



**Gachanja Muhoro & Sons Limited t/a Dasy Mart Supermarket v Kamau & 2 others
(Environment & Land Case 497 of 2016) [2024] KEELC 1565 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1565 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 497 OF 2016**

**AA OMOLLO, J
MARCH 14, 2024**

BETWEEN

**GACHANJA MUHORO & SONS LIMITED T/A DASY MART
SUPERMARKET PLAINTIFF**

AND

**MARTIN NGANGA KAMAU 1ST DEFENDANT
DAVID WANDERI P/A TAIFA AUCTIONEERS 2ND DEFENDANT
JANE WANJIRU NGANGA 3RD DEFENDANT**

RULING

1. The Applicants filed a Notice of motion dated 18th October 2023 seeking for the following orders;
 - a. Spent
 - b. Spent
 - c. That there be a stay of execution of the judgement issued by this court on 28th September 2023 and all consequential orders thereto pending the hearing and determination of the Appeal filed at the Court of Appeal.
 - d. That the costs of this Application be in the Cause
2. The application is supported by an affidavit sworn by Geoffrey Muiruri Gachanja on 18th October 2023 and a Supplementary Affidavit sworn on 3rd November 2023.
3. The Applicant stated that the Court delivered a judgement on 28th September 2023 in Kisumu, dismissing the Plaintiff's suit and allowed the 1st and 2nd Defendants counterclaim for a sum of Kshs. 8,131,680/= being the rent arrears together with interest at the rate of 18% per annum from 30th January 2017 until payment in full. That being aggrieved by the judgment of this court the Applicant



has filed an Appeal against the said judgment at the Court of Appeal which Appeal, raises triable issues, has high chances of success and will be rendered nugatory and futile unless the orders sought herein of stay of execution are granted by the court.

4. The Applicant stated that the Notice of Appeal was filed and uploaded on the online Judiciary portal on 29th September 2023 being the very next date after delivery of the judgment by the court and that the court file was received back at the Milimani Law Courts from Kisumu Law Courts on 4th October 2023 and despite numerous attendances at the court registry by their Advocates the Notice of Appeal was only ready for collection duly signed and sealed by the court on Thursday 12th October 2023.
5. The Applicant stated that this Court held that the distress for rent that was levied against them by the 1st and 2nd Defendants/Respondents was lawful and that the Respondents have commenced execution proceedings unless stay orders are granted herein. That in the event the Defendants proceed with the execution process the Plaintiff will essentially be locked out from the seat of justice and from exercising its constitutional right to an appeal.
6. It is contended that the Defendants will not suffer any prejudice if the orders sought being granted by the Court and a substantial portion of their assets valued at Kshs. 46,656,790/= are still held by the Defendants.
7. The 1st and 2nd Defendants/Respondents opposed the motion *vide* a replying affidavit sworn by Martin Ng'ang'a Kamau on 25th October 2023. They confirmed having a Judgment in their favor issued on the 28th day of September 2023. That it is the Applicants' intention to deny them the fruits of this Judgment, accrued from the arrears of Rent, which was long due. Further, that the Appellant was required to lodge and serve a notice of appeal within Seven (7) days from the date of delivery of Judgment, a requirement that they failed to comply with making the intended appeal irregular.
8. The Respondents stated further that they are able to refund the decretal sum if the appeal is determined in favour of the plaintiff/applicant. That the Applicant has not provided any security for the performance or settlement of the decree as the law requires hence does not deserve the Orders sought in this application. They averred that there has been no demonstration on the merit of the intended Appeal thus the Court cannot be left to speculate on the merit of the same without evidence. Lastly, the Applicant has not demonstrated the loss they stand to suffer were they to settle the decretal amount which is in essence rent arrears.

Submissions

9. *Vide* submissions dated 10th November 2023 the Applicant submitted that they lodged a Notice of Appeal within fourteen (14) days of the judgment in with compliance to Rule 77 (2) of the [Court of Appeal Rules, 2022](#). The [said rule](#) provides that any person who desires to appeal to the Court of Appeal from the decision of the High Court/ Environment and Land Court is required to give notice by lodging such a notice in writing with the Registrar of the High Court within 14 days of the date of the decision against which it is desired to appeal. They also cited the case of [Florence Seyanoi Kibera & Anor vs. Deborah Achieng Aduda & Anor](#) Civil Application No. 211 of 2018.
10. The Applicants submit that the purpose of an application for stay of execution pending an appeal is to preserve the subject matter so that the rights of the Appellant are safeguarded; to save time and the Appeal if successful, is not rendered inconsequential. They stated that the motion was brought without undue delay and substantial loss will result to them unless stay of execution is ordered.
11. The Applicants contended that the Respondents' true means, resources and assets are unknown to it thus they may not be able to pay back or refund the decretal sum as alleged. Further, that



- the Defendants already have in their possession the Plaintiff/ Applicants assets that are of a higher value than the decretal sum so it serves no purpose to provide security for costs. In support of this argument, they cited the case of *Nickson Muthoka Mutavi vs. Kenya Agricultural Research Institute* Civil Appeal No. 93 of 2012 and *Africa Eco-camps Limited and Exclusive African Treasurers Limited*. Civil Application No. 183 of 2014 where the Court of Appeal in granting stay of execution stated that; once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden shifts to the Respondent to show what resources he has to satisfy the decree should the appeal succeed since that is a matter likely to be peculiarly entirely within the knowledge of the Respondent.
12. While relying on the case of *Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others* [2009] eKLR the Applicant submitted that under Order 42 rule 6 of the *Civil Procedure Rules* it is not a condition precedent for grant of stay that the Applicant satisfies the Court that its appeal has overwhelming chances of success and what is permissible and desirable for the Applicant to disclose is the nature of its intended appeal so that the Court satisfies itself that in determining whether or not to exercise its discretion in favour of the Applicant, it is not doing so on frivolous grounds. That the Applicant has therefore, discharged this mandate by annexing a draft copy of its memorandum of appeal detailing the nature of its intended appeal.
 13. The Defendant/Respondent submitted that in terms of the Lease Agreement between the parties, rent was payable quarterly in advance, and they have been denied their due rent all that long. That this application expresses the Plaintiff/Applicant intention to extend their (Respondents) misery.
 14. In a bid to show that they can refund a sum of (shs. 8,131,680/- were the intended appeal to succeed, the Respondents submitted that they are the registered owners of the parcels of land known as Plot. Nos. 239, 240 and 241 on LR. No. 6845149 situated at Utawala, Nairobi together with the premises erected therein, and which comprised part of the premises rented to the plaintiff/applicant amongst other tenants. They added that this court should decline the invitation by the Applicant to shield them from their obligation under the Lease Agreement in respect to rent payment which they voluntarily executed.
 15. They contended that the Applicant has not proved the allegation that the 1st and 2nd Defendant/ Respondent are holding its good worth over Kshs. 61,000,000 which according to it, is adequate security as required by the rules. The Respondents posit that learned Judge found as a fact that the Applicants had not proved its case, and in particular the existence of the goods valued at the amount claimed and accordingly dismissed the suit with costs. Thus the alleged goods cannot be considered as security envisaged under the Rules while granting an Order for Stay of Execution of the Decree.
 16. The Respondents submitted that there will be no substantial loss to be suffered by the Applicant by paying the arrears of rent found to be due and owing to the 1st and 2nd Defendant/Respondents, and which rent has been outstanding since 2015. In the alternative, the Respondents urged the Court to order the Plaintiff/Applicant deposit the entire decretal amount in an interest earning account in the names of the Advocates on record for the parties, within a period of 14 days from the date of the Ruling. In support, they cited the Court of Appeal, in Civil Appeal No. 183 of 2014 -Africa Eco Camps Ltd vs Exclusive African Treasurers Ltd referred by the Plaintiff/Applicant herein.

Determination:

17. I have considered the application, the response thereto together with the written submissions in determining whether or not to grant the stay of execution order. The principles guiding the grant of



a stay of execution pending appeal are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:

“No order for stay of execution shall be made under subrule (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.

18. In Visbram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.

19. In addition to order 42 rule 6, the Court can also apply the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act. Section 1A (2) of the Civil Procedure Act provides that;

“the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective”

20. This application was filed within a month after the delivery of the judgement hence it was brought without undue delay. Secondly, there is a notice of appeal lodge and it is not within the mandate of this court to determine whether it is irregular or otherwise. Order 42 rule 6(4) states that an appeal to the Court of Appeal shall be deemed to have been filed under the Rules once a notice of appeal has been given. Consequently, the only point for consideration in this application is whether the Applicant has demonstrated that they will suffer substantial loss unless the orders sought are granted.

21. With regard to what entails substantial loss, in the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, it was stated that:

“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 ... 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.”

22. The decree sought to be stayed is respect of monetary sums of money awarded to the Defendants in the judgement rendered on 28th September 2023 for accrued rent and special damages amounting to Kenya Shillings 8,131,680 together with interest. The Applicant contend that they stand to suffer substantial loss since there is no evidence that the Respondents are likely to refund the monies if the appeal succeeds in addition to the averment that the Respondents are custody of their assets valued at over Kshs. 46,656,790.00.



23. On the other hand, the 1st and 2nd Respondents argued that the application for stay of execution pending appeal is a way for the Applicant to continue delaying from paying the rent arrears owed and delay them from enjoying the fruits of the judgement. That they have demonstrated that they have the means to refund the decretal sum if the appeal succeeds by showing that they own land where they have developed premises which have tenants which one of the premises was previously rented by the Applicant herein that currently has another tenant.
24. In balancing the competing interests of the parties herein, I am guided by the decision in the case of *Michael Ntouthi Mitheu vs Abraham Kivondo Musau* (2021)eKLR, which held that;

“The law is that where the applicant intends to exercise its undoubted right of appeal, and in the event it were eventually to succeed it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security. The issue of adequacy of security was dealt with by the Court of Appeal in *Ndubiu Gitabi vs. Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 where the Court of Appeal expressed itself as follows:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it.’

25. In line with the above discussion and taking into consideration the history of the case as given in the judgement, I reach a finding that this court should grant a conditional stay of execution pending appeal. The condition shall be that the Applicant deposits 50% of the decretal sum in a joint interest earning account. Consequently, the application is granted as follows;
- a). That there be and is hereby issued a stay of execution of the judgement rendered on 28th September 2023 and all consequential orders thereto pending the hearing and determination of the Appeal filed at the Court of Appeal on condition that the Applicant shall within 60



days from the date hereof deposits 50% of the decretal sum in an interest earning account to be opened in the names of the advocates for the parties on record.

- b). In default, the stay orders shall automatically lapse
- c). That the costs of this Application abide the winner in the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH MARCH, 2024

A. OMOLLO

JUDGE

