



Samson (Suing as the Legal Representative of the Estate of Samson Kabiru Kabitu) v Co-operative Bank of Kenya & 2 others (Environment & Land Case 40 of 2015) [2024] KEELC 3915 (KLR) (20 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3915 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 40 OF 2015**

**MAO ODENY, J
MAY 20, 2024**

BETWEEN

**JULIA NJOKI SAMSON PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SAMSON
KABIRU KABITU**

AND

**CO-OPERATIVE BANK OF KENYA 1ST DEFENDANT
MICHAEL KABURU SAMSON 2ND DEFENDANT
CHARLES KIMANI WANGUI 3RD DEFENDANT**

RULING

1. This ruling is in respect of a Notice of Motion dated 8th December, 2023 by the 1st Defendant/Applicant seeking the following orders:
 - a. Spent.
 - b. Spent.
 - c. This Honourable court be pleased to stay execution of decree/judgment delivered on 15th November, 2023, pending hearing and determination of the Appeal at the Court of Appeal.
 - d. The costs of and incidental to this Application abide by the result of the said Appeal.
2. The application is grounded on the supporting affidavit of Jacob Munyao the Applicant's Branch Manager who deponed that the respondent may execute at any time there being no encumbrance after the court issued the decree.



3. The applicant deponed that the instant application has been made without delay and that they will suffer substantial loss if the application is not allowed as prayed.
4. The respondent filed a replying affidavit dated 22nd January, 2024 where she averred that the judgment had been delivered in her favour declaring the charge over the suit property Bahati Kabatini Block 1/2697 illegal. She further deponed that she is in possession of the suit property and allowing the instant application will result in the loss of her home hence stands to suffer harm, as they are paupers and have no other place to call home apart from the suit property.

Applicant's Submissions

5. Counsel for the Applicant relied on Order 42 Rule 6 of the [Civil Procedure Rules](#) and the case of [Butt v Rent Restriction Tribunal](#) [1979] and submitted that the Applicant is apprehensive that the respondent might dispose of the suit land their detriment, which will render the Appeal nugatory.
6. Counsel further submitted that the applicant will suffer substantial loss as it risks its money and/or interest on the loan accruing which may outstrip the value of the suit property. Counsel relied on the case of [M'ndaka Mbiuki v James Mbaabu Mugwiria](#) [2016] eKLR and stated that the application has been brought without inordinate delay.
7. On the issue of security for due performance of the decree, counsel relied on the case of [Selestica Limited v Gold Rock Developments](#) and submitted that the court has discretion to issue any orders to preserve the subject matter. Counsel urged the court to balance the interests of both parties and allow the application as prayed.

Respondent's Submissions

8. Counsel for the Respondent relied on the case of [James Wangalawa & Another v Agnes Nailiaka Cheseto](#) [2012] eKLR and submitted that the apprehension of execution as raised by the Applicant on the issue of substantial loss c suffice.
9. Counsel further relied on the case of [Samvir Trustee Limited V Guardian Bank Limited](#) (Nairobi) HCCC 795 of 1997 and Section 80 of the [Land Registration Act](#) and submitted that in the event the appeal succeeds, the Registrar can still rectify the register even where the suit land has been disposed of to a third party.
10. On the issue of security for the due performance of the decree, counsel relied on the case of [Arun C Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others](#) [2014] eKLR and submitted that the Applicant has not shown or stated its willingness to deposit any security and thus the application ought to be dismissed with costs.

Analysis and Determination

11. The issue for determination in an application for stay of execution is whether the applicant has met the threshold as provided for under Order 42 rule 6 of the [Civil Procedure Rules](#), which provides as follows:

“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.”

12. The purpose of stay of execution is to preserve the substratum of the case as was held in the case of *Consolidated Marine v Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi), 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”.

13. The Applicant contends that it would suffer substantial loss if stay is not granted as it risks losing its money and/or interest on the loan accruing which may outstrip the value of the suit property.

14. The court is cognizant of the fact that it has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the appeal and the Respondent who is seeking to enjoy the fruits of her judgment.

15. It is noted that the impugned judgment was delivered on 15th November, 2023 while the Applicant filed the instant application on 8th December, 2023 which in essence shows that the application was filed timeously.

16. On the issue of security for the due performance of the decree, in the case of *Kenya Commercial Bank Limited v Sun City Properties Limited & 5 Others* [2012] eKLR the court held that:

“in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced in a bid to balance the two competing interests; the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal. I do not see, why the same should not be applicable in this case.”

17. The court has discretion to grant stay of execution on terms that it considers just taking into consideration the interest of the decree holder and the party that is seeking a second bite of the cherry.

18. Consequently, I find that it would be in the interest of justice to order that the Respondent neither parts with the possession nor change the character of the suit land pending the hearing and determination of the Appeal. The Applicant to deposit Kshs. 500,000/= in a joint interest earning account of the advocates on record within 30 days, failure to which the stay lapses.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 20TH DAY OF MAY 2024.

M. A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the *Civil Procedure*.

