



**Osman & another v Wepukulu & another (Environment & Land
Case 57 of 2016) [2024] KEELC 3934 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3934 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 57 OF 2016**

EC CHERONO, J

MAY 16, 2024

BETWEEN

SAID ALI OSMAN 1ST PLAINTIFF

MOHAMMED OANY ISSA HUSSEIN 2ND PLAINTIFF

AND

FREDRICK NYONGESA WEPHUKULU 1ST RESPONDENT

MARY NJOKI KIMOTHO 2ND RESPONDENT

RULING

1. The application before me for determination is the application dated 12th Mrch, 2024 where the applicant prays for the following orders;
 - a. Spent.
 - b. Spent.
 - c. That there be stay of execution of the decree/judgment delivered by the Honourable Court on 26th day of February, 2024 pending the hearing and determination of the appeal preferred by the Plaintiff/Applicants.
 - d. That costs of this application be provided for.
2. The application is anchored on the grounds that being aggrieved by the Court's judgment dated 26th day of February, 2024 the applicant has preferred an appeal and if orders for stay of execution of that judgment are not issued the intended appeal will be rendered nugatory and that the intended appeal is meritorious with high chances of success.
3. The application is further supported by the sworn affidavit of the 1st applicant dated 12th March, 2024 and the annexures attached thereto.



4. The application is unopposed by the respondents since at the time of preparing this ruling no response was on record.
5. The applicants filed submissions dated 22nd April, 2024 where it was submitted that they have satisfied the requirements to grant the orders sought as stipulated in Order 42 Rule 6 of the [Civil Procedure Rules](#). It was their argument that the respondents herein are on the verge of executing the decree of the court and if the orders sought are not granted then the appeal shall be rendered nugatory.
6. I have considered the application, the supporting affidavit and the submissions by the applicants and I find that the main issue for determination is whether the applicants have demonstrated that the orders of stay of execution pending appeal are merited.
7. The application is for stay of execution of decree/ judgment of this Honourable Court dated 26th February, 2024. It is trite that an appeal lying from a decision of the High court is the preserve of the Court of Appeal according to Section 66 of the [Civil Procedure Act](#) and Section 3 of the [Appellate Jurisdiction Act](#), Cap 3 Laws of Kenya and the procedure for institution of such an appeal is set down in the Court of Appeal Rules. Section 66: Appeal from decree of High Court
 66. Except where otherwise expressly provided in this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie from the decrees or any part of decrees and from the orders of the High Court to the Court of Appeal.
Section 3 of the [Appellate Jurisdiction Act](#), Cap 9 Laws of Kenya;
 3. Jurisdiction of Court of Appeal
 - (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under law.
8. 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.
9. Further to the above, stay may only be granted for sufficient cause and that 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 courts are 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.
10. 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.”



11. An applicant for stay of execution of a decree pending must therefore for stay of execution of a decree or order pending appeal satisfy 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.

See Civil Appeal No.107 of 2015, *Masisi Mwita V Damaris Wanjiku* Njeri (2016) eKLR, *Stephen Wanjohi v Central Glass Industries Ltd*, Nairobi HCC No.6726 of 1991 and *Antoine Ndiaye v African Virtual University* [2015] eKLR.

12. In considering this application, this Court shall take into account the fact that a successful litigant also has a right to enjoy the fruits of his/her Judgment. The impugned judgment which the applicant seeks to appeal to the Court of Appeal was delivered on 26th February, 2024 and the applicant filed this application on 12th March, 2024 which was about 2 weeks after the delivery of the judgment. I therefore find that the application has been filed without unreasonable delay. I also note that the applicant filed his Notice of Appeal the same date the judgment was delivered and as such, I find this was filed within the required period under Rule 75 of the *Court of Appeal Rules*.
13. On the second condition whether the applicant will suffer substantial loss if the stay order is not granted, it is a conditional requirement for the grant of stay pending appeal that the applicant must demonstrate the substantial loss he or she will suffer if the stay order is not granted. In the case of *Mukuma V Abuoga* (1988) KLR 645 the court held that;
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
14. Also see the case the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, where it was observed that:
- “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.”
15. The applicant in this case contends that the respondents herein are desirous and are in the process of executing the decree to his detriment. Looking at the impugned Judgment, it is clear that the Parties were given 30 days within which to cause for cross-transfer of the titles i.e. for land parcel no. East Bukusu/South Kanduyi/4626 to the respondents and the title for land parcel no. East Bukusu/South Kanduyi/4627 to the applicants. In default, the deputy registrar was to execute all necessary transfer documents to effect the cross-transfer. The applicant contends that 30 days have since lapsed and that the respondents have since applied and obtained the decree in preparation for execution.



16. 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.”

17. Having carefully analyzed the testimony of the witnesses and the exhibits produced, I have no doubt in my mind that the impugned Judgment is informed by facts and the law and that this court did not err in its findings. Accordingly, I find that the applicant has not established how he would suffer substantial loss unless an order of stay pending appeal is granted.

18. As to security of costs, the applicants have stated that they are ready and willing to give security for the due performance of the decree appealed from.

19. Taking all the above factors into account and considering that the court has to balance between the rights of successful litigant to enjoy the fruits of his/her judgment vis-à-vis those of a party which has not crystallized, this court finds sufficient grounds have been given to deny the respondent the fruits of his judgment.

20. In the upshot, I find that the applicants have not established the requirements for the grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the *Civil Procedure Rules*.

21. Accordingly, I hereby dismiss the applicants’ application dated 12th March, 2024 with costs to the Respondents.

22. It is so ordered.

DATED, SIGNED AND DELIVERED at BUNGOMA this 16th day of May, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

Mr. Wafula H/B for Masengeli for the Respondent

Appellant/Advocate-absent

Bett C/A

