



Nairobi City County v Mwangi; Kingori (Purchaser); Mwangi (Applicant) (Environment and Land Miscellaneous Application 73 of 2014) [2024] KEELC 1367 (KLR) (14 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1367 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 73 OF 2014**

**JO MBOYA, J
MARCH 14, 2024**

**IN THE MATTER OF: THE ENVIRONMENT & LAND COURT ACT; 2011
AND
IN THE MATTER OF: THE RATING ACT, CAP. 267 OF THE LAWS OF KENYA**

BETWEEN

NAIROBI CITY COUNTY PLAINTIFF

AND

ESTHER NYAMBURA MWANGI DEFENDANT

AND

PHYLIS WAMBUI KINGORI PURCHASER

AND

ANNE WARINGA MWANGI APPLICANT

RULING

1. The applicant herein has filed the notice of motion application dated the February 1, 2024 and which is brought pursuant to the provisions of order 42 rule 6(1) of The *Civil Procedure Rules, 2010* as well as section 1A, 1B and 3A of the *Civil Procedure Act*, chapter 21 Laws of Kenya and in respect of which the applicant has sought for the following reliefs;
 - i. That this application be certified as urgent and service be dispensed with in the first instance for reasons of urgency. [Spent].
 - ii. That upon hearing this application *ex-parte*, this honourable court be pleased to grant a stay of execution of its ruling and orders made on January 30, 2024, pending the hearing of this application inter parties.



- iii. That upon hearing this Application inter-parties, this Honourable Court be pleased to grant a stay of execution of its Ruling and orders made on January 30, 2024; pending the hearing and determination of the appeal therefrom.
- iv. That costs of this application be provided for.
2. The instant application is premised and anchored on numerous grounds which have been highlighted at the foot of the application. Furthermore, the application beforehand is supported by the affidavit of Phyllis Wambui King'ori [Deponent], sworn on even date.
3. Upon being served with the subject Application, the 3rd Respondent filed Grounds of opposition dated the February 15, 2024; and in respect of which the 3rd Respondent has contended, inter-alia, that the Honourable court is devoid and or divested of Jurisdiction to grant the orders of stay sought.
4. First forward, the instant Application came up for hearing on the March 6, 2024, whereupon the advocates for the respective Parties covenanted to canvass and ventilate the Application beforehand by way of written submissions.
5. Pursuant to and at the request of the Parties, [details in terms of the preceding paragraph], the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.
6. For coherence, the Applicant thereafter proceeded to and filed written submissions dated the March 1, 2024 [which submissions apparently predate the directions] whereas the 3rd Respondent filed written submissions dated the March 8, 2024.
7. Both sets of written submissions are on record.

Applicant's Submissions:

8. The Applicant herein filed written submissions dated the March 1, 2024; and wherein same [Applicant] has adopted and reiterated the grounds contained at the foot of the Application. Besides, the Applicant has also adopted and highlighted the averments contained in the body of the supporting affidavit.
9. Furthermore, Learned counsel for the Applicant has thereafter raised, highlighted and canvassed three [3] salient and pertinent issues for due consideration and determination by the Honourable court.
10. Firstly, Learned counsel for the Applicant has submitted that the Application beforehand has been filed and/or lodged without unreasonable delay or at all. Subsequently, Learned counsel for the Applicant has intimated that the ruling under reference was rendered on the January 30, 2024 and whilst the instant application was filed on the February 1, 2024.
11. Arising from the foregoing, Learned counsel for the Applicant has submitted that the Applicant beforehand was filed within 48 hours of the delivery of the impugned Ruling.
12. Secondly, Learned counsel for the Applicant has submitted that the Applicant has demonstrated that same shall be disposed to suffer substantial loss, unless the application is heard and allowed.
13. In particular, Learned counsel for the Applicant has submitted that by the Ruling of the court, [which is subject to an appeal to the Honourable Court of Appeal], this court revoked, canceled and nullified the Applicant's certificate of title to and in respect of the suit property.



14. Pertinently, Learned counsel for the Applicant has contended that the limb of the Ruling of the court relating to the cancelation of the title to the suit property, is one that is capable of execution and/or implementation.
15. Further and at any rate, Learned counsel for the Applicant has submitted that unless the orders of stay are granted, the title to the suit property in favour of the Applicant shall stand revoked and thereafter transferred to and in favor of the 3rd Respondent.
16. To this end, Learned counsel for the Applicant has thus contended that in the event of such transfer, the 3rd Respondent shall automatically become the legitimate owner of the suit property; and same shall be at liberty to, inter-alia, alienate and dispose of the suit property.
17. In a nutshell, Learned counsel for the Applicant has submitted that the likelihood of alienation or transfer and disposal of the suit property, unless the orders sought are granted, constitutes and amounts to Substantial loss, which needs to be averted.
18. In support of the foregoing submissions, namely, that the Applicant has demonstrated substantial loss, Learned counsel for the Applicant has cited and relied on, inter-alia, the case of Nicholas Stephen Okaka & another v Alfred Waga Wasonga (2022)eKLR, Absalom Dova v Trabo Transporters Ltd (2013)eKLR; and James Wangalwa & another v Agnes Naliaka Chesetu (2020)eKLR, respectively.
19. Thirdly, Learned counsel for the Applicant has submitted that the Applicant herein is ready and willing to offer and provide security for the due performance of the decree that may ultimately arise and/or ensue from the subject proceedings. Furthermore, Learned counsel for the Applicant has submitted that whilst considering the security, [if any], to be ordered, the court should take into account that the suit property constitutes sufficient security.
20. In support of the submissions touching on and concerning provision of security, Learned counsel has cited and relied on, inter-alia, the holding in RWW v EKW (2019)eKLR; and Arun C Sharma v Hashana Raikundalia T/a Raikundalia & Co Advocates Nairobi Misc. Civil Application no 802 of 2010, respectively.
21. Consequently and in view of the foregoing, Learned counsel for the Applicant has thus implored the Honourable court to find and hold that the subject application is meritorious and thus ought to be allowed/granted.

3rd Respondent's Submissions:

22. The 3rd Respondent herein filed written submissions dated the March 8, 2024; and in respect of which, same has adopted and reiterated the Grounds of opposition which were filed on behalf of the 3rd Respondent.
23. Additionally, Learned counsel for the 3rd Respondent has submitted that the proceedings that were commenced by and on behalf of Nairobi City county which touched on and/or concerned the subsequent sale and disposal of the suit property, were commenced long after the death of the registered proprietor of the suit property, namely, Esther Nyambura Mwangi; and hence no lawful orders could arise and/or emanate from the impugned proceedings.
24. Furthermore, Learned counsel for the 3rd Respondent has also submitted that to the extent that the said proceedings were a nullity in law and coupled with the fact that the court has since found and held as much; then the court is divested of the requisite jurisdiction to grant any orders of stay or at all.



25. In any event, learned counsel for the 3rd Respondent has submitted that insofar as the court found and held that the proceedings were a nullity and thus void, there is no lawful proceedings or otherwise that are capable of premising the subject Application.
26. To this end, Learned counsel for the 3rd Respondent has cited and relied on, *inter-alia*, [Geeta Baharat Shah & 4 others v Omar Said Mwatayari & another](#) (209)eKLR and [Victor Maina Ngunjiri & 4 others v Attorney General & 6 others](#) (2018)eKLR, respectively.
27. Arising from the foregoing, Learned counsel for the 3rd Respondent has therefore contended that the Application by and on behalf of the Applicant, does not disclose any reasonable basis or at all; and thus same ought to be dismissed with costs.

Issues for Determination

28. Having reviewed and appraised the contents of the subject Application and the Response[s] thereto and upon taking into consideration the written submissions filed, the following issues crystallize and are thus worthy of determination.
 - i. Whether the instant Application has been mounted without unreasonable and inordinate delay or otherwise.
 - ii. Whether the Applicant herein has established and demonstrated that substantial loss is likely to accrue and/or arise.
 - iii. Subject to proof of substantial loss, what security if at all; suffices and/or is appropriate.

Analysis and Determination:

Issue Number 1 -Whether the instant Application has been mounted without unreasonable and inordinate delay or otherwise.

29. The instant Application touches on and concerns stay of execution of the Ruling and order of the Honourable court issued on the January 30, 2024.
30. To the extent that the subject Application seeks to procure an order of stay of execution pending the hearing and determination of an Appeal; it is imperative to state and observe that such Application is required to be lodged and/or mounted without undue and unreasonable delay.
31. Consequently, whenever an applicant, the instant applicant not excepted, seeks to procure an order of stay of execution pending the hearing of an appeal, then same must establish and demonstrate that the application beforehand, has been filed/lodged without undue delay.
32. Put differently, it is the obligation of an Applicant desirous to partake of and/or procure an order of stay to lodge the application for such an order, timeously and with due promptitude.
33. Notwithstanding the foregoing, where there is any scintilla of delay [irrespective of the length thereof] then it behooves the Applicant to account for every single day of delay and/or better still to provide cogent, plausible and credible explanation for such delay. [See the holding of the Supreme Court of Kenya in the case of [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others](#) [Civil Application No. 16 of 2014[2014]eKLR.]
34. Having highlighted the foregoing principle, it is now appropriate to revert to the subject matter and to consider whether the subject Application has been made and/or mounted timeously and with due promptitude or otherwise.



35. Suffice it to point out that the Ruling giving birth to the impugned orders, which are the subject of the stay of Execution pending the Hearing of the Intended Appeal, was delivered on the January 30, 2024.
36. On the other hand, it is not lost on the court that the current application was filed on the February 1, 2024; and hence, it is evident and apparent that the application beforehand, was filed within 48 hours from the date of delivery of the Ruling in question.
37. Notably, the instant application was filed timeously and with due promptitude and in this regard, it is my finding and holding that the application beforehand is not vitiated by any iota/ scintilla of delay or at all.
38. In a nutshell, my answer to issue number one [1] is to the effect that the Application beforehand has been filed timeously, with due promptitude and without any unreasonable delay or at all.

Issue Number 2: Whether the Applicant herein has established and demonstrated that Substantial loss is likely to accrue and/or arise.

39. Other than the requirement that an Applicant for an order of stay of execution pending appeal, files the application without undue and/or unreasonable delay, there is also the requirement that such an Applicant must espouse, establish and demonstrate the likelihood of substantial loss occurring.
40. For coherence, it has hitherto been stated and observed, times without number, that substantial loss is the cornerstone and/ or pillar to the granting of an order of stay of execution pending appeal.
41. In any event, the provisions of order 42 rule 6(2) of The *Civil Procedure Rules, 2010*; which underpins the Application for stay of execution, also highlights and amplifies the necessity to demonstrate the likelihood of substantial loss.
42. Furthermore, the need and necessity to demonstrate substantial loss as a pre-condition to the issuance of an order of stay of execution of Execution pending Appeal was also underscored by the Court of Appeal in the case of *Kenya Shell Ltd v Benjamin Karuga Kibiru* (1986)eKLR, wherein the court stated and held thus;

“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 a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”
43. Having taken cognizance of the foregoing, it is now appropriate to venture forward and to discern whether the Applicant beforehand has espoused and demonstrated the likelihood that Substantial loss shall and accrue or otherwise.
44. To start with, there is no gainsaying that the suit property hitherto belonged and was registered in the name of Esther Nyambura Mwangi, now deceased. However, it appears that there were outstanding rates attaching to the suit property and as a result of the outstanding rates, the City County Government commenced proceedings before the City Court for purposes of recovering [sic] the rates.
45. Subsequently, the City County Government procured a favorable order, which allowed same to attach and sell the suit property on account of [sic] the outstanding rates.



46. Pursuant to and as a result of the order issued by the City Court, the City County Government of Nairobi, indeed proceeded to and sold the suit property vide Public auction.
47. Notably, the Applicant herein participated in the bid and thereafter emerged as the highest bidder, culminating into the sale of the Suit Property; execution of the memorandum and certificate of sale, respectively.
48. Arising from the sale of the suit property *vide* Public auction and upon being issued with the requisite transfer instrument, the Applicant proceeded to and caused the suit property to be transferred and registered in her name. Consequently, the Applicant became the registered proprietor of the suit property.
49. Be that as it may, the 3rd Respondent, who is the Legal administratrix of the Estate of Esther Nyambura Mwangi, [now Deceased], thereafter filed an application seeking to impugn, inter-alia, the proceedings that were commenced by the City County Government and which led to the transfer of the suit property in favor of the Applicant.
50. Suffice it to point out that the Application by and on behalf of the 3rd Respondent was heard and allowed on the January 30, 2024. Instructively, the Honourable court proceeded to and decreed, *inter-alia*, revocation of the title in the name of the Applicant.
51. Arising from the said order, the Applicant has now approached the court and seeks to procure an order from the court and in this respect, the Applicant now contends that unless the orders sought are granted, there is a likelihood of the suit property being transferred to and in favor of the 3rd Respondent; and who thereafter, shall be seized of the requisite mandate to alienate, sell, transfer and/or dispose of the suit property.
52. According to the Applicant, if the suit property were to be dealt with and or dispose of during the pendency of the intended appeal, then the Applicant herein would lose (sic) her rights and/or interests thereto, if the appeal were to ultimately succeed.
53. At any rate, the Applicant has contended that in the event of alienation, the title to and in respect of the suit property will thus vest in the name of a Third Party; and hence even the intended appeal would be rendered academic.
54. Arising from the foregoing, I beg to point out that the orders which were issued on the January 30, 2024; and which are the subject of an appeal before the Court of Appeal have deep, serious and extensive ramifications on the ownership and title to the suit property.
55. Furthermore, there is no gainsaying that upon the transfer and registration of the suit property in the name of the 3rd Respondent in actualization of the Court Orders, then the 3rd Respondent shall become the proprietor of the suit property and thereafter same shall be vested with the statutory privileges underpinned by the provisions of section 24 and 25 of the [Land Registration Act](#), 2012 [2016].
56. Pertinently, one of the statutory rights and privileges that attached to ownership of a property, Land not excepted, is the right to sell, alienate, dispose of and/or charge same. [See [Mohansons \(Kenya\) Limited v Registrar of Titles & 2 others](#) [2017] eKLR].
57. In view of the foregoing, it is not lost on the court that once the 3rd Respondent becomes the registered proprietor of the suit property, then same shall have extensive rights to the suit property including the rights to dispose of, which rights if exercised, shall negate and/or otherwise put the title of the suit property outside the purview of the appeal.



58. Consequently and to my mind, the kind of loss that may arise and/or accrue, if the Orders sought are not granted, constitutes and/or amounts to substantial loss, which ought to be averted and/or taken care of.

59. To this end, it is appropriate to adopt and reiterate the holding of the Honourable Court in the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, where the court held as hereunder;

11. 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, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma v Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under order 42 of the CPR and rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...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.”

60. From the foregoing analysis, there is no gainsaying that the Applicant beforehand has placed before the Honourable court plausible and cogent evidence to demonstrate that substantial loss is likely to arise and/or accrue, unless an Order of Stay of Execution is granted.

Issue Number 3 Subject to proof of Substantial loss, what security if at all; suffices and/or is appropriate.

61. Having come to the conclusion that the Applicant herein has established and demonstrated the likelihood of substantial loss arising and or occurring, the last issue that must now be addressed relates to and or concern[s] provisions of security.

62. To start with, there is no gainsaying that after the delivery of a Ruling and/or Judgment the court finds and holds in favor of someone. Instructively, in the instant matter the court found and held in favor of the 3rd Respondent.

63. Arising from the foregoing, the 3rd Respondent thus becomes the beneficiary of a lawful Judgment and/or pronouncement of the court; and thus same accrues legitimate rights that require equal protection and/or vindication. In this respect, the holding of the Court in the case of *RWW v EKW* (2019)eKLR, is pertinent and apt.

64. For coherence, the Court stated and held thus;

8. 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.

65. Notably, the court in the decision [supra] was alive to and appreciative of the fact that a successful litigant [the Third Respondent not excepted], ought not to be deprived of the fruits of the Judgment, without due indemnity being availed and/or supplied.
66. In my humble view, the only way to safeguard the rights and interests of a successful litigant like the 3rd Respondent herein, during the pendency of an Appeal is to procure and obtain provision of due security by the Applicant.
67. Furthermore, the court in the case of *Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others* [2014 eKLR had occasion to consider the import, scope and tenor of reasonable security.
68. For good measure, the court stated and held thus;

I presume since the Applicants are saying they have filed an appeal, the security they are proposing is pursuant to Order 42 rule 6 of the Civil Procedure Rules. 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. The alternative security being offered presents several problems. The first one-the security is owned by another person. This is a civil suit where the Applicants are judgment-debtors. But, the Applicants seem to have borrowed from the criminal procedures where a person stands surety for the attendance of another in court. Civil process is quite different because, in a 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 the 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.

69. To my mind, the security to be provided needs to cushion the Decree holder [DH] against the prejudices and/or inconveniences, to be suffered during the pendency of an appeal for which an order of stay has been granted.
70. Arising from the foregoing analysis and taking into account the foregoing circumstances and coupled with the fact that the suit property generates returns, [Proceeds], it suffices to point out that the Applicant herein shall deposit Kes.1, 000, 000/= only; in an Escrow account in the names of the respective advocates within a set timelines.
71. Before departing from the question of security, there is one more issue to be disposed of. For coherence, the issue herein relates to the contention by Learned counsel for the Applicant that the suit property can very well be deemed and constituted as security for purposes of order 42 rules 6(2) of The *Civil Procedure Rules, 2010*.
72. Unfortunately, the suit property has since been decreed to belong to the 3rd Respondent, who is the decree holder. Consequently, if the arguments by Learned counsel for the Applicant is to hold sway then it means that the 3rd Respondent is the one being called upon to provide and to furnish security; and not otherwise.
73. Invariably, I am afraid that the invitation by and on behalf of Learned counsel for the Applicant, is not only misconceived, but same is inimical to the intendment of the provisions of order order 42 rule 6(2) of the *Civil Procedure Rules, 2010*.



74. In short, I decline the invitation to decree that the suit property be constituted as the security. In any event, such kind of an invitation would have the ripple effect of negating the import and tenor of the decision of this court which are the subject of the intended Appeal.

Final Disposition:

75. Having appraised and analyzed the issues that were raised in the body of the Ruling herein, there is no gainsaying that the Applicant has met and satisfied the requisite conditions for the grant of an order of stay of execution pending appeal.

76. Consequently and in the premises, the Application dated the February 1, 2024; be and is hereby allowed on the following terms;

- i. There be and is hereby granted an order of stay of execution, enforcement and/or implementation of the Ruling and order of the court issued on the January 30, 2024 pending the hearing and determination of the Appeal/intended appeal to the court of appeal.
- ii. Nevertheless, the Applicant herein shall provide security in the sum of Kes.1, 000, 000/= only to be deposited in an Escrow account in the names of the advocates for the respective Parties.
- iii. The security in terms of clause (ii) above shall be deposited in an Escrow account in a bank/ financial institution to be agreed upon by the respective advocates. In any event, the deposit shall be made and/or undertaken within 60 days from the date hereof.
- iv. In default to comply with the limb pertaining to deposit of security, the orders of stay of execution herein shall lapse automatically.
- v. Furthermore, the Applicant herein shall not on her part, alienate, sell, dispose of and/or deal with the title of the suit property in any manner whatsoever that may negate the substance of the Ruling of the court.
- vi. At any rate, there be and is hereby granted an order of Inhibition to be registered against the Certificate of title in respect of the suit property pending the determination of the appeal/ intended appeal to the court of appeal.
- vii. Costs of the Application shall abide the outcome of the appeal/intended appeal

77. It is so ordered.

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

OGUTTU MBOYA,

JUDGE.

In the Presence of:

**Benson - Court Assistant

Mr. Njugi B V for the Applicant.

Mr. S. N Otinga for the 3rd Respondent.

N/A for the 1st and 2nd Respondents.

