



REPUBLIC OF KENYA



KENYA LAW
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**Fwamba v Nyairo (Environment and Land Appeal E020 of 2021)
[2024] KEELC 4940 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4940 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E020 OF 2021**

EC CHERONO, J

JUNE 13, 2024

BETWEEN

FRANCIS WANJALA FWAMBA APPELLANT

AND

MICAH MOGAKA NYAIRO RESPONDENT

RULING

1. The application before me for determination is the notice of motion dated January 30, 2024 brought under section 3A and 63 (e) of the [Civil Procedure Act](#) and order 42 rule 6 of the [Civil Procedure Rules](#) where the applicant seeks for the following orders;
 - a. Spent.
 - b. That this Honourable Court be pleased to grant temporary stay of execution of the Court's Decree and Judgment in Bungoma Environment and Land Case Appeal No. E020 of 2021 pending the hearing and determination of this application interparties.
 - c. That this Honourable Court be pleased to grant temporary stay of execution of the court's Decree and judgment in Bungoma Environment and Land Case appeal No. E020 of 2021 pending the hearing and determination of the appeal in the court of Appeal.
 - d. That costs of this application be provided for.
2. The application is anchored on the grounds shown on the face of the application. In brief, the applicant avers that being aggrieved by the Court's judgment dated 27th day of February, 2023 he has preferred an appeal with overwhelming chances of success and if orders for stay of execution of that judgment are not granted, the intended appeal will be rendered nugatory.



3. The application is further supported by the affidavit of Micah Mogaka Nyairo-the applicant herein erroneously described as the respondent in the pleadings (I believe erroneously) sworn on January 30, 2024 and the annexures attached thereto.
4. The application is opposed with a replying affidavit sworn by the respondent's replying affidavit by the respondent sworn on February 5, 2024. in the said replying affidavit, the respondents contend that the orders sought are the preserve of the appeal court and therefore this court's jurisdiction has not been properly invoked. The deponent further deposed that there has been a delay in presenting the instant application given that the impugned judgment was delivered on February 27, 2023 and execution has already commenced. The deponent further deposed that the firm of Makokha, Wetangah & Luyali Associates is not properly on record since there is no consent by the previous advocate on record permitting the new Firm of Advocates to come on record after judgment. He argued that by this application, the applicant is asking the court to determine the viability of the appeal on a decision this Court has rendered in finality.
5. The applicant also filed a supplementary affidavit sworn on March 16, 2024 in which he deposed that this Court has the jurisdiction to determine the current application under order 42 rule 6 of the Civil Procedure Rules. It was further stated that the firm of Makokha, Wetangah & Luyali Associates entered into a consent with the firm of Anwar & Co. Advocates allowing them to come on record on behalf of the applicant.
6. When the said application came up for directions, the parties agreed to have the same canvassed by way of written submissions within given timelines. Following the said consent directions, the applicant filed his submissions dated April 17, 2024 in support of the application.
7. In his submissions, the applicant raised one issue whether he deserves to be granted the orders sought which he answered in the affirmative and urged the court to allow the application as sought since the requisite conditions have been met. The applicant further submitted that no prejudice would be occasioned to the respondent since he (the applicant) was ready and willing to deposit the entire judgment sum with the court or in a joint interest earning account as security for the due performance of the judgment/Decree. Reliance was placed in the following cases; Visbram Ravji Halai vs. Thornton & Turpin Civil Application Nai 15 of 1990(eKLR), Machakos High Court Civil Appeal No.19 of 2019 Victory Construction Ltd vs. BM (Suing thru next friend PMM), Century Oil Company Limited vs. Kenya Shell Company Limited (Nairobi) Milimani HCMCA No. 1561 of 2007, Samvir Trustee Limited vs. Guardian Bank Limited Nairobi(Milimani) HCCC No.795 of 1997, Mwaura Karuga t/ a Limit Enterprises vs. Kenya Bus Services Ltd & 4 others (2015) eKLR and others.
8. At the time of writing this Ruling, the respondents had not filed their submissions.

Legal Analysis And Determination

9. I have considered the application, the supporting affidavit, the Replying affidavit, the submissions by the applicants and the applicable law and find that the main issue for determination in this application is whether the applicant has established the principles for the grant of stay of execution of the Judgment/Decree pending appeal.
10. It is not in contention that this Court rendered final Judgment/Decree after hearing the parties and their witnesses on 27/02/2023. It is not also in contention that the current application is seeking stay of execution of the impugned judgment of this Honourable Court dated February 27, 2023. It is trite that under section 66 of the Civil Procedure Act as read with section 3 of the Appellate Jurisdiction Act, Cap 3 Laws of Kenya, an appeal from a decision of the High court (and Courts of equal status) is the



preserve of the Court of Appeal. It is also clear that the procedure for institution of such an appeal is set out in the [Court of Appeal Rules](#). Section 66 of the [Civil Procedure Act](#) states as follows;

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 also provide as follows;

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.

11. 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.

12. 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 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.

13. Section 1A (2) of the [Civil Procedure Act](#) provides as follows;

“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.”

14. The purpose and objective of an order for stay of execution is to preserve the substratum of the appeal in order to ensure that the appeal is not defeated. In the case of *Consolidated Marine. vs. Nampijja & another*, Civil App.No.93 of 1989 (Nairobi), the Court held: -

“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. From the provisions of order 42 rule (2) of the [Civil Procedure Rules](#), there are three conditions for the grant of Stay pending Appeal which include:



- i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
 - ii. The application is brought without undue delay and
 - iii. 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.
15. 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.
16. On the first element for consideration on whether the applicant will suffer substantial loss if the stay order is not granted. It is a requirement that the applicant must demonstrate the nature of substantial loss he or she will suffer if the stay order is not granted. In the case of *Mukuma v Abuoga* (1988) eKLR 645, the court held;
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
17. Also see the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, where the Court observed as follows:
- “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.”
18. From the foregoing therefore, the onus is on the applicant/appellant to show the substantial loss he/she would suffer if the order for stay of execution is not granted. It is important to note that by granting stay of execution of the impugned judgment/Decree, the Court is directing that the status quo should remain as it were before the judgment which would be denying a successful litigant the fruits of his/her judgment. In my view, that should not be done unless the appellant has shown sufficient cause. Besides, it is not sufficient for the applicant to merely state that he/she would suffer substantial loss. (See *New Stanley Hotel Ltd -vs- Arcade Tobacconist* (1980) eKLR 757).
19. In *Machira T/A Machira & Company Advocates .v. East African Standard* (No 2) 2002 eKLR, the Court held: -
- “If the Applicant cites as a ground substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given Where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay
Indeed, remote contingencies would not warrant the Court’s interference with the ordinary course of justice and the process of the law.”
20. The appellant in his supporting affidavit and the supplementary affidavit has not mentioned or demonstrated how he will suffer substantial loss unless the orders sought are granted. No iota of



evidence has been placed before this Court demonstrating the nature of irreparable lossor that the respondent will not be in a position to refund the decretal sum should the appeal be successful. As a matter of fact, the applicant deposed in paragraph 7 of his supporting affidavit that the respondent is his colleague at work place in the same department and in the same office.

21. Further, the appellant moved to this Court 11 months after the impugned Judgment had been delivered. That is clearly inordinate delay which has not been explained. The appellant alleges that he has been following up on the typed proceedings which in my considered view have no bearing on an application of this nature. Finally, the appellant has offered to deposit the decretal sum as security with the court or in a joint interest earning account for the due performance of Judgment/Decree or any such orders as the court may require.
22. It is trite that the grant for stay of Execution is discretionary in nature. The Court of Appeal in *Butt vs Rent Restriction Tribunal* [1982] eKLR 417 discussed on how such discretion should be exercised as follows:
 - a. "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.
 - b. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
 - c. 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.
 - d. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 - e. The court in exercising its powers under order XLI rule 4(2)(b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."
23. Having considered the current application and the totality of the materials placed before me, I find that the applicants have not satisfied the three principles for the grant of the orders sought under order 42 Rule 6 of the *Civil Procedure Rules*.
24. For all the aforementioned reasons, I find the notice of motion application dated January 30, 2024 devoid of merit and the same is hereby dismissed with costs to the Respondent.
25. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 13TH DAY OF JUNE, 2024.

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HON.E.C CHERONO
JUDGE

In the presence of;

1. Mr. Imainata H/B Nyamu for the Respondent



2. Mr. Wanjala H/B for Wattangah for the Appellant

3. Bett C/A

