



**Rabe v Gude (Environment & Land Case 237 of 2021)
[2024] KEELC 3796 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 3796 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 237 OF 2021**

AE DENA, J

MARCH 14, 2024

BETWEEN

MARINA GISELA RABE PLAINTIFF

AND

HAMADI SALIM GUDE DEFENDANT

RULING

1. The Judgement in this matter was rendered by this court on 8/8/2023 wherein the following orders were issued;
 1. That the Defendant’s counterclaim is hereby dismissed.
 2. That the Chief Land Registrar to cancel the title deed Kwale/Diani SS/3190 issued to the Plaintiff and the Defendant and instead Marina Gisela Rabe be registered as the sole owner as lease and a title deed do issue.
 3. II above shall be subject to compliance with other legal requirements as to ownership of land by foreigners.
 4. There shall be no orders as to costs.
2. Aggrieved the Defendant/Applicant filed a Notice of Motion before this court on 17/8/2023 seeking the following orders;
 1. Spent
 2. Spent
 3. That the Honourable court be pleased to issue stay of execution of the aforesaid judgement decree and amended decree pending the hearing and determination of the intended appeal



4. That pending inter partes hearing and determination of this application, this honourable court be pleased to grant a temporary order of injunction restraining the Plaintiff/Respondent either by herself and/or through her servants agents assigns, successors or whomsoever from alienating, lending, charging mortgaging, encumbering, sub dividing, disposing off, transferring offering for sale, selling, dealing with and/or interfering in any manner with the title to and/or consenting to transfer registering any transfers or issuing any title in respect of any subdivision arising from the property known as Kwale/Dianiss/3032 [Suit property] situated in Ukunda.
5. That pending inter partes hearing and determination of this application, this honourable court be pleased to grant a temporary order of injunction restraining the Plaintiff/Respondent either by herself and/or through her servants agents assigns, successors or whomsoever from alienating, lending, charging mortgaging, encumbering, sub dividing, disposing off, transferring offering for sale, selling ,dealing with and/or interfering in any manner with the title to and/or consenting to transfer registering any transfers or issuing any title in respect of any subdivision arising from the property known as Kwale/DianiSS/3032[Suit property] situated in Ukunda until the intended appeal is heard and determined.
6. That costs of this application be provided for.
3. The application is set upon grounds on its face and the supporting affidavit of the Defendant/Applicant Hamadi Salim Gude.He avers that the decree in the matter was issued in his absence and during the courts vacation. That the matter only came to his knowledge after a copy of the decree and judgement was sent to the personal email of his former Advocate who is now a Judge. That this happened despite the court administrator informing parties that this court would be away from 1/8/2023 to 15/9/2023.
4. The Applicant states that he instructed another firm of advocates to come on record on his behalf and file an appeal to the Judgement rendered. That despite these changes, the Deputy Registrar Kwale sent an email to his former Advocate and the Land Registrar Kwale with an amended decree and Judgment despite change of representation.
5. It is averred that by conduct of this court, the Applicant is denied his right to a fair administrative action and that the impending execution exposes him to irreparable harm. That unless the stay orders are issued the appeal will be rendered nugatory. Further that the decree and the amended decree thereof is irregular as it contravenes the provisions of Order 21 Rule 8[2] where a draft decree ought to be sent to the advocates for the parties for perusal within a period of 7 days and in the instant case no draft decree was sent.
6. At paragraph 13 of the affidavit, it is alleged that the court has moved to find the Plaintiff whose case was dismissed since 21/11/2022 and struck out the Defendants undefended counterclaim. The Applicant has annexed a copy of his Memorandum of Appeal which he states has higher chances of success and beseechs the court to issue stay.
7. In opposing the application, the Plaintiff through the firm of Kupalia Fondo Mwagunya& Associates filed grounds of opposition before court on 19/10/2023 and raised the following grounds;
 1. That the application is unfounded and ungrounded.
 2. That the application is filed by a firm of advocates not properly on record as there is a consent filed to have the matter conducted by the law firm of M/s Sherman Nyongesa & Mutubia Advocates and should be struck out.



3. That the Defendant has not demonstrated that he will suffer irreparable and substantive loss in the event execution is allowed to proceed before the appeal is heard.
4. That the application ought to be dismissed with costs accordingly.
8. The application is further opposed by a replying affidavit sworn by the Plaintiff Marina Gisela Rabe. It is averred that the Defendant has not demonstrated at all in his supporting affidavit that he will suffer irreparable and substantive loss in the event execution is allowed to proceed before the appeal is heard. That in fact, it is his own admission that he did not contribute anything towards purchase of the property. The Defendant has further conceded to not being in occupation of the suit property. He has also not made any offer for security.
9. At paragraph the Plaintiff denies any under dealings in obtaining the decree herein. That the Defendant has not displayed any prejudice suffered in relation to issuance of the decree. The court is urged to disallow the application.
10. The application was dispensed by way of submissions.

Determination

11. A preliminary issue has been raised which I find necessary to address at the outset. The Plaintiff/ Respondent contends that the firm of M.S. Shariff & Company Advocate and which has brought the present application is not properly on record. It is trite that where there is a change of advocate after Judgment, such change has to be by leave of court as per the provisions of Order 9 Rule 9[a] of the Civil Procedure Rules, Order 9[b] allows for change of Advocate to be through a consent between the outgoing advocate and the proposed incoming advocate and the rationale for this was explained in the case of SK Tarwadi v Veronica Mueblemann [2019] eKLR. I note that the Applicant has indicated in the affidavit in support of the application that he had instructed the new firm of advocates to institute an appeal against the Judgment of this court. It is my presumption that the Applicant intended to have the former advocate down tools once the process of this court was complete. In the interest of justice, I will not vest the mistakes of counsel on the client [Applicant] by dismissing the application for reason that the advocate on record is not properly before court. It behoves me to focus on substantive justice.
12. I will now embark on determination of the main prayer in the application namely stay of execution pending appeal. The principles guiding the grant of a stay of execution pending appeal are well settled and 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.”
13. The court, in RWW v EKW [2019] eKLR, considered the purpose of stay of execution orders pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory.



However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs”.

14. In *Mukuma v Abuoga* [1988] KLR 645 the Court of Appeal stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory”.
15. From the provisions of order 42 and rationale in the above case law it is clear the essence of stay of execution pending appeal is to preserve the suit property so that its status does not change to render any outcome nugatory especially for the Appellant in the event the Court uphold the appeal. I have also noted the requirement for an Applicant to demonstrate irreparable loss and the Applicants and Plaintiffs contentions in this regard. The Applicant submits that he is a co-owner and built therein is a house he considers matrimonial home and thus of high sentimental value. The Plaintiff urges in her reply that the Defendant as a finding of the trial court never contributed a single shilling towards purchase of the suit property. The later argument by the Plaintiff for me should be reserved for merits of the appeal that has been filed before the Court of Appeal.
16. I have already highlighted the rationale for the grant of orders of stay pending appeal. From the provisions of order 42 the court has also been empowered with discretion to grant or not. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent. It is also established that each case is decided on its circumstances. The Applicant has urged that the Plaintiff is in possession of the suit property and carries out business on the same. The Plaintiff indeed does not deny this fact but only states that the applicant has admitted that they are not in possession. For me the fact that the Plaintiff is in possession presents an opportunity for the court to weigh and balance the interests of both parties. The Applicant is not in possession and commits to abide by any orders of the court. The Plaintiff on the other hand is in possession and has control of the property. And this is where a balance is struck as I see no prejudice to be suffered by the Plaintiff as she is already in a position of advantage as against the Applicant herein. This in my view warrants the consideration of this court to exercise its discretion towards grant of the orders of stay of execution and which meets the rationale for the grant of orders of stay of execution pending appeal as drawn from the case law cited.
17. Arising from the provisions of order 42 herein the court must also be satisfied that the application for the orders of stay have been brought before court timeously. The Applicant placed the application before the court on 17/8/2023 which was slightly over a week after the Judgement which was issued on 8/8/2023. I agree with the Applicants submissions in this regard. It is my finding that the Applicants herein has brought this Application without undue delay.
18. I will now address the requirement for security as required under Order 42 Rule 6 (2) (b) The purpose for security was aptly discussed in *Aron C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates* where the court stated 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.”

- 19 The Plaintiff posits that the Applicant has failed to provide security and is not entitled to the orders sought. The Applicant has stated that since there were no orders for costs the requirement for security should not apply. The case of *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others* [2015] was relied upon. My interpretation of the Order 42 Rule 6 (2) (b) is that the security can also be ordered by the court. I note that the title of the suit property Kwale/ Diani SS /3032 is registered in the names of both the Plaintiff and the Defendant held in common and this should suffice for purposes of security for any emerging costs.
- 20 The upshot of the foregoing is that pending the disposal of the Appeal herein this court grants an order of stay of execution of the Judgement delivered on 8/08/23 and the attendant decree in the following terms; -
- 1) That the status quo on the suit property Kwale/Diani SS/3032 shall be maintained and for the avoidance of doubt the Plaintiff shall remain in physical and actual possession.
 - 2) There shall be no disposal, sale, charge, subdivision of the suit property Kwale/Diani SS/3032 by either of the parties. There shall be placed an inhibition order against the title in tandem with this direction.
 - 3) Having made the above orders, I do not find it necessary to consider the prayers for injunction.
 - 4) Costs shall abide the outcome of the Appeal.

Orders accordingly.

RULING DATED SIGNED AND DELIVERED THIS 14TH DAY OF MARCH 2024.

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A.E DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Ng’ang’a Holding Brief for Ms. Ng’ang’a for the Defendants/Applicants

Mr. Fondo for the Plaintiff/Respondent

Mr. Daniel Disii - Court Assistant.

