



Chudasama v Chudasama; Shah (Interested Party) (Suing in Her Own Right and also as the Legal Representative of the Estate of Harilal Mulji Chudasama) (Environment & Land Case 1394 of 2016 & 249 of 2019 (Consolidated)) [2025] KEELC 284 (KLR) (30 January 2025) (Ruling)

Neutral citation: [2025] KEELC 284 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1394 OF 2016 & 249 OF 2019 (CONSOLIDATED)
OA ANGOTE, J
JANUARY 30, 2025**

BETWEEN

JASWANT HARILAL CHUDASAMA PLAINTIFF

AND

SHASHIKANT HARILAL CHUDASAMA DEFENDANT

AND

NILABEN KARTIC SHAH INTERESTED PARTY

**SUING IN HER OWN RIGHT AND ALSO AS THE LEGAL REPRESENTATIVE
OF THE ESTATE OF HARILAL MULJI CHUDASAMA**

RULING

1. Before this Court for determination is the Plaintiff/Applicants' Motion dated the 20th June, 2024 brought pursuant to the provisions of Sections 1A, 1B, 3A of the Civil Procedure Act, and Order 42 Rule 6 of the Civil Procedure Rules seeking the following reliefs:
 - i. That this Honourable Court be pleased to stay execution of the Judgment of Honourable Justice O.A Angote delivered on the 6th February, 2024 in NRB ELC No 1394 of 2016(O.S) consolidated with ELC No 249 of 2019 pending the hearing and determination of the intended Appeal.
 - ii. That this Honourable Court be pleased to stay the execution of the Order dated the 11th June, 2024 pending the hearing and determination of the intended Appeal.
 - iii. That this Honourable Court be pleased to grant any other orders it deems just and expedient.



- iv. That the costs be in the cause.
2. The application is supported by the Affidavit of Jaswant Harilal Chudasama, the Plaintiff/Applicant of an even date. He deponed that on the 31st October, 2016, he filed an Originating Summons in ELC 1394 of 2016 which was later consolidated with ELC 249 of 2019 and that on the 6th February, 2024, the Court delivered a judgement dismissing his claim.
 3. He stated that aggrieved by the judgement, he filed a Notice of Appeal dated the 16th February, 2024 on the 19th February, 2024 and served the same upon Counsel for the Respondent and the Interested Party and that he further sought from the Deputy Registrar on the 16th February, 2024, copies of the proceedings.
 4. According to the deponent, the decree in this matter was issued on the 4th April, 2024 and that further, the Respondent has extracted a Court Order dated the 11th June, 2024 seeking to execute the Judgment through the appointment of an independent valuer to sell the suit property which is his home.
 5. He urges that he is apprehensive that unless the orders sought are granted, the Respondent may execute at any time causing him to suffer substantial loss as his intended appeal, anchored on cogent grounds and raising triable issues will be rendered nugatory; that he will suffer irreparable damage in the event the Respondent disposes of the suit property, and that the interests of justice favour the grant of the Motion.
 6. In response to the Motion, Chudasama Hitesh Shashikant, the Defendant/Respondents' son swore a Replying Affidavit on the 9th July, 2024. He deponed that his father's health has greatly suffered since the delivery of the Judgment on the 6th February, 2024 necessitating his swearing of the response to the Motion; that he holds a general power of attorney in respect of all his fathers' affairs and has been involved with the suit since its inception and that by virtue of the foregoing, he is well versed with the matter and competent to swear the Affidavit.
 7. He posits that the Applicant has filed two separate applications for stay of execution, the first being on the 23rd May, 2024 and the present one; that the first Motion was set down for inter-partes hearing on the 27th May, 2024; that it was however not served upon them nor was it prosecuted on the 27th May, 2024 on which date the Applicant and his Counsel were absent and that his father's Motion for execution of the decree which was also due for hearing on the 27th May, 2024 proceeded, and the orders sought were granted, to wit, appointment of a valuer to sell the suit property and share the proceeds.
 8. According to Mr Hitesh, the Applicant only filed the present Motion upon service of the orders of 27th May, 2024 and upon being contacted to arrange a date for valuation and that the present Motion is an abuse of the process of the court and he is opposed to the same as well as to the Motion of 23rd May, 2024.
 9. He posits that the above notwithstanding, the Applicant has not met the threshold for the grant of stay of execution pending appeal; that the Applicant's intended appeal is not arguable because of the court's finding, and due to the fact that the title and sale agreement affirm that the suit property is co-owned by the Respondent, the Applicant and their father, and that the Motion was filed after unreasonable delay being 4 ½ months after delivery of the judgement.
 10. Mr Hitesh avers that while the Applicant alleges substantial loss and irreparable damage, he has not demonstrated the same and that on the contrary, if the judgement is executed, he will receive two thirds of the share of proceeds which he can use to purchase another home.



11. He states that the Respondent has already begun the process of execution following the granting of his Motion of 27th April, 2024 in which a valuer and estate agent were appointed to value and thereafter sell the property and that the orders arising from the Motion dated the 11th June, 2024, were served on the Applicant but the same elicited no response until the letter of 20th June, 2024 was sent seeking access to the property for purposes of valuation.
12. He urges that his father is in his sunset years, experiencing health difficulties and wishes to enjoy his retirement; that he has been supporting his parents despite the fact that his father has an investment he can live off; that his father would like to derive his livelihood from the property which he contributed for during his lifetime, and that the Applicant has not offered any security as required.
13. The parties filed submissions and authorities which I have considered.

Analysis and Determination

14. Having carefully considered the pleadings and rival submissions by the parties, the sole issue that arises for determination is whether the Plaintiff/Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution pending Appeal?
15. The law with respect to stay of execution pending appeal is to be found under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules which provide as follows:

“(1) 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 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 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.”

16. In *Vishram Ravji Halai vs Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal, discussing the High Courts’ jurisdiction [read ELC] under these Rules stated:

“The Superior Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, 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. The application must of course be made without unreasonable delay.”

17. What arises from the foregoing is that the grant of orders of stay of execution is subject to the court’s discretion, upon demonstration of sufficient cause and as guided by the provisions of Order 42 rule 6 of the Civil Procedure Rules. Speaking to what constitutes sufficient cause, Gikonyo J in *Antoine Ndiaye vs African Virtual University* [2015] eKLR, persuasively opined:

“stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the Court should be guided by the three prerequisites provided under order 42 rule 6 of the Civil Procedure Rules...”

18. As to how the court should exercise its discretion, the exposition by the Appellate court in *Butt vs Rent Restriction Tribunal* [1982] KLR 417 is instructive. The learned judges noted:

- “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.”

19. Further to the above, the courts are now enjoined to give effect to the overriding objectives in the exercise of its powers under the *Civil Procedure Act*. The Court is so guided.

20. By way of a brief background, the Applicant vide the consolidated suits sought inter-alia, to be declared the sole proprietor of the suit property. He alleged that while the property was co-owned by himself, the 1st Respondent and their deceased’s father, their father had transferred to him his share, and he was entitled to the Respondent’s portion by way of adverse possession subsequently entitling him to sole ownership of the entire parcel.

21. On his part, the Respondent counter-claimed, contending that the Applicant held their father’s share of the property in trust for the estate, and he was entitled to his third. He sought to have the property sold and the proceeds sub-divided amongst the Applicant, himself and their father’s estate for distribution amongst his heirs.



22. The matter proceeded for hearing and vide its judgement of 6th February, 2024, the Court found inter-alia, that the transfer of 1/3 share of the suit property to the Applicant was not fraudulent, that the Applicant's claim to the Respondent's portion by way of adverse possession had not been demonstrated and that that the Respondent is entitled to 1/3 of the suit property as a co-tenant.
23. The court also directed the property to be valued for purposes of determining its market value and thereafter sold and its proceeds shared in the ratio of 2/3: 1/3 between the Applicant and the Respondent respectively. Aggrieved by this decision, the Applicant has filed a Notice of Appeal. He asks this Court to stay the execution of the judgement pending the determination of the Appeal.
24. He also asks this court to stay its orders issued on the 11th June, 2024 in which the court appointed Mr Fredrick J Kinyua as an independent valuer for the purposes of the decree and the firm of Kinyua Koech as the Estate Agent to sell the property as per Order 5 of the decree. The Court also directed that the Applicant's share of the proceeds from the sale be deposited in court.
25. Beginning with the aspect of delay, as correctly stated, what it constitutes was discussed in the case of Jaber Mohsen Ali & Another vs Priscillah Boit & Another [2014] eKLR where Munyao J stated:
- “The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.”
26. Similarly, the Court in Utalii Transport Company Limited & 3 Others vs. NIC Bank Limited & Another [2014] eKLR stated:
- “Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so, on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court's mind on the delay, caution is advised for courts not to take the word 'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality.”
27. The judgement sought to be appealed against herein was delivered on the 6th February, 2024 whereas the present Motion is dated the 20th June, 2024. This constitutes a period of approximately 4 ½ months.
28. The Respondent contends that this delay is unexplained and subsequently unreasonable. The Applicant on his part contends that this delay is not unreasonable asserting that it immediately after the judgement filed the Notice of Appeal and sought proceedings. He does not however explain why the present Motion was not filed immediately.
29. Further, no attempts have been made to explain the circumstances leading to the abandonment of his earlier Motion of 23rd May, 2024. In the circumstances the court considers this delay unreasonable.



30. Speaking to the nature of substantial loss, the Court of Appeal in the case of Rhoda Mukuma vs John Abuoga [1988] eKLR, stated thus:
- “substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory...”
31. Clarifying that substantial loss exceeds the ordinary consequences suffered by any judgement debtor, the court in Century Oil Trading Company Ltd vs Kenya Shell Limited [2007] eKLR opined:
- “The word ‘substantial’ cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words ‘substantial loss’ must mean something in addition to all different from that.”
32. Further, the Court in James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR explained that the process of execution alone does not amount to substantial loss. It stated as follows:
- “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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. This is what substantial loss would entail...”
33. Courts have also held that substantive loss must be demonstrated. This position was articulated by the Court of Appeal in Kenya Shell Limited vs Benjamin Karuga Kibiru & Another [1986] eKLR which held as follows:
- “It is usually a good rule to see if Order 41 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.”
34. It is the Applicant’s contention that he stands to suffer substantial loss if stay is not granted. He opines that the Respondent will proceed to execute the decree to his detriment thereby rendering him homeless and his appeal nugatory because in the event of its success, he will have lost his home, and that a valuer having already been appointed, execution is imminent.
35. It was deponed that the Respondent he elderly and in ill health and seeks to enjoy the fruits of his investments and that once the property is sold, the Applicant will receive a third of his proceeds and will be able to get another home.
36. The court has considered the two positions. In doing so, it remains alive to its duty to balance the interests of the Applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory, and the interests of the Respondent who is seeking to enjoy the fruits of his judgment.



37. As cautioned by Kuloba, J in *Machira T/A Machira & Co Advocates vs East African Standard* [2002] eKLR:

“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 judgment 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.”

38. Vide the Appeal, the Applicant claims the entirety of the suit property. On the other hand, the judgment mandates the sale of the suit property and the sharing of the proceeds therefrom. Should his appeal in this respect succeed and the execution has proceeded, it will undoubtedly have been an academic exercise. The property having been sold to a third party will inevitably be outside the realm of the court.

39. The court also notes that the Applicant is currently in occupation and possession of the property and it is he who initially instituted the suit seeking the entire property and not the Respondent who is seeking to sell it and recover his shares. In the end the court is convinced that the Applicant has demonstrated substantial loss.

40. Moving to the last issue regarding provision of security, its purpose was discussed by the Court in *Arun C Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, thus:

“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.”

41. The Applicant has not proposed any security. He has however indicted his willingness to abide by any terms in that regard. The issue of security is discretionary and it is upon the court to determine the same.

42. It is trite that the three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive and not disjunctive. Whereas the Applicant has adequately demonstrated sufficient loss and has indicted willingness to offer security as granted by the court, they did not timeously file the motion.

43. In fact, the application was only filed by the Applicant after the Respondent’s application for the appointment of an independent valuer was allowed by the court.

44. For those reasons, the application dated 20th June, 2024 is dismissed with costs.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30TH DAY OF JANUARY, 2025.

O. A. Angote

Judge

In the presence of;

Mr. Nduta Kamau for Dr. Kamau for 1st Defendant

No appearance for Plaintiff

Mr. Onyeigo for Ms Letich for Interested Party

Court Assistant: Tracy

