



King'ang'i & 2 others v King'ang'i & 3 others (Environment and Land Appeal E012 of 2023) [2024] KEELC 3329 (KLR) (24 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3329 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL E012 OF 2023**

JM MUTUNGI, J

APRIL 24, 2024

BETWEEN

SAMUEL KABUTHI KING'ANG'I 1ST APPLICANT

GERALD GITUKE KING'ANG'I 2ND APPLICANT

STEPHEN KIMENYI KING'ANGI 3RD APPLICANT

AND

JOSEPH GATHITU KING'ANG'I 1ST RESPONDENT

JULIUS GITUKE KING'ANG'I 2ND RESPONDENT

MARGARET WAMBURA GIKUNJI 3RD RESPONDENT

CATHERINE WAKUTHI NJANJA 4TH RESPONDENT

RULING

1. This Ruling is on the Applicants' Notice of Motion application dated 22nd September 2023 seeking the following orders:
 1. Spent
 2. Spent
 3. That pending the hearing and determination of this Appeal, this Honourable Court be pleased to issue an Order of stay of execution of the ex-parte judgment delivered on 25.01.2023, the consequential decree issued on 02.03.2023 and/or any subsequent orders there from.
 4. That costs of this application be provided for.
2. The motion is predicated upon the annexed affidavit of the Applicants who aver that the suit raises triable issues. They claim that the Judgment dated 26.01.2023 and the Ruling dated 29.08.2023 were



entered against the Applicants despite service of the Summons and Pleadings not being effected on the Applicants. They aver that they learnt about the matter in the lower court when they were served with a notice to show cause dated 5.05.2023, which prompted them to appoint an Advocate who filed an application to set aside the ex-parte Judgment and which was dismissed on 29.08.2023. They state that should the execution proceed, they stand to suffer irreparable loss and prejudice and also it will render their application nugatory.

3. The application is opposed through a Replying Affidavit sworn by Joseph Gathitu King'angi dated 29th September, 2023. The Respondents grounds of opposition to the Motion are that they sued the Applicants herein vide Baricho PMCC No. E199 of 2022. They aver that the Applicants were duly served with copies of summons to enter appearance and the Respondents' pleadings, by a Court Process Server in the presence of the 1st Respondent. The Respondents aver that the Applicants ignored the summons and failed to enter appearance, which prompted the Respondents to apply for interlocutory Judgment which was granted on 25.01.2023 and a Decree issued consequently. The Respondents state that they commenced the execution process and it was when they served the Applicants with the Notice to Show Cause that the Applicants sensed the gravity of the matter and were prompted to file the application dated 26.06.2023 to set aside the Judgment entered on 25.01.2023, which application was subsequently dismissed. The Respondents aver that the Appeal herein does not raise triable issues and does not have a chance of success and further opine that the Applicants had not demonstrated the prejudice or substantial loss they would suffer if stay orders were not granted. It is further the Respondents position that the Applicants have brought the application under the wrong provisions of the law and urge the Court to dismiss the same with costs.
4. The parties canvassed the application by way of written submissions. I have considered the application, the affidavit in support and the Replying Affidavit in opposition and I have considered the submissions by the parties. The singular issue for determination in this matter is whether the Applicants have made out a case to justify grant of an order of stay of execution of the ex-parte Judgment delivered on 25.01.2023.
5. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) 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. Further to the above, stay may be granted for sufficient cause and that the Courts are now enjoined to give effect to the overriding objective in the exercise of their powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions.
7. Section 1A(2) of the [Civil Procedure Act](#) provides that
 - “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective”



while under section 1B some of the aims of the said objectives are to facilitate;

“the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”

8. An application for stay of execution of a Decree or Order pending appeal should satisfy the conditions set out in Order 42 Rule 6(2), to wit;

- (a) that substantial loss may result to the applicants unless the order is made,
- (b) that the application has been made without unreasonable delay, and
- (c) that such security as the Court orders for the due performance of such Decree or Order as may ultimately be binding on the Applicant has been given. See *Antoine Ndiaye v African Virtual University* [2015] eKLR.

9. As to what constitutes substantial loss, the Court in the Case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, observed thus:

“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 ... 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.”

10. In the instant case, the applicants aver that they stand to suffer substantial loss if stay of execution is not granted as LR Mwerua/Kagio/955, 9952 and 9953 which the Respondents/decree holders seek to have attached in execution of the decree are their only source of livelihood.

11. The Court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“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. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

12. The Respondents in the instant matter obtained a money decree in the Lower Court in default of defence on the part of the Appellants/Applicants. The application by the Appellants before the Lower Court to set aside the *exparte* Judgment was dismissed and that has triggered the appeal before



this Court. The Appellant through the instant application seeks stay of execution of the exparte Judgment entered on 25/1/2023 and all other consequential orders emanating therefrom. While the Respondents oppose the application for stay of execution of the decree, they urge that in the event the Court is inclined to grant stay of execution, such grant of stay should be conditioned on the Appellants being required to deposit the decretal sum as security for the payment of the Decree in the event, the Appellants appeal is unsuccessful.

13. The Appellants have urged that if execution of the Decree is not stayed, their parcels of land on which they rely as their only source of livelihood stand the risk of being sold in execution of the Decree. They contend that they would suffer substantial loss if the parcels of land are sold. The Appellants thus argue they stand to suffer greater prejudice than the Respondents, if an order of stay of execution is not granted. The Appellants maintain they have satisfied the threshold for grant of a stay of execution as they have demonstrated they have an appeal that is not frivolous and that they are likely to suffer substantial loss should stay not be granted.
14. For their part the Respondents contend they have a valid decree from the Court and are entitled to enjoy the fruits of their success before the Court by having the Decree in their favour satisfied. The Respondents further submit that the Appellants have not offered any security to warrant the grant of an order of stay of execution of the decree. The Court in considering an application for grant of stay of execution has to take into account the competing interests of both the Appellants and the Respondents and has therefore to endeavor to strike a balance such that no party is exposed to suffer undue prejudice one way or the other.
15. The Court of Appeal in the Case of *Absalom Dova v Tarbo Transporters* (2013) eKLR succinctly enunciated the applicable principle when it stated as follows:-

“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 prospects 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...”
16. In the instant matter, if the Court was to deny the Applicants the order for stay of execution, it would place the Applicants at a more prejudicial position than the Respondents. While it is unfortunate that the Respondents have had to wait to enjoy the fruits of their Judgment, the Applicants have adequately demonstrated that they are likely to suffer loss should their properties be attached and sold off. The Applicants did state that they were apprehensive that the Respondents may not be able to repay them should the Appeal go in their favour. That fear is not far-fetched as the Respondents have neither rebutted nor demonstrated that they had the means and capacity to refund the Applicants the money paid in satisfaction of the decree if the Appeal is successful. I am satisfied that the Applicants have adequately demonstrated that they would suffer substantial loss if stay is not granted.
17. The second aspect to consider is whether the Application before Court had been filed without undue delay. I noted that the Ruling in regard to the Appellant’s Notice of Motion dated 26th June 2023 was delivered on 29th August 2023 while the present application is dated 22nd September 2023. The Memorandum of Appeal is also dated 31st August 2023. Thus, there was no undue delay.
18. Lastly, the Applicant is required to furnish security to the Court as security for the performance of the Judgment debt should the appeal fail. In the present case, the award from the trial Court in favour



of the Respondents was made on 2nd March 2023 for the decretal amount of Kshs. 738,943.90/- This amount emanates from a legal court order issued by the trial magistrate and where a party seeks stay, such an application must still be weighed against the parameters under Order 42 Rule 6 of the Civil Procedure Rules.

19. The essence of provision of security was aptly enunciated in the Case of Arun C. Sharma v. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others [2014] eKLR, where the court stated:-

“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.... Civil process is quite different because in 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 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.”

20. The Applicants herein have not offered and/or furnished security as envisaged under Order 42 Rule 6 of the Civil Procedure Rules. The Respondents on their part opine that should the Court exercise its jurisdiction to grant stay, such stay should be on terms that the Applicants deposit the decretal sum in Court as security.

21. The Court in the Case of Gianfranco Manenthi & Another v. Africa Merchant Assurance Company Ltd [2019] eKLR, observed as follows respecting the provision of security:-

“.... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower Court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his Judgment in case the appeal fails.

Further, Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a Court which has delivered the matter in his favour. This is therefore to provide a situation for the Court that if the Appellant fails to succeed on appeal there could be no return to status quo on the part of the Plaintiff to initiate execution proceedings where the Judgment involves a money Decree. The Court would order for the release of the deposited decretal amount to the Respondent in the appeal. ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that Courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the Court to determine.”

22. As already demonstrated in James Wangalwa & Another v. Agnes Naliaka Cheseto (*supra*) the three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive. It is my finding that the Applicants herein, though they brought this application without undue delay and adequately demonstrated the substantial loss that they would suffer, did not furnish or offer security for the performance of the decree, in the event they were unsuccessful in the Appeal.



23. Grant of stay of execution is at the discretion of the Court having regard to all the circumstances and the applicable law. After a careful review and evaluation of the material before the Court and having regard to the applicable principles as elucidated in the authorities referred to, I exercise any discretion and allow the application for stay in terms of prayer (3) of the Notice of Motion dated 22nd September 2023 on the following terms:-

- i. That the Appellants/Applicants do make a partial deposit of the decretal sum of Kshs 400,000/- in Court within 45 days from the date of this Ruling.
- ii. That in the event the partial deposit of the decretal sum is not made as in (i) above, the stay will lapse and the Respondents shall be at liberty to proceed with execution.
- iii. Costs of the application to abide the outcome of the Appeal.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA VIDEO LINK THIS 24TH DAY OF APRIL 2024.

J. M. MUTUNGI

ELC - JUDGE

