



**Kasanga v Miriti & 3 others (Environment & Land Case
160 of 2009) [2024] KEELC 1383 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1383 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 160 OF 2009**

J OMANGE, J

MARCH 7, 2024

BETWEEN

JAPHAETH KILONZO KASANGA PLAINTIFF

AND

JOSHUA MWITI MIRITI 1ST DEFENDANT

**NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES 2ND
DEFENDANT**

LAWI NYATENG 3RD DEFENDANT

PETER OMONDI MCODIDA 4TH DEFENDANT

RULING

1. In the Notice of Motion application dated the 4th December 2023 the Applicant sought the following orders:
 - a. Spent.
 - b. That the honourable court be pleased to grant a stay of execution on judgement delivered by justice L.Komingoi on the 12th October 2023 and decree herein pending hearing and determination of this application inter parties.
 - c. That the honourable court be pleased to grant a stay of execution on the Judgement delivered by Justice L. Komingoi on the 12th October 2023 and decree herein pending hearing and determination of the intended appeal.
 - d. costs of the application.
2. The Application is supported by the affidavit and supplementary affidavit by the Applicant sworn on 4th December 2023 and on 24th December, 2023 respectively in which it is deponed that the Applicant



has filed a memorandum of appeal dated 25th October 2023 seeking to appeal the Judgement delivered on the 12th October 2023 and is apprehensive that the Respondent will proceed to execute the orders unless stay is granted which execution will render the appeal nugatory. The appellant insists the appeal has a high chance of success. Further in the supporting affidavit the Applicant indicates that he is willing to deposit a decretal amount in the sum of Ksh 250,000/= as security for due performance of the decree.

3. The Applicant filed submissions dated 22nd January 2024 in which he submitted that he has met all conditions for grant of stay of execution. The Applicant stated that he shall suffer substantial loss if the orders are not granted as execution of the Judgement will involve demolition of a building which is a residential place for a number of families that will be greatly affected not to mention the financial implication of the loss. Further he submitted that the Respondent had not satisfied the court of his financial standing that he would compensate the Applicant in the event his appeal succeeds which he argued is sufficient reason for the court to allow the stay.
4. He cited the case of *GN Muema P/A (Sic) Mt view Maternity & Nursing Home v Miriam Bisber & another* in which the court considered as crucial the Respondent's ability to compensate the Applicant in case the appeal succeeded. It was also submitted that the appeal had been filed in good time hence no inordinate delay as the memorandum of appeal was filed on the 25th October 2023. Lastly the Applicant submitted that he is willing to deposit security for due performance of the decree in the sum of Ksh 250,000/= for costs. The application is unopposed.
5. The only issue for determination is whether the court should stay the order and Judgement issued on the 12th October 2023. The Courts jurisdiction is derived from of Order 42 rule 6 (1) 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.
6. The first condition as set out in order 42 Rule 6 (2) is whether Applicant has brought the application without unreasonable delay. The application herein was filed on 4th December 2023. The Applicant filed a memorandum of Appeal on 24th October 2023. The application was thus filed without inordinate delay.
 7. Secondly, the Applicant is required to establish that if the application is not allowed, substantial loss would result. Substantial loss has been defined in several judicial pronouncements. In the case of *Francis K. Chabari & another v Mwarania Gaichura Kairubi* [2022] eKL Justice C. K. Yano quoted *Geoffery Muriungi & another v John Rukunga M'imonyoso* as to define substantial loss as follows;

“the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or “rendering the appeal nugatory” within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal”



8. In the Judgement appealed against, the court ordered the Applicant to vacate the suit property or he be evicted. The court also ordered the demolition of the Applicant's structures. In the case of *Kenya Shell Limited v Benjamin Karuga Kigubu & another* (1982-1988) KAR 108 the Court of Appeal stated.

“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 rendered nugatory by some other event. Substantial loss in various forms is the cornerstone for granting stay.”

9. In the case of *Absalom Dora v Turbo Transporters* [2013] eKLR it was stated.

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights the appellant to his appeal which includes the prospect that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”

10. The basis of the jurisdiction of the court under Order 42 is that substantial loss would result to the Applicant unless a stay of execution is granted. In this particular case, the appeal is against orders of eviction and demolition. No doubt unless stay is allowed the Applicant will suffer substantial loss as they will be evicted and their structures demolished. If the building were demolished, the appeal would no doubt be rendered nugatory. Stay of execution will preserve the subject matter.

11. The third condition, is that the Applicant must furnish security for the due performance of the decree. The Applicant has offered to deposit security of Kshs 250,000.

12. This court in considering the application must balance the interests of both the Applicant and the Respondent. The Applicant who seeks to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgement.

13. Considering the foregoing the application is allowed in the following terms;

- a. Stay of execution pending the hearing and determination of the appeal is granted subject to clause (b) and (c) below.
- b. The Applicant is to deposit Kshs 250,000 in court within 30 days.
- c. The Applicant is to file the record of appeal within 120 days.
- d. In default of compliance with (b) and (c) the orders of stay are to lapse.
- e. Costs of the application to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 7TH DAY OF MARCH 2024.

JUDY OMANGE

JUDGE

In the presence of: -



Mr. Munyuti holding brief for Mr. Kinyua for the Applicant

Mr. Musyoka for the Respondent

Steve - Court Assistant

