



Jomo Kenyatta University of Agriculture & Technology v Kwanza Estates Limited (Environment and Land Appeal E026 of 2023) [2024] KEELC 13569 (KLR) (15 May 2024) (Ruling)

Neutral citation: [2024] KEELC 13569 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E026 OF 2023**

MAO ODENY, J

MAY 15, 2024

BETWEEN

**JOMO KENYATTA UNIVERSITY OF AGRICULTURE &
TECHNOLOGY APPELLANT**

AND

KWANZA ESTATES LIMITED RESPONDENT

(Being an Appeal from the Ruling and Orders of the Chief Magistrate's Court of Kenya at Nakuru (Hon. Elizabeth Juma, CM) made on 26th day of September 2023 in Nakuru Chief Magistrate's Court Environment and Land Case No. E939 of 2022)

RULING

1. This ruling is in respect of a Notice of Motion dated 26th October, 2023 by the Applicant seeking the following orders:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. After the said inter-partes hearing of this Application the Court be pleased to grant a stay of execution of the Ruling and Orders of the Chief Magistrate's Court of Kenya at Nakuru (Hon. Elizabeth Juma, CM) made on 26th day of September 2023 in Nakuru Chief Magistrate's Court Environment and Land Case No. E939 of 2022; *Kwanza Estates Limited v Jomo Kenyatta University of Agriculture & Technology* rendered on 26th September, 2023 pending hearing and determination of the intended appeal;
 - e. An appropriate order be made for costs of this Application.



2. The application was premised on the grounds enumerated on the face of the motion and supported by the affidavit of Richard Wokabi Kariuki, the Chief Legal Officer of the Appellant dated 26th October, 2023 where he deponed that the Applicant would suffer substantial loss if an order of stay of execution is not granted.
3. He further deponed that the monies and properties owned by the Appellant are public assets that are managed and monitored by the exchequer and any interruption to the same would have negative public interest implications that would adversely affect the operations of the Appellant and expose it to pecuniary embarrassment, legal and administrative queries.
4. The Respondent opposed the application vide a Replying Affidavit sworn by Geoffrey Makana Asanyo, the Managing Director of the Respondent dated 20th November, 2023. He deponed that the application is meant to derail the matter and deny the Respondent the opportunity to enjoy the fruits of the ruling delivered by the subordinate court on 26th September, 2023. The Respondent further deponed that the trial court properly and correctly entered the summary judgment after it was satisfied that the matter merited the issuance of a summary judgment.

Applicant's Submissions

5. Mr. Kinuthia, counsel for the Appellant identified the following issues for determination:
 - a. The substantial loss that may result to the Applicant unless the orders of stay of execution are issued;
 - b. The Application for stay of execution has been made without unreasonable delay;
 - c. Whether the Applicant should deposit security as a condition for stay;
 - d. Whether it is in the public interest to grant the stay orders sought.
6. Counsel submitted that the Appellant's Memorandum of Appeal dated 26th October 2024 has demonstrated that it has an arguable appeal especially considering the trial court ignored the effect of the Court of Appeal judgment delivered on 16th June, 2023 to the Respondent's case.
7. Counsel relied on the cases of *Kenya Commercial Bank Limited v Sun City Properties Limited & 5 others* [2012] eKLR, *National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another* Nairobi Civil Application No 238 of 2005, *Air services Limited v Theuri Munyi* [2014] eKLR and *Teachers Service Commission v Sarah Nyanchama Ratemo* [2014] eKLR. and submitted that the Respondent has not demonstrated by way of evidence of its capability to refund the decretal amount if it is paid out.
8. Counsel further relied on the case of *Focin Motorcycle Company Limited v Ann Wambui Wangui & another* [2018] eKLR and submitted that just before judgment was rendered, parties had to partially reconstitute the court file long after the Applicant's final submissions had been filed in 2016 and the application was lodged timeously, hence the inference of delay on the part of the Applicant is unfounded.
9. Mr. Kinuthia also argued that the Appellant is a public institution with sufficient funds to meet any liability that may result from the Court's decision should its appeal fail and it should therefore not be required to deposit security and cited the cases of *Teachers Service Commission v Benson Kuria Mwangi* [2020] eKLR and *Paul Kosgei v National Industrial Training Authority & another; Cabinet Secretary, Ministry of Labour & Social Services (Interested Party)* [2021] eKLR.



10. Counsel submitted that the Appellant is a public entity meaning that settlement of the decretal sum will be from public funds and the resources allocated to it are to be used primarily for provision of higher education and relied on the case of *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others* [2014] eKLR.

Respondent's Submissions

11. Mr. Konosi, counsel for the Respondent identified two issues for determination, namely, whether the applicant merits the grant of order of stay of execution sought and who should bear the costs of the application?
12. Counsel relied on provisions of Order 42 Rule 6 of the *Civil Procedure Rules* and the cases of *Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another* [2015] eKLR, *Victory Construction v BM (a minor suing through next friend one PMM)* [2019] eKLR, *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR, *Machira t/a Machira & Co Advocates v East African Standard* [2002] eKLR, *M/S Portreitz Maternity v James Karanga Kabia* Civil Appeal No 63 of 1997 and *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR.
13. Counsel submitted that the Appellant has not placed anything before the court to demonstrate that it will suffer substantial loss if an order of stay is not granted. He submitted that the orders of the Magistrate's Court are for the payment of a sum of money owed as mesne profits and as such the Appellant will not suffer substantial loss. Counsel added that that the Respondent has averred that it is capable of reimbursing the decretal sum in the unlikely event the appeal herein succeeds, an averment, which has not been controverted.
14. It was counsel's submission that the ruling appealed against was delivered on 22nd September 2023 and the Appellant filed this application on 30th October, 2023 a period of over 30 days. Counsel submitted that the Appellant has not explained the delay or bothered to give any reason for failing to bring the application promptly and relied on the cases of *Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd* [2019] eKLR, *Arun C. Sharma v Ashana T/A Ruirundalia & Co Advocates & 2 others* [2014] eKLR.
15. Counsel further submitted that the Appellant has not offered to deposit any security as required by law and urged the court to dismiss the application with costs to the respondent.
16. Mr. Konosi finally submitted in order to fast track the appeal, the Respondent made an offer that the Appellant deposits the decretal amount in a joint interest earning account in the names of the advocates of the parties, an offer that was rejected.

Analysis and Determination

17. The issues for determination in an application for stay of execution are provided for under Order 42 Rule 6 of the *Civil Procedure Rules*. If an Applicant meets the requirements under the said order, then the court can grant the orders as prayed.
18. The Appellant has submitted that it is a public institution with monies and assets managed by the exchequer and if the same is interfered with it will affect the operations of the institution hence will suffer substantial loss. Further, that the Appellant will be forced to divert public funds if the orders sought are not granted which will affect its capacity to offer higher education to students enrolled at the institution.



19. In the case of *James Wangalwa & Anor v Agnes Naliaka* [2012], the court stated 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...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 a successful party in the Appeal.”
20. The Applicant must file the application without undue delay in order for the court to grant an order of stay of execution. In the case of *Jaber Mohsen Ali & Anor v Priscillah Boit & Another* [2014] eKLR the court held that what amounts to unreasonable delay is dependent on the surrounding circumstances of each case.
21. The impugned ruling was delivered on 22nd September, 2023 and this application was filed on 30th October, 2023. The Appellant gave an explanation that the advocates on record were supplied with the copy of the said ruling in mid-October and filed the application timeously. I find that the application was filed without unreasonable delay. The circumstances surrounding each case must be considered to enable a court find whether an application was filed timeously as an application filed within 3 or 4 days might be deemed to have been filed with delay and one filed after six months or one year to have been timeously filed.
22. On the third pre-requisite for provision of security as a condition for grant of stay of execution, counsel for the Appellant relied on Order 42 Rule 6, 7 and 8 of the *Civil Procedure Rules* and submitted that the Appellant is a government institution established under the Universities Act, Cap 210B, Laws of Kenya as a public university, hence it is not required to provide security as a condition for an order of stay of execution.
23. Order 42, Rule 8 of the *Civil Procedure Rules* provides:
- “No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.”
24. It is not in dispute that the Appellant is a public University which is established under by *Act No 8 of 1994*. It is an Act of Parliament to establish the Jomo Kenyatta University of Agriculture and Technology; to provide for the control, governance and administration of the University; and for connected purposes.
25. Section 3(2) provides that:
- The University shall be a body corporate with perpetual succession and a common seal, and shall in its corporate name be capable of—
- (a) suing and being sued;
 - (b) taking, purchasing or otherwise acquiring, holding, charging and disposing of movable and immovable property;
 - (c) borrowing or lending money; and
 - (d) doing or performing all such other things or act, for the furtherance of the provisions of this Act which may lawfully be done or performed by a body corporate”



26. It follows that the Appellant is a body corporate able to sue and be sued as well as enter into commercial transactions, thus cannot hide under the veil of and/or be protected by Order 42 rule 8. It is therefore subject to furnishing security on such terms as the court may direct.
27. The court has discretion in either granting or rejecting an application for stay of execution but such discretion must be exercised judiciously. Consequently, the court hereby exercises its discretion in favour of the Applicant to allow the application for stay on the following terms:
- a. Stay of execution is hereby granted pending the hearing and determination of the Appeal.
 - b. The stay is conditional on the Appellant filing and serving the record of Appeal within 30 days from the date of the ruling failure to which the Appellant to deposit half of the decretal amount in joint interest earning account of counsel on record within 30 days as security for the due performance of the decree.
 - c. Failure to abide by the terms under (b), the stay shall lapse.
 - d. Costs of the application to abide by the outcome of the Appeal.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 15TH 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.

