



**Tomas & 2 others v Muigai & 2 others (Environment & Land Case  
86 of 2021) [2024] KEELC 4276 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4276 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 86 OF 2021**

**AE DENA, J**

**MAY 23, 2024**

**BETWEEN**

**SAID MWINYIKAI TOMAS ..... 1<sup>ST</sup> PLAINTIFF**

**ALI HAMISI JAMALI ..... 2<sup>ND</sup> PLAINTIFF**

**BIASHA MWALIMU GANYUMA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**JOHN NJOROGE MUIGAI ..... 1<sup>ST</sup> DEFENDANT**

**CHRISTINE MUNGA ..... 2<sup>ND</sup> DEFENDANT**

**KWALE DISTRICT LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Applicant herein seeks for stay of execution of the judgement of this court rendered on 18/9/2023 and the resultant decree dated 4/10/2023 pending appeal. The court is further urged to stay the proceedings herein as well. The application is supported by an affidavit sworn by Elly Enos Wesonga Advocate who is in conduct of the matter and is further pursuing the appeal on behalf of the Applicants. The deponent states that despite the Notice of Appeal having been filed on 27/9/2023 and which was without delay, there has been an issue with procuring the typed proceedings from the registry despite several letters for follow up to the Deputy Registrar. That it is common knowledge that filing a Notice of Appeal does not warrant stay of execution as the one issued by the court lapsed in the stipulated 30 days hence the instant application.
2. The application is opposed by grounds of opposition filed before court on 5/12/2023. It is stated that the judgement delivered on 18/9/2023 ordered for vacant possession of the suit property to the Plaintiffs within 90 days. That the timeline of 90 days has lapsed and therefore there is nothing to stay. It is averred that a Record of Appeal has not been filed and the application cannot stand. The



application is termed a waste of judicial time and an abuse of the court process which ought to be dismissed with costs.

3. The application is further opposed by a replying affidavit sworn by Said Mwinyikai Tomas the 1<sup>st</sup> Plaintiff. It is stated that the instant application is a delay tactic by the Defendants who are keen on ensuring the Plaintiffs do not enjoy the fruits of their judgement. That there is clearly no appeal on record and that the allegations that the proceedings were delayed is not substantiated. The court is asked to disallow the application and that in the event the same is allowed, there be conditional deposit of Kshs 30,000,000/= as security being the value of the property.
4. The application was dispensed by way of written submissions. The Applicant filed on 9/01/24 and the Plaintiff on 7/2/24. The court has considered the submissions.

### **Analysis and Determination**

5. I have considered the Notice of Motion and the affidavit in support of the same, the grounds of opposition and replying affidavit opposing the application. The main issue for determination that emerges is whether the Applicants have met the threshold for grant of orders of stay of execution pending appeal.
6. The purpose and objective of an order for stay of execution is to preserve the substratum of the appeal in order to ensure that the appeal is not defeated. In the case of *Consolidated Marine v Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi), the Court underscored 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”.

7. Whether to grant an order of stay of execution is discretionary. The Court of Appeal in *Butt Rent Restriction Tribunal [1982] KLR 417* espoused and gave guidance on what to consider as follows: -
  1. “The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
  3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
  4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
  5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
8. Further an Applicant who craves an order for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), namely; -



- (a) that substantial loss may result to the applicant 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. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma v Abuoga* [1988] KLR 645 thus; -
- Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
10. From the judgement the subject of the decree whose execution is sought to be stayed, it is clear that the contest was on the ownership of property Kwale/Diani Beach Block/1456. In my final orders, the Plaintiffs were declared the lawful owners of the suit property and a permanent injunction together with eviction orders issued against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Earlier on, it was noted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had invaded the suit property and even proceeded to construct thereon and took occupation of the same. I do not wish to belabour much on my findings in the judgement, however in the event that the Court of Appeal overturns my findings, then the Defendants would have indeed suffered loss in the event that demolition of their property takes place before then. Indeed this would not only be substantial but the appeal will be rendered irrelevant. This therefore calls for the court to apply its discretion in favour of the Applicant. to grant the orders sought pending the hearing and determination of the appeal.
11. The instant application was filed on 27/11/2023 which was 2 months after the judgement of this court. I find that the same has been filed within a reasonable period of time given the reasons by counsel on typed proceedings.
12. On the issue of security for costs, the Plaintiffs opine that the Defendants/Applicants should pay a sum of Kshs. 30,000,000/= The purpose and essence of deposit of security was discussed in the case of *Arun C Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates,Nrb Misc. Civil Application No. 802 Of 2010*, 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 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.”
13. I find the amount quoted by the Plaintiffs/Respondents way on the higher side. The security should not be based on the value of the suit property. The court in exercise of its discretion on grant or refusal of stay of execution orders is guided to keep in mind that the rights of both parties should be considered so as to allow justice to prevail. Setting an exorbitant amount in terms of security might lead to a party seeking to appeal a matter failing to do so for the simple reason of failing to meet the monetary



condition set. To me, the same will be an injustice. I am guided by the court in the case of Absalom Dova v Tarbo Transporters [2013] eKLR, where it was observed 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 Applicant 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...”

14. The overriding objectives of the *Civil Procedure Act* and the Rules are to enhance the dispensation of justice. The application herein is premised upon the provisions of the Act and the rules, the court is therefore enjoined to consider the wider context and purpose of the same in applying the provisions thereof. This is the essence of Section 1A and 1B of the *Civil Procedure Act*.
15. The court has been referred to the case of Gianfranco Manenthi & Another v Africa Merchant Assurance Ltd [2019] eKLR and the dictum of Justice R. Lagat Korir on security and which in my view is distinguishable on the basis that the same focuses on monetary decree which is not the case in the present suit. I note the Applicants have not made any proposal as to what they intend to deposit as security for costs but as already observed there must be a balance. The court will take it upon itself to render a decision on the same. All in all, the court finds the rest of the components to be satisfied in securing a stay of execution pending appeal have been met.
16. Before I make my final orders in this matter I find it necessary to comment on the issue of delay in procuring of typed proceedings which has been raised by the Applicant. This has been occasioned by the sudden demise of one of the office administrators (secretary). The station is currently served by only one staff awaiting the deployment of a replacement.
17. Accordingly, I hereby grant stay of execution of the judgement rendered on 18/9/2023 and the resultant decree dated 4/10/2023 in the following terms;
  - a. The Applicants shall deposit a sum of Kshs. 350,000/= in the court’s account and or a bank guarantee being Security for Costs within 45 days of the date of this Ruling.
  - b. The Deputy Registrar ELC Kwale shall ensure typed proceedings be prioritised and made available to the Applicants within 30 days of this ruling.
  - c. Failure to comply with orders (a) above, the order of stay herein issued shall automatically lapse.
  - d. Costs of the Application to abide the outcome of the Appeal.

Orders accordingly.

**RULING DATED SIGNED AND DELIVERED THIS 23RD DAY OF MAY 2024.**

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**A.E DENA**

**JUDGE**

**Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of: -**

**No appearance for the Plaintiffs/ Respondents**



**Ms. Mwakuzuzu holding brief for Mr. Mathare for the 1<sup>st</sup> & 2<sup>nd</sup> Defendants/Applicants**

**Mr. Mwandeje for the 3<sup>rd</sup> Defendant**

**Mr. Daniel Disii – Court Assistant**

