



**Luis (Suing as the Executrix of Vincent Aghostinho Rafael Luis (Deceased) v Mwangi
(Environment and Land Case 185 of 2016) [2024] KEELC 4223 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4223 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CASE 185 OF 2016**

A OMBWAYO, J

MAY 9, 2024

BETWEEN

**TAHIRA BEGUM LUIS (SUING AS THE EXECUTRIX OF VINCENT
AGHOSTINHO RAFAEL LUIS (DECEASED)) PLAINTIFF**

AND

PETER MUCHIRI MWANGI DEFENDANT

RULING

1. Peter Muchiri Mwangi, (hereinafter referred to as the applicant) has come to this court for orders that this honorable Court be pleased to issue an order for stay of execution of the aforesaid Judgment/ Decree pending the hearing and determination of the intended Appeal preferred therefrom against the Court's judgment/decree delivered on 8th February, 2024 in the Environment and Land Court by honorable Justice L.A. Omollo. That the costs of this application be provided for.
2. The application is based on facts that the Applicant/Appellant has preferred an Appeal by lodging the requisite Notice of Appeal of Judgment on 15th February, 2024 from the Judgment/ Decree herein to the Court of Appeal and which Appeal is competent and has appreciable chances of success.
3. The applicant contends that if execution of the said Judgment/Decree is not stayed, the aforesaid Appeal will be rendered nugatory and would thereby occasion the Appellant/Applicant substantial loss as that he and his family, who had been using the suit land for personal use and to cultivate seasonal crops, would suffer substantial loss of their livelihood and that if the execution of the Judgment/ Decree is not stayed, the intended Appeal will be rendered nugatory and would thereby occasion the Appellant/Applicant substantial loss as the suit land will be exposed to adverse dealings by the Plaintiff/Respondent including sale, transfer, lease or mortgage to third parties which in turn would affect the substratum of the Appeal thus rendering it nugatory. It is thus imperative to preserve the subject matter of the Appeal to await its determination. The Plaintiff/Respondent is at liberty and may proceed to execute the Decree subject of the intended Appeal at any time



4. The applicant believes that in those premises it is only fair and just that there be stay of execution of the Judgment/Decree subject herein pending the hearing and determination of the preferred/intended Appeal, as the case would be. The Appellant/Applicant is amenable to furnishing security pending appeal as may be directed.
5. The application is founded on a supporting affidavit of the applicant in which he reiterates that has high chances of success and that if the execution is not stayed the applicant will suffer irreparable loss and that the respondent will suffer no loss.
6. The respondent on the other has filed a replying affidavit stating that she is a person of means and capable of paying any reasonable damages to the applicant but conversely the applicant is not a person of means and cannot instruct an advocate due to his lack of means. The value of the property is Kshs270,000,000.
7. The respondent states that she has all along been in possession and utilization of the property as opposed to the applicant who has never utilized the property. Moreover, that the respondent's husband has before charged the property to Delphis Bank. She states that the application is meant to deny her enjoying the fruits of the judgment
8. The applicant submits that his application herein for stay of execution pending Appeal is premised on Order 42 rule 6 of the *Civil Procedure Rules, 2010* which specifies the circumstances under which either the trial Court or an appellate Court may order stay of execution of a decree or order pending an Appeal.
9. He relies on the case of *Rana Auto Selection Ltd V Lilian Osebe Moses* [2021] Order 42 Rule 6(2) of the *Civil Procedure Act*, which lays down the conditions which an Applicant must satisfy in order to deserve orders of stay of execution pending hearing of Appeal;
10. The Applicant must satisfy the Court that he/she stands to suffer substantial loss if stay is not granted and that the Application had been filed without unreasonable delay. The Applicant must also show that he/she was willing to offer such security as may be ordered by the Court.
11. The applicant cites the Court of Appeal's case of *Butt v Rent Restriction Tribunal*, Civil App No. NAI 6 of 1979, as cited in *Masisi Mwita v Damaris Wanjiku Njeri* (2016) eKLR (Madan, Miller and Porter JJA) while considering an application of this nature said that the power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
12. According to the applicant, the general principles in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.
13. The Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
14. Similarly, in the case of *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR, cited in *In re Estate of Kakua Kioko* (Deceased) [2018] eKLR, the Court observed; "It is clear from the wording of Order 42 Rule 6 (1), for an Applicant to succeed in an application of this nature, he must satisfy the following conditions, namely;
 - (a) Substantial loss may result to the applicant unless the order is made.



- (b) The application has been made without undue delay.
- (c) such security as to costs has been given by the applicant.
15. From the foregoing, the courts discretion in deciding whether or not to grant stay of execution as sought in this application must be guided by any of the three main principles.
16. The applicant submits that if the application is not allowed, the he stands to suffer great loss of his land in question which he is currently using with his family for personal use and to cultivate crops, cows, sheep and other essential livestock for his survival.
17. Further, that if his application for stay pending Appeal is not allowed, this would render his intended Appeal nugatory in the sense that if the Appeal is successful, he may not be able to recover the suit land which is in imminent danger of being sold and/or disposed off by the Plaintiff/Respondent herein to other third parties.
18. According to the defendant applicant, the Plaintiff/Respondent has not indicated in her response to his application if she is a person of means and/or would refund him the value of the suit land in the event the Appeal is successful. It is therefore his submission that substantial loss may result unless the order of stay of execution is made. He is guided by the case of *Sentrim Contracts Ltd v Joseph* where the Court so held; "The principles to be considered when deciding an application for stay of execution pending appeal are well settled. First an Applicant must show the substantial loss he would suffer if the order for stay of execution is not given. Secondly, the Applicant must show that the application was filed without undue delay. Thirdly, the court must take into account the provision of security for the due performance of the decree..."
19. It is submitted that the Plaintiff/Respondent may not be able to refund the value of the suit land in the event the suit land is sold to third party and/or his occupation and use of the same for person use is interfered with by way of execution in event his intended appeal succeeds. It is humbly submitted that the Application had been brought timeously as required under Order 42 Rule 6 (2) of the [Civil Procedure Rules](#) and without delay. The judgment appealed against was delivered on 8th February, 2024 whereas this application was timely filed on 1st March, 2024 in order to defeat any delay whatsoever.
20. The applicant has deposed in the Supporting Affidavit and his supplementary Affidavit that he is willing to abide by the conditions that this Honorable Court may deem just and fair in allowing the application herein in order to allow him ventilate his appeal which he sincerely believes has great chance of success.
21. The court has considered the material canvassed in respect of the motion. First, it is pertinent to state that at this stage, the Court is not concerned with the merits of the appeal. It is trite that the power of the court to grant stay of execution of a decree pending appeal is discretionary, however the discretion should be exercised judicially. See [Butt v Rent Restriction Tribunal](#) [1982] KLR 417.
22. The Applicants prayer for stay of execution pending appeal, is brought under Order 42 Rule 6 of the [Civil Procedure Rules](#) which provides that:
- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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”.
23. The cornerstone consideration in the exercise of the discretion is whether the Applicants have demonstrated the likelihood of suffering substantial loss if stay is denied. One of the most enduring legal authorities on the issue of substantial loss is the case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the Shell case are especially pertinent. These are that:
1.
 2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
 3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
 4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”
24. The decision of Platt Ag JA, in the Shell case, establishes two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Platt Ag JA (as he then was) stated inter alia that:

The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the *Civil Procedure Rules* was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts... (_emphasis added)”

25. The learned Judge continued to observe that: -

It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.” (Emphasis added)



26. Earlier on, Hancox JA in his ruling observed that

It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would,... render the appeal nugatory. This is shown by the following passage of *Cotton LJ in Wilson -v - Church* (No 2) (1879) 12ChD 454 at page 458 where he said:-

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.”

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

27. I have considered the application and do find that the judgment was entered on the 8th day of February 2024 whereas the application was filed on the 29th February 2024 thus less than one month after judgment and therefore the same was made without unreasonable delay as the application was filed timeously.

28. On substantial loss, I do find that the applicant has not demonstrated substantial loss as he is not in possession of the suit property and has never been in possession of the same since the year 1980 but the plaintiff decree holder demonstrated that he was in possession and has constructed two houses on the property. The plaintiff has cultivated the land and fenced the same and therefore is in active use of the property. Moreover, the plaintiff respondent has previously taken and repaid a loan using the same parcel of land as security and therefore it cannot be said that she is a woman of no means. The 1st defendant is in occupation and use of adjacent property being 1056. The upshot of the above is that the application is dismissed with costs.

RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 9TH DAY OF MAY 2024.

A. O. OMBWAYO

JUDGE

