



**Ongeche v Molyn Credit Ltd & another (Environment & Land Case
136 of 2015) [2024] KEELC 1217 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1217 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 136 OF 2015**

**BN OLAO, J
MARCH 7, 2024**

BETWEEN

JOEL ONGECHE PLAINTIFF

AND

MOLYN CREDIT LTD 1ST DEFENDANT

STANLEY SHIUNDU AMUKAYA 2ND DEFENDANT

RULING

1. The dispute between Joel Ongenge Ontunga (the plaintiff) and Molyn Credit and Stanley Shiundu Amukaya (the 1st and 2nd defendants respectively) over the ownership of the land parcel No Bukhayo/bugengi/6305 (the suit land) was heard by Omollo J and vide a judgment delivered on 28th August 2023, the Judge made the following disposal order:
 - a. An order be and is hereby issued cancelling the registration of the 1st defendant and subsequently the 2nd defendant as the owner of L.R Bukhayo/bugengi/6305. The register shall be rectified to return the plaintiff as the owner of the suit property.
 - b. Upon cancellation of the registration of the 2nd defendant as the owner and title reverting back to the plaintiff's name, the suit title shall remain in custody of the 1st defendant until the loan amount due is paid in full.
 - c. Costs of the two suits awarded to the plaintiff.
2. The defendants were aggrieved by that judgment and lodged a Notice of Appeal in this Court's registry on 22nd September 2023.
3. The defendants have now moved to this court vide their Notice of Motion dated 24th October 2023 and filed on 25th October 2023 by which they seek the following orders:



1. Spent
2. That this Honourable Court be pleased to grant stay of execution of the judgment delivered on 28th August 2023 and any other subsequent Court orders issued by this Honourable Court pending the hearing and determination of the appeal filed by the Applicants by lodging a notice of appeal dated 22nd day of September 2023.
3. That costs of this application be provided for.
4. The application is premised on the grounds set out therein and the provisions of Section 3A of the *Civil Procedure Act* and Order 40 and 24 of the Civil Procedure Rules. It is also supported by the affidavit of one Moses Namayi Anyangu a Director of the 1st defendant.
5. The gravamen of the application is that the defendants are aggrieved by the judgment delivered on 28th August 2023 and would wish the status quo to remain pending the hearing of the appeal for which they have filed a Notice of Appeal dated 22nd September 2023. That it will be prejudicial to them if the orders sought are not granted and their appeal has chances of success.
6. Annexed to the application are the following documents:
 1. Notice of Appeal dated 22nd September 2023 and lodged herein on the same date.
 2. Decree dated 28th August 2023.
7. The application is opposed and the plaintiff has filed a replying affidavit dated 22nd November 2023 in which he has deposed, inter alia, that the application is an afterthought and a waste of this court's time. That there is inordinate order in filing this application since the defendants have all along been aware about this judgment in which they were directed to return the title to the suit land to him.
8. Further, the defendants have not demonstrated to this court the loss which they will suffer if the order of stay of execution is not granted nor offered any security. The application is therefore frivolous, vexatious and has not met the required threshold.
9. The application has been canvassed by way of written submissions. These have been filed both by Mr Achero instructed by the firm of Achero Mufuayia & Company Advocates for the defendants and by Mr Bogonko instructed by the firm of Bogonko Otanga & Company Advocates for the plaintiff.
10. I have considered the application, the rival affidavits and the submissions by counsel.
11. The defendants seek the main order that there be a stay of execution of the judgment delivered herein on 28th August 2023 as well as all other subsequent orders pending the hearing and determination of their appeal.
12. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules which donates the power to grant such an order; reads:

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.

(2) 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.” Emphasis added.

It is clear from the above that in order to justify the grant of an order of stay of execution pending appeal, the defendants were required to satisfy all the following conditions i.e:

1. Show sufficient cause.
2. Demonstrate that if the orders are not granted, they will suffer substantial loss.
3. File the application without unreasonable delay.
4. Offer security.

That threshold was also reiterated by the Court of Appeal in the case of *Vishram Ravji Halai & Another -v- Thornton & Turpin* (1963) Ltd 1990 Klr 365 [c.a. Civil Application No. NAI 15 of 1990] [1990 eKLR] where it said:

“Thus, the Superior Court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay.”

I will therefore consider those grounds sequentially to determine whether the defendants are deserving of the order sought.



Sufficient Cause

13. The term sufficient cause or good cause was considered by Musinga J.A in the case of Hon. Attorney General -v- The Law Society Of Kenya & Another C.a. Civil Appeal No. 133 of 2011 [2013 eKLR] where he said it means:

“The burden placed on a litigant (usually by Court rule or order) to show why a request should be granted or any action excused ... see Black’s Law Dictionary 9th Edition page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

The marginal note in Order 42 Rule 6 of the Civil Procedure Rules reads:

“stay in case of appeal”,

Therefore, for the defendants to show sufficient cause, they needed to prove that they have commenced the process of filing an appeal against the judgment delivered on 28th August 2023. To do so, they were required to comply with the provisions of Rule 75(1) and (2) the Court of Appeal Rules. It reads:

75 (1) “Any person who desires to appeal to the court shall give notice in writing which shall be lodged in duplicate with the registrar of the Superior Court.

- (2) Every such notice shall, subject to Rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”
Emphasis added.

Rule 77(1) of the same Rules requires that the notice be served on the Respondent within 7 days from the date on which it was filed.

14. It is clear from the above that a party who wishes to appeal the judgment of this court to the Court of Appeal, and thereafter seek a stay of execution, does not have the laxity of going to sleep. It is that Notice of Appeal which will demonstrate sufficient cause and clothe this court with the jurisdiction to favourably consider an application for stay of execution pending appeal. This is because, without the Notice of Appeal filed within the required time, there can be no evidence of an appeal and therefore no basis upon which the court can even consider any stay of execution no matter how meritorious the application may be. The importance of such a notice was re-emphasized in the case of University Of Eldoret & Another -v- Hosea Sitienei & Three Others 2020 eKLR at paragraph 36 where the Supreme Court said:

“The filing of a notice of appeal is not premised on any occurrence or condition to be fulfilled by the appellant. The filing of a notice of appeal signifies the intention to appeal”,

The Supreme Court went on to add that:

“... the filing of the Notice of Appeal is a jurisdictional prerequisite”.

The court was of course referring to Rule 36 of its Rules which also provides that any Notice of Appeal from the decision of the Court of Appeal must be filed within 14 days of the decision sought to be appealed.



15. The defendants herein lodged their Notice of Appeal on 22nd September 2023 which was 25 days after the delivery of the judgment on 28th August 2023. That was some 11 days beyond the statutory 14 days provided for under the Rules. No explanation has been proffered for that delay. In any event as was held in *Hamendra Mansukhlal Shah -v- Alnoor Kara & Premier Savings Finance Ltd* 2001 eKLR;

“Moreover, it is trite law that a notice of appeal is a simple and not complicated document which does not need a lot of ceremony to lodge”.

16. Given the above pronouncements by superior courts and especially the finding that a Notice of Appeal is a jurisdictional prerequisite, it follows that there is no appeal instituted against the judgment delivered on 28th August 2023. Therefore there can be no basis upon which this court can even purport to consider whether or not there are any grounds to warrant the grant of an order of stay of execution of that judgment because there is no pending appeal as required by law.

17. On that basis alone, this application is for dismissal for want of sufficient cause.

18. I will nonetheless consider the other grounds for purposes of completeness.

Substantial Loss

19. This was described by Platt Ag. J.A. (as he then was) in the case of *Kenya Shell Ltd -v- Benjamin Kibiru & Another* 1986 KLR 410, as “the cornerstone of both jurisdiction for granting a stay.”

20. I have looked at the application and the supporting affidavit. There is not even a fleeting reference as to what “substantial loss” the defendants will suffer if the order for stay of execution is declined. The defendants have only made reference to the need to maintain the status quo pending appeal, that they will be prejudiced, that there is a looming execution and that they have confidence in the success of their appeal. There is no mention of any “substantial loss” either in the Notice of Motion or the supporting affidavit. The only time that the term substantial loss has been referred to is in the submissions by the defendants’ counsel where he has said:

“It is clear that if this Honourable court fails to grant the order of stay pending appeal and setting aside it’s judgment, the Applicants are going to suffer substantial loss if the Respondent proceeds with executing the judgment and appurtenant order of this court in this case.”

However, submissions are not evidence – *Daniel Toroitich Arap Moi -v- Mwangi Stephen Muriithi & Another* 2014 eKLR.

21. The defendants have been unable to surmount the hurdle of demonstrating that they will suffer substantial loss if the order of stay of execution is not granted.

Filing The Application Without Unreasonable Delay

22. Judgment sought to be appealed was delivered on 28th April 2023 and this application was filed some two (2) months later on 25th October 2023. The record shows that the defendants’ counsel was emailed the judgment on 28th August 2023. That is not in dispute because both in paragraph (1) of the grounds upon which the application is promised and paragraph (2) of the supporting affidavit it is confirmed by the defendants that “this Honourable Court delivered its judgment on 28th August 2022”. There is nothing to suggest that the defendants became aware about the judgment on the later date. While the law does not define what amounts to “unreasonable delay”, it is trite law, however, that any delay must be explained to the satisfaction of the court. The defendants have not given any explanation,



satisfactory or otherwise, as to why it took them two (2) months to file this application. Given that they were aware about the judgment because it was emailed to their counsel on 28th August 2023, I find that delay to be unreasonable.

23. The defendants have therefore failed to surmount the hurdle of approaching this court without unreasonable delay. On that ground, this application must fail.
24. Finally, the defendants were required to offer security, as the court may order, for the due performance of any decree or order as may ultimately be binding on him. Such an offer, as was held in *Wycliffe Sikuku Walusaka -v- Philip Kaita Nekesa* 2020 eKLR:

“... must of course come from the Applicant himself as a sign of good faith to demonstrate that the application for stay of execution pending appeal is being pursued in the interest of justice and not merely as a decoy to obstruct and delay the Respondent’s right to enjoy the fruits of his judgment.”

Nowhere in both their application nor the supporting affidavit by Moses Namayi AnyangU have the defendants made any offer of security or even given an undertaking that they are willing to abide with any terms which this court may impose. And although such terms are ordinarily determined by the court, the party seeking a stay of execution pending appeal ought to show that he is prepared to meet such conditions as the court may impose. The defendants herein must appreciate that the plaintiff already has a judgment in his favour the fruits of which he is entitled to enjoy. That is a fact which this court cannot ignore even as it weights the competing interests of the defendants who have a right of appeal which they want to prosecute, and the plaintiff who has a judgment in his favour and which he is entitled to execute.

25. The offer of security is one of the four (4) limbs under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules. The defendants have not been able to meet it.
26. This application must therefore also collapse for that purpose.
27. Ultimately therefore, and having considered the Notice of Motion dated 24th October 2023, it is obvious that the defendants have not been able to meet the threshold for the grant of an order of stay of execution pending appeal. Most significantly, the defendants have not satisfied this court that they have commenced the process of instituting any appeal which is really the fulcrum upon which such an application must be supported.
28. Accordingly, I issue the following disposal orders:
 1. The Notice of Motion dated 24th October 2023 is dismissed.
 2. The defendants shall meet the plaintiff’s costs of the application.

BOAZ N. OLAO

JUDGE

7TH MARCH 2024

RULING DATED, SIGNED AND DELIVERED ON THIS 7TH DAY OF MARCH 2024 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.

