



**Kamwara v Kagembe (Environmental and Land Originating Summons
E001 of 2021) [2024] KEELC 3764 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3764 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E001 OF 2021**

CK YANO, J

APRIL 25, 2024

BETWEEN

GEOFFREY KIANIA KAMWARA PLAINTIFF

AND

MWIKAMBA KAGEMBE DEFENDANT

RULING

1. By a Notice of Motion dated 29th September, 2023 and said to be brought under Rule 5 (2) (b) of the *Court of Appeal Rules*, 2022 and all the enabling provisions of the Law, the Applicant seeks the following orders:
 1. Spent
 2. That the Honourable Court be pleased to order a Stay of Execution and/or Stay of any further proceedings in the instant suit, pending the filing and prosecution of the intended Appeal at the Court of Appeal.
 3. That the cost of this application be costs in the Cause.
2. The application is premised on the grounds on the face of the motion and supported by the affidavit of Geoffrey Kiania Kamwara Applicant, sworn on 29th September, 2023.
3. The Applicant avers that he duly instructed his Advocates on record to lodge a notice of Appeal against the Ruling delivered on 26th July, 2023 and has annexed a copy of the said Notice of Appeal marked "GKK1." That his advocates on record served the said Notice of Appeal upon M/s Kimakia Magara & Partners Advocates for the respondents.
4. The Applicant avers that the Deputy Registrar has duly transmitted one copy of the notice of Appeal to the appropriate registry as it is required under rule 78 of the *Court of Appeal Rules*, 2022. That his advocates on record are preparing the Records of Appeal for filing at the Court of Appeal. That his



intended Appeal to the Court of Appeal is highly meritorious as more so demonstrated on the attached draft Memorandum of Appeal marked “GKK2.”

5. The Applicant states that it is in the interest of justice that there is stay of execution and/or Stay of any further proceedings in the instant suit, so as not to prejudice the intended Appeal at the Court of Appeal.
6. In response to the application, the Respondent filed a replying Affidavit sworn on 18th December, 2023. It is his contention that the application is Scandalous, frivolous and an abuse of the court’s time.
7. The respondent avers that he has also perused the Applicant’s memorandum of appeal and has been advised by his advocates that the Applicant’s intended appeal does not raise triable issues and therefore it has no chance of succeeding. That he is further advised by his advocates that a claim brought under the Originating Summons is responded to by way of a replying affidavit and therefore it is improper to put in a counterclaim.
8. The respondent states that the principle that “costs follow the event” is well recognized by the law under section 27 of the Civil Procedure Act, and the same is used for compensating the successful party for the trouble taken in prosecuting or defending the case. The Defendant/Respondent avers that he successfully defended his case and the court was right and within the law in awarding him the costs of the suit.
9. The respondent avers that the application and the intended appeal is purely an act to delay justice and that should the application be allowed, he will stand prejudiced as he has already been and he continues to be deprived the fruits and benefits of the previous Judgment and Ruling delivered in his favour.
10. The respondent states that he is advised by his advocates that under Order 46 Rule 6 (2) (a) of the Civil Procedure Rules, the Applicant is mandated to demonstrate how substantial loss may result to the applicant should the order sought not be granted.
11. The respondent states that the applicant has failed to demonstrate whether he will suffer or the manner in which he will suffer substantial loss should execution not be stayed. In that regard, he prays that the Application be dismissed and stated that in the event that the court is inclined to grant stay of execution as prayed by the Applicant, then the Applicant be ordered to deposit One Million Five Hundred Thousand shillings (Kes.1,500,000/=) as security for costs. That further to the forestated, he is advised by his counsel on record that order 26 Rule 1 of the Civil Procedure Rules gives the Court the power to require or order that such costs be paid.
12. The respondent states that for the said reasons he prays that the application dated 29th September, 2023 be dismissed with costs borne by the intended Appellant/Applicant. The respondent prayed for the application to be dismissed with costs.
13. The application was canvassed by way of written submissions. The Applicant filed his submissions dated 22nd February, 2024 through the firm of Waklaw Advocates.
14. The applicant has submitted inter alia, that the Applicant/plaintiff after being greatly aggrieved by the Ruling delivered on 26th July, 2023 and which ruling dismissed partly his application dated 30th March, 2023, he lodged a Notice of Appeal on 7th August, 2023. That the said Notice of Appeal was duly served upon the Advocates for the Respondent.
15. The Applicant submitted that he has filed the present application seeking for stay of execution and/or stay of any further proceedings in the instant suit, pending the filing and prosecution of the intended Appeal at the Court of Appeal.



16. The Applicant submitted *inter alia* that he filed a meritorious Appeal at the Court of Appeal at Nyeri on 16th November, 2023 and the said Appeal is pending for hearing and final determination. That it is in the interest of justice that there be a stay of Execution and/or stay of further proceedings in the instant Suit pending the hearing and final determination of the filed Appeal, otherwise the said meritorious Appeal may be rendered nugatory if the Stay is denied and which outcome will no doubt subject the Appellant to suffer irreparable loss and damage.
17. The Applicant submitted that Rule 5 (2) (b) of the [Court of Appeal Rules](#) 2022 donates the Court unfettered jurisdiction to Stay execution and/or Stay of any further proceedings, when an Appeal is filed and the essence is to protect the Appeal filed from being rendered nugatory, if the executions in the Superior Court were to be effected before the Appeal was heard and determined.
18. It is the Applicant's submission that he has duly filed an Appeal at the Court of Appeal and has attached a copy of the Memorandum of Appeal on the submissions and stated that the said Appeal is pending for hearing and final determination. That the annexed memorandum of Appeal raises no doubt and or ambiguities that the Appeal at the Court of Appeal has high chances and or probability of success.
19. The Applicant submitted that the provisions of Order 42 Rule 6 (1) and (2) of the [Civil Procedure Rules](#), only applies for Appeals from Subordinate Court to the High Court and not from the High Court to the Court of Appeal and therefore cannot oust the express and Superior Provisions as outlined under Rule 5 (2) (b) of the [Court of Appeal Rules](#) 2022 and in the upshot the Respondent's submissions dated 18th December, 2023 ought to fall on its own sword.
20. It is the Applicant's submission that they appreciate the Jurisdiction of the court is limited to adjudicating on the merits and demerits of the Appeal filed at the Court of Appeal. The Applicant submitted that the Respondent's submissions touching on the filed Appeal do not deserve the light of the day.
21. The respondent filed his submission dated 18th December, 2023 through the firm of Kimakia Magara & Partners wherein he gave a brief background of the case. The respondent proceeded to identify the salient issues for determination being whether the applicants will suffer substantial loss if the orders are not granted and whether the security as to costs has been given by the Applicant.
22. Regarding the first issue, the respondent submitted that the provisions governing Stay of Execution pending Appeal are set out in Order 42 Rule 6 (1) and (2) of the [Civil Procedure Rules](#). The respondent further relied on the case of [Antoine Ndiaye -vs- African Virtual University](#) (2015)eKLR and the case of [James Wangalwa & Another -vs- Agnes Naliaka Cheseto](#) (2012)eKLR on what amounts to substantial loss.
23. It is the respondent's submission that from the above authorities, the onus of proving substantial loss and/or damage is with the Applicant. That in the instant application, the Applicant has not established whether any substantial loss would be suffered and/or the nature of the substantial loss to be suffered in the event the court declined to issue the orders of Stay.
24. The respondent submitted that it is evident that the Applicant has brought the application in bad faith with the aim of frustrating the Respondent and to deny him the fruits of his judgement and on that account, the application should not be allowed.
25. On whether the security as to costs has been given by the Applicant, the respondent submitted that upon perusing the intended appellant's Memorandum of Appeal, he notes that the intended appeal lacks merit and does not have any chances of Succeeding as the intended appeal has not raised any triable issues.



26. The respondent further submitted that the applicant has failed to demonstrate in his application and Supplementary Affidavit the willingness to furnish the security as to costs.
27. The respondent submitted that the Applicant should deposit the said security as a guarantee that the Respondent will be able to have access to the same without any hardship in the circumstance that the intended appeal fails. The respondent further submitted that, that being the case should the court be inclined to grant the orders sought by the Applicant, he should be ordered to provide security as to costs.
28. The respondent nonetheless submitted that the conditions required for a grant of stay of execution pending appeal have not been met by the applicant and therefore the application should be dismissed with costs.

Analysis And Determination

29. This court has carefully considered the application, the response and the submissions herein. The principles of granting stay of execution are provided for under Order 42 Rule 6 (1) of the Civil Procedure Rules. Therefore, Rule 5 (2) (b) of court of Appeal Rules cited by the Applicant is only applicable to a matter before the Court of Appeal and not this court.
30. Order 42 Rule 6(1) of the Civil Procedure Rules states as follows:

“No appeal or a 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 of Appeal 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 an application being made, to consider such application and to make such orders thereon as may to it seem just. 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 the orders set aside.”
31. Order 42, Rule 6 states:

“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
 - 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.”
32. The applicant needs to satisfy the Court on the following conditions before he can be granted the stay orders:
 1. Substantial loss may result to the applicant unless the order is made.
 2. The application has been made without unreasonable delay, and
 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.



33. The issue as to whether the intended appeal is arguable in my view can only be determined by the Court of Appeal and not this court.
34. In the impugned ruling, the Applicant sought to review the order on costs that was awarded in the judgment delivered on 9th November, 2022. The court declined to review the said order. It is that ruling that the Applicant intends to appeal to the Court of Appeal. In the application and the affidavit in support, I have not heard the Applicant indicate that the Respondent would not be able to repay the costs in the event that the applicant's appeal is successful. As correctly submitted by the respondent, the onus of proving substantial loss and/or damage is with the Applicant. However, in this application, the applicant has totally failed to establish what substantial loss he would suffer in the event the court declined to grant orders of stay. I am equally not persuaded that the applicant's appeal would be rendered nugatory if the application is not granted.
35. I find that this application has no merit and I dismiss it with costs to the respondent.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH APRIL, 2024

**C.K YANO,
JUDGE**

