



REPUBLIC OF KENYA



Mbola (Appealing through his recognized agent John Ndambuki Kitenge) v Masila (Environment and Land Appeal E014 of 2022) [2024] KEELC 1634 (KLR) (13 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1634 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E014 OF 2022**

TW MURIGI, J

MARCH 13, 2024

BETWEEN

**KITENGE MBOLA (APPEALING THROUGH HIS RECOGNIZED AGENT
JOHN NDAMBUKI KITENGE) APPELLANT**

AND

JAMES KILUNGYA MASILA RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 3rd August, 2022 brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* in addition to Order 42 Rule 6 (1) and (2) and Order 51 Rules 1, 13 and 14 of the Civil Procedure Rules in which the Appellant/Applicant seeks the following orders: -
 1. Spent.
 2. Spent.
 3. That the Honourable Court does grant stay of execution pending hearing and determination of the Appeal filed by the Applicant.
 4. Spent.
 5. That the costs of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of John N. Kitenge sworn on even date.



The Applicant's Case

3. The Applicant averred that the Respondent purchased his land through his son and that it was his grandson who signed the sale agreement without his authority, knowledge or consent. He further averred that the lower court awarded the Respondent a portion of the suit property measuring 36m by 63m when there was no contract of sale between him and the Respondent. That being aggrieved by the judgment of Hon. F. Makoyo delivered on 08/07/2022, he had filed a memorandum of appeal to this Court.
4. He averred that the Executive Officer was given authority by the lower court to execute transfer documents at the expiry of the appeal period which was due to end on 7/8/2022. He contended that he will suffer substantial loss if stay of execution is not granted, since his land will be transferred which will render the appeal nugatory.
5. He further averred that he is ready to deposit Kshs. 119,100/= deposited with the Chief Wautu Location as security for costs. He asserted that the application has been brought without unreasonable delay.

The Respondent's Case

6. The Respondent filed a replying affidavit dated 5th December, 2022 in opposition to the application. He averred that the intended appeal is devoid of merit and has no chances of success. He further averred that the Applicant has come to Court with unclean hands because he has adamantly refused to execute the relevant transfer forms to have the portion of land measuring 36m by 63m excised from the suit property.
7. He contended that the Applicant has not satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for the grant of stay of execution. According to the Respondent, the Applicant's right of appeal ought to be balanced with the Respondent's right to enjoy the fruits of his judgment. He asserted that if the Court is inclined to grant a stay of execution, the Applicant should be ordered to deposit Kshs. 500,000/= as security for costs.

The Response

8. In a supplemental affidavit dated 24/5/2023, the Applicant averred that the Appeal herein raises triable issues and has high chances of success. He stated that he was willing to deposit the Title deed of the suit property as security for the due performance of the decree. He denied that he had approached the Court with unclean hands and asserted that the suit property was sold by his son together with his grandson without his knowledge.
9. The application was canvassed by way of written submissions.

The Applicant's Submissions

10. The Applicant's submissions were filed on 26/5/2023.
11. Counsel submitted that the Applicant has satisfied the conditions for the grant of stay of execution set out in Order 42 Rule 6 (2) of the Civil Procedure Rules. Counsel submitted that the Applicant was seeking to preserve the property from being transferred to the Respondent because he did not execute the sale agreement with the Respondent.
12. Counsel argued that there has been no delay in presenting the instant application since the judgment was delivered on 8th July, 2022 and the application herein was filed on 3rd August, 2022.



13. Counsel further submitted that the Appellant will suffer substantial loss if a stay of execution is not granted as the suit property will be transferred to the Respondent yet his major argument in the appeal is that he never sold any land to the Respondent. Counsel submitted that upon transfer of the suit property, the Respondent could further sell the land to third parties, subdivide it, or charge the land to the detriment of the Applicant.
14. Concluding his submissions, Counsel contended that the Applicant has expressed his willingness to furnish security for costs. None of the authorities cited by Counsel were availed for the Court's perusal.

The Respondent's Submissions

15. The Respondent's submissions were filed on 27th March, 2023.
16. On his behalf, Counsel identified the following issues for the court's determination: -
 - i. Whether the Applicant has established sufficient cause?
 - ii. Whether substantial loss would ensue from a refusal to grant the orders sought?
 - iii. Whether the Applicant ought to furnish security?
17. Counsel submitted that for an order of stay of execution to issue, the Applicant must satisfy the conditions enumerated under Order 42 Rule 6 (2) of the Civil Procedure Rules.
18. Counsel submitted that the Applicant has not established sufficient cause to warrant the grant of the orders sought.
19. Counsel further submitted that the Respondent purchased the suit property from the Applicant and subsequently started developing it. It was further submitted that the Applicant will not suffer substantial loss if the orders sought are not granted.
20. On the third issue, Counsel submitted that the Applicant should be ordered to furnish security for the due performance of the decree. None of the authorities cited by Counsel were availed for the Court's perusal.

Analysis And Determination

21. Having considered the application, the respective affidavits and the rival submissions, the only issue that arises for determination is whether the Applicant has satisfied the conditions set out under Order 42 Rule 6 of the Civil Procedure Rules for the grant of stay of execution pending Appeal.
22. Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules outlines the guiding principles to be met for the grant of stay and provides that:-
 - 6(1) 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 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.
 - 6(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 such security of costs for the performance of such decree or order as may ultimately be binding on him has been given by Applicant.
23. Going by the above provisions, it is clear that in an application for stay of execution pending Appeal, the Applicant must satisfy the following three conditions: -
1. The Court is satisfied that substantial loss may result to the Applicant unless the order is made.
 2. The application has been made without unreasonable delay.
 3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the Applicant has been given by the Applicant.
24. In considering an application for stay of execution, I am guided by the case of *Butt Vs Rent Restriction Tribunal* (1982) KLR 417 where the Court of Appeal gave the following guidelines:-
- “The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicants at the end of the proceedings. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”
25. The grant of an order of stay of execution is a discretionary one. In the case of *RWW Vs EKW* (2019) eKLR the Court held that:-
- “...the purpose of an application for stay of execution pending an appeal is to preserve the subject 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 the 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 damages.”
26. The Court is therefore called upon to balance the rights of the successful party so as not to hinder him from his fruits of judgment and those of the Appellant whose Appeal may succeed and be rendered nugatory if stay of execution is not granted.
27. The purpose of stay of execution is to preserve the substratum of the case. In the case of *Consolidated Marine Vs Nampijja & Another Civil App No. 93 of 1989* (Nairobi) the Court held that;
- “The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.”
28. The Applicant is seeking for a stay of execution of the judgment delivered on 8th July, 2022 by Hon. F. Makoyo PM in Kilungu ELC Case No. 9 of 2019 pending the hearing and determination of the appeal.



29. The Court will now determine whether the Applicant has satisfied the conditions upon which the orders sought can be granted.
30. On the first condition of proving that substantial loss may result unless an order of stay is granted, the Applicant should not only state that he is likely to suffer substantial loss, he must prove that he will suffer substantial loss if stay orders are not granted.
31. In so finding, I am persuaded by the holding in the case of Charles Wahome Gethi Vs Angela Wairimu Gethi (2008) eKLR where the Court of Appeal held that:-
- “...it is not enough for the Applicants to say that they live or reside on the suit land and they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”
32. What amounts to substantial loss was expressed by the Court of Appeal in the case of Mukuma Vs Abuoga (1988) KLR as follows:-
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.
33. The Applicant averred that he is apprehensive that the Executive Officer may execute the transfer forms in respect of a portion measuring 36M by 63M comprised in the suit property. He submitted that he is apprehensive that the Respondent may thereafter sell, transfer, subdivide or charge the said portion of land. On the basis of the above, the Applicant contended that he would suffer irreparable loss as his appeal would be rendered nugatory if the orders sought are not granted.
34. The Respondents on the other hand argued that the Applicant has come to court with unclean hands because he has refused to execute the transfer documents in respect of the portion of land measuring 36m by 63m in his favour.
35. I have read the judgment delivered on 6th of May 2021 by Hon. Makoyo. The Court in its findings stated as follows;
- a. That an order does hereby issue compelling the Defendant to execute by signing all the relevant forms for transfer of the portion of land measuring 36M * 63M to be excised from land Parcel No. Makueni/wautu/3290 failure to which the Executive Officer of the court to sign the transfer forms.
 - b. A declaration does hereby issue that the Defendant holds a portion measuring 36M * 63M within land parcel No. Makueni/Wautu/3290 in trust for the Plaintiff.
 - c. Costs of the suit are awarded to the Plaintiff.
36. It is not in dispute that the Applicant is the registered proprietor of the suit property. It is evident from the judgment that the Applicant was directed to transfer to the Respondent the portion thereof and in default the Executive Officer of the court to sign the transfer forms. The Applicant denied executing a contract for sale with the Respondent.
37. Based on the foregoing, I find that the Applicant has satisfied this Court that he is likely to suffer substantial loss if the substratum of the Appeal is transferred or sold to third parties.



38. In an application for stay of execution pending Appeal, an Applicant must also satisfy the Court that the application has been made without unreasonable delay. It is not in dispute that the judgment was delivered on 8th July 2022. The present application was filed on 3rd August 2022. I find that the application was brought without unreasonable delay.
39. On the last condition as to the provision of security for costs, Order 42 Rule 6 (2) (b) of the Civil Procedure Rules is couched in mandatory terms to the effect that the Applicant must furnish security for the performance of the order or decree. In the case of Arun C Sharma Vs Ashana Raikundalia T/A Raikundalia & Co. Advocates and 2 others (2014) eKLR, the court held that:-
- “The purpose of the security under Order 42 is to guarantee 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 applicant 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 a security for the 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.”
40. The Applicant has expressed his willingness to deposit Kshs 119,100/=or the title deed in court as security for costs.
41. In the end I find that the Applicant has satisfied the conditions required for the grant of stay of execution pending Appeal.
42. The upshot of the foregoing is that the application dated 3rd August 2022 is allowed in the following terms:-
- i. Stay of execution of the judgment/decree is granted pending the hearing and determination of the Applicant’s Appeal.
 - ii. The Applicant shall deposit the title deed for land parcel No. Makueni/Wautu/3290 within 30 days from the date of delivery of this ruling in default the stay orders shall automatically lapse.
 - iii. Each party to bear its own costs.

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HON. T. MURIGI
JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 13TH DAY OF MARCH, 2024.

In the presence of:

Kemboi court assistant

In the absence of the parties.

