



**Kai v Tosetto (Environment and Land Appeal 23 of 2023)
[2024] KEELC 4056 (KLR) (22 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4056 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 23 OF 2023
FM NJOROGE, J
MAY 22, 2024**

BETWEEN

LUCKY KAI APPELLANT

AND

DANIELLA TOSETTO RESPONDENT

RULING

1. For determination is the Applicant's Notice of Motion dated 5th December 2023 seeking the following orders:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. After the said inter partes hearing of this application this court be pleased to grant a stay of execution of the judgment rendered on 21st November 2023 be granted pending the hearing and determination of the Defendant's/Applicant's Appeal.
 - e. This honourable court do grant such orders as it deems necessary and expedient in the circumstances.
 - f. An appropriate order be made for costs of this application.
2. The application is premised on the grounds set out on its face and the supporting affidavit of Lucky Kai the Applicant who stated that judgment was delivered in the lower court on 21st November 2023 in favour of the Plaintiff; that having considered the judgment, she intends to appeal against the same as she has filed a Memorandum of Appeal. It was stated that the intended appeal raises arguable grounds and if stay is not granted the appeal shall be rendered nugatory.



3. In response, the Respondent filed a replying affidavit stating that the intended appeal does not raise arguable grounds as she sufficiently proved her proprietorship of the suit premises. She stated that the Applicant does not stand to suffer any loss as he is not the proprietor of the suit premises and the present application is a delay tactic.

Disposition

4. The Application was canvassed by way of written submissions. I have taken into consideration the parties' submissions. The issue for determination is whether the stay for execution is merited.
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. Therefore, the question arising first is whether in his application for stay of execution of a decree or order pending appeal the applicant has satisfied all the conditions set out in Order 42 Rule 6(2), aforementioned: 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.
 7. It was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR as follows:

“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.”

8. The basis of the application is that there is real and imminent possibility of execution issuing against the applicant and he stands to suffer substantial loss and also that no prejudice would be occasioned to the respondent who can be adequately compensated by an order of costs. Another ground is that the applicant is ready to abide by the orders of this court as to deposit of security. The memorandum of appeal has been filed and the application was brought timeously. I have however examined the supporting affidavit and found no effort by the applicant to establish that he would suffer substantial loss if the orders sought are not granted.
9. 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 “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.”

10. Therefore, further to the provisions of Order 42 *CPR* as cited herein above, stay may be granted for sufficient cause and the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in Sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The court is now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.
11. In the present application, I have noted that the applicant alleges in his supporting affidavit that he was condemned unheard. The circumstances of that default are not clearly understood and are indeed not for in-depth examination and adjudication in the present application. I have also considered the memorandum of appeal and I think the grounds therein are arguable.
12. The overarching principle that guides this court in all matters before it whether on appeal or otherwise is that every person is entitled to natural justice, besides the constitutional right espoused by Article 50 of the *Constitution* to the effect that, to paraphrase, every person is entitled have every dispute that can be resolved by application of the law tried and determined in an impartial forum. This includes any questions raised in appeals. It is observed that in his application the applicant has demonstrated his willingness to deposit any security for costs.
13. It would not be proper in the circumstances of this case that execution issues against the applicant before the issues that he raises in the appeal are heard determined. In stating this the court is also aware that it must balance between the rights of the applicant to be heard on appeal and the rights of the respondent to enjoy the fruits of his judgment. The balance can be struck easily by putting into place measures that ensure that the appellant does not drag this appeal forever.
14. In the end I find in favour of granting the stay of execution orders sought. I therefore allow the application dated 5th December 2023 and I issue the following orders:
 - a. A stay of execution of the judgment rendered on 21st November 2023 is hereby granted pending the hearing and determination of the Applicant’s Appeal;
 - b. The applicant shall file and serve upon the respondent a competent record of appeal within 45 days of this order in default of which the stay of execution orders issued in (a) herein above shall lapse and execution may issue at the instance of the respondent;
 - c. This matter shall be mentioned on 25th September for directions on the hearing of the appeal;
 - d. The costs of this application shall abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 22ND DAY OF MAY 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

