



**Chiko v Agunga (Environment and Land Appeal 14 of 2023)  
[2024] KEELC 4186 (KLR) (14 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4186 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND APPEAL 14 OF 2023  
FM NJOROGE, J  
MAY 14, 2024**

**BETWEEN**

**KWANYA KIRONDA CHIKO ..... APPLICANT**

**AND**

**ALFRED NYADIMO AGUNGA ..... RESPONDENT**

**RULING**

1. The Applicant filed a Notice of motion dated 7<sup>th</sup> November 2023 seeking the following orders:
  - a. Spent
  - b. That in the interim, there be a stay of execution of the judgment and decree of Hon. JM Kituku (SPM) Kilifi in Kilifi ELC No 59 of 2020: *Kwanya Kironda Chiko v Alfred Nyadimo Agunga* pending the hearing and determination of this application inter parties.
  - c. That in the interim, there be a stay of execution of the judgment and decree of Hon. JM Kituku (SPM) Kilifi in Kilifi ELC No 59 of 2020: *Kwanya Kironda Chiko v Alfred Nyadimo Agunga* pending the hearing and final determination of this Appeal
  - d. The costs of the application be in the cause.
2. The application is founded on the grounds set out on its face and the supporting affidavit of Kwanya Kironda Chiko, the Applicant who deponed that on October 13, 2023, Hon. J.M Kituku (SPM) delivered a judgment that dismissed his suit against the respondent with costs while at the same time upholding the Respondent's counterclaim; that aggrieved by the said judgment, his advocates filed a memorandum of appeal on October 26, 2023 which appeal has chances of success hence the present application for stay of execution.
3. The Respondent filed a replying affidavit sworn by himself stating that judgment in the lower court was entered in his favour and the appellant ordered to pay a total sum of Kshs. 5,000,000 as refund



and damages for breach of contract. He stated that he is not opposed to the appellant being granted stay as long as he fulfills all the guidelines for stay.

## Disposition

4. The application was canvassed by way of written submissions. I have considered the rival affidavits, the submissions by the parties as well as the authorities relied on. The issue for determination is whether the order sought for stay of 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:

“Stay in case of appeal [Order 42, rule 6]

1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
2. 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, an applicant 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), aforementioned: namely (a) that an appeal has been instituted, (b) substantial loss may result to the applicant unless the order is made, (c) that the application has been made without unreasonable delay, and (d) 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. Further to the above, stay may only be granted for sufficient cause and the Court, in deciding whether or not to grant the stay and in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, is no longer limited to the foregoing provisions. The court may consider any other factor that is relevant in determining whether or not to grant a stay. The courts are 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. 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.”



8. In the present case there is already an appeal in which the present application is being made and the first condition is therefore satisfied.

9. As to what substantial loss is, it was observed in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, 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.”

10. 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.”

11. In the present case the gravamen of the applicant’s appeal is that the thumbprint of the applicant was procured unprocedurally and that the land was registered in the name of a non-citizen yet the suit property is his only land where he resides with his family, and he may be dispossessed of the same on the strength of the same judgment he impugns. These are issues that require determination with finality in the appeal which he has commenced.

12. In the case of *James Wangalwa & another (supra)* Hon Justice F. Gikonyo added as follows:

“The right of appeal is a constitutional right that actualizes the right to access to justice, protection and benefit of the law, whose essential substance, encapsulates that the appeal should not be rendered nugatory, for anything that renders the appeal nugatory impinges on the very right of appeal.”

13. This court is of the view that in the circumstances unless the order of stay sought is granted he may suffer substantial loss if evicted in that he may be unable to provide shelter to his family yet the outcome of the appeal may happen to be in his favour much later on after passing through all that travail.

14. As to whether the application has been made without unreasonable delay I note that the applicant had already obtained a temporary stay in the trial court but the same was to expire 4 days after the present application was filed and I am persuaded that there was no delay in presenting the present application to court.



15. Regarding security this court has mandate to order any security that it deems fit and just in the circumstances.
16. In light of the foregoing and in exercise of my discretion I will allow the application for stay of execution on condition that the appellant files and serves the record of appeal within 45 days from the date hereof in default of which the respondent shall be at liberty to execute the judgment.
17. The appeal shall be mentioned on 18/7/2024 for directions as to hearing.

**DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 14TH DAY OF MAY 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

