregoing, the Court dispenses the Notice of Motion dated 3<sup>rd</sup> October 2023 in the following terms:
- a. The Notice of Appeal dated 3<sup>rd</sup> October 2023 be deemed as duly filed within time upon payment of the requisite fees.



- b. Pending the hearing and determination of the Appeal, a stay of execution is hereby issued against the judgement delivered by this Court on 21<sup>st</sup> September 2023.
- c. The an order of stay is hereby issued on condition that security of costs of Kshs 20,000,000/- be deposited in a joint interest earning account in the names of the parties Advocates on record within 30 days of delivery of this ruling.
- d. Failure to comply with order (c) above, the stay issued herein shall automatically lapse without further reference to this Court.
- e. Each party shall bear its own costs of this application.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>TH</sup> DAY OF MARCH 2024.**

**E. K. WABWOTO**

**JUDGE**

**In the presence of: -**

Ms. Murugi h/b for Mr. Okulo for the Plaintiff/Respondent.

Ms. Akinyi h/b for Mr. Kounah for the Defendant/Applicant.

Court Assistant; Caroline Nafuna.

