



Nurani & another (Suing as the legal administrators of the Estate of Sadrudin Shamsudin Ismail Nurani) v Gulam & 2 others (Environment & Land Case 596 of 2014) [2025] KEELC 682 (KLR) (20 February 2025) (Ruling)

Neutral citation: [2025] KEELC 682 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 596 OF 2014
OA ANGOTE, J
FEBRUARY 20, 2025**

BETWEEN

FARRAH SADRUDIN NURANI & FEISAL SADRUDIN NURANI (Suing AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF SADRUDIN SHAMSUDIN ISMAIL NURANI) PLAINTIFF

AND

**GALEB GULAM 1ST DEFENDANT
SUNSHINE COTTAGES LIMITED 2ND DEFENDANT
DIAMOND TRUST BANK OF KENYA LTD 3RD DEFENDANT**

RULING

1. Before this Court for determination is the 2nd Defendant/Applicant's Motion dated 25th June, 2024, brought pursuant to the provisions of Sections 1A and 3A of the *Civil Procedure Act* and Orders 42 Rule 6 and 51 Rule 1 of the Civil Procedure Rules seeking the following reliefs:
 - a. That this Honourable Court be pleased to order for stay of execution of the Judgment and Decree of 13th June, 2024 pending the hearing and determination of the Intended Appeal.
 - b. That the costs of this application be awarded to the Applicant.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Gurdeep Singh Mehangra, the 2nd Defendant's/Applicant's Director of an even date, who deponed that on the 13th June, 2024, this Court delivered a Judgment where it found, inter-alia, that the 2nd Defendant did not have a valid title to L.R No 1160/230 (hereinafter the suit property), and proceeded to direct that the aforesaid title be cancelled and that the 2nd Defendant is dissatisfied with the Judgment and intends to appeal against it having already lodged a Notice of Appeal.



3. According to Mr. Mehangra, the 2nd Defendant has an arguable appeal on the ground that the executor of the deceased's estate had and conveyed proper title over the suit property to the 2nd Defendant; the Plaintiffs had knowledge of the suit property's existence and its subsequent sale as early as 2003; and the Plaintiffs' suit was time barred, having failed to take action for more than 16 years after the cause of action arose in 1993.
4. It was submitted that the Plaintiffs did not have any cause of action, no fraud having been proven against the 2nd Defendant and that the 2nd Defendant was an innocent purchaser for value and that this Court was jurisdictionally barred from impugning the 2nd Defendant's title to the suit property merely because the executor had purportedly failed to provide an account of the assets and liabilities in the succession court.
5. According to Mr Mehangra, the 2nd Defendant is the duly registered proprietor of the suit property and has been in possession thereof at all times since purchasing it; that it is reasonably apprehensive that should a stay of execution not be issued, the Plaintiff will proceed to have its title cancelled and that it stands to suffer substantial loss which cannot be compensated by way of damages as, should execution proceed, it will be stripped of its ownership of the suit property with the consequence that its appeal will be rendered nugatory.
6. It is his assertion that no prejudice will be occasioned to the Plaintiff as the status quo will have been maintained; that in any event, the court already issued interim stay orders which lapsed on the 27th June, 2024 and no prejudice has been suffered and that the application has been filed without undue delay.
7. In response to the Motion, the Plaintiffs/Respondents filed Grounds of Opposition as well as a Replying Affidavit. Vide the Grounds dated the 3rd July, 2024, the Plaintiffs contended that:
 - i. The Application does not disclose any ground to merit the issuance of the orders sought therein.
 - ii. The Application seeks to steal a march on the Decree-Holders, the interim orders issued herein pending the hearing and determination of the suit having been spent with the determination of the matter in accordance with the Judgement delivered on 13th June, 2024.
 - iii. This Honourable Court cannot sit as an appellate court over its own decision in determining the arguability or otherwise of the intended appeal.
 - iv. The orders sought, if granted shall embarrass this Honourable Court.
 - v. Having found that the 2nd Defendant does not have any legal interest in the suit property, this Honourable Court cannot be asked to condone the very fraud by issuing orders which continues to vest title and possession of the suit property in the very party.
 - vi. The 2nd Defendant's remedy, if any, lies elsewhere.
 - vii. The 2nd Defendant cannot be said to suffer any substantial damage if the orders sought are not granted as while it holds the now impugned title, the suit property remains in the state under which it was fraudulently transferred to it with no re-development having been undertaken thereon.
 - viii. The Application is otherwise an abuse of the process of this Honourable Court.
8. The Replying Affidavit dated 10th September, 2024 was sworn by Farrah Sadrudin Nurani, a Co-Plaintiff and Co-Legal Administrator of the Estate of Sadrudin Shamsudin Ismail Nurani with the authority of his Co-Legal Administrator, Feisal Sadrudin Nurani.



9. He deponed that this matter was instituted contemporaneously with a Motion seeking injunctive orders to preserve the suit property; that after consideration of the Motion, the court [Mutungi J] issued an injunction which was confirmed by consent of the parties and that the injunction was to last until the hearing and determination of the matter.
10. It was the deposition by the Plaintiffs that the matter was heard and determined on merit with a finding made in favour of the Estate of the deceased; that as advised by Counsel, upon the court's determination, the aforesaid injunction became spent and that the order seeking to stay execution of the Judgment is an attempt to deny the Plaintiffs and/or Estate of any protection in law and allow the 2nd Defendant to deal with the suit property to their detriment.
11. It was deponed that the orders sought herein have the effect of reinstating the 2nd Defendant as the registered owner of the suit property, enabling it to deal with the same under the guise of escalating the matter to the Court of Appeal.
12. According to the Plaintiff, immediately upon the issuance of the limited stay herein, there was an online advert for the sale of the suit property; that as advised by Counsel, the Judgment debtor herein is not one deserving of an order of stay of execution as sought and that the 2nd Defendant will not suffer any loss if the orders sought are not granted as it has a remedy against the persons it paid the alleged purchase price for the suit property.
13. It was deposed that in exercising its equitable jurisdiction, this court cannot be seen to sanitize the illegal acts complained of; that the orders sought will be calling upon this court to second guess itself in a matter it has since fully and finally expressed itself on and that the Motion is unmerited and should be dismissed.
14. The 2nd Defendant/Applicant, through its Director, Gurdeep Singh Mehangra, swore a Further Affidavit on the 12th September, 2024. He deponed that the substantive appeal has already been served on the Plaintiffs and other parties and that its involvement has not been shown in respect of the alleged advertisement of the suit property.
15. Mr Mehangra deponed that the 2nd Defendant's Motion would be inconsistent with the Plaintiffs' assertions that the Motion will have the effect of reinstating the 2nd Defendant as the registered owner of the suit property and that the interests of justice dictate that the Motion is allowed.
16. The 1st and 3rd Defendants did not file any pleadings with respect to the Motion. Their respective Counsel however indicated their support of the Motion. The Plaintiffs' and the 2nd Defendant's counsel filed submissions and authorities which I have considered.

Analysis & Determination

17. Vide their Grounds of Opposition, the Plaintiffs contended, among others, that the Motion does not disclose any grounds warranting issuance of the orders sought.
18. Furthermore, the Plaintiffs asserted, the court cannot sit on appeal over its own decision by determining the arguability or otherwise of the intended appeal and that the Motion is a calculated attempt to gain an unfair advantage over the decree holders, effectively seeking to "steal a match" on them.
19. The Plaintiffs have also argued that the 2nd Defendant has failed to demonstrate the substantial or irreparable harm that would result if the orders sought are not granted.



20. Having keenly considered the foregoing together with the Plaintiffs' response vide the Replying Affidavit, the court finds that these issues can be distilled into a single overarching question, being whether the 2nd Defendant/Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution pending Appeal.

21. The law with respect to stay of execution pending appeal is found in Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, 2010 which provides as follows:

“(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 sub rule (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.”

22. In *Vishram Ravji Halai vs Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal, discussing the High Court's [read ELC's] jurisdiction under this Order stated as follows:

“The Superior Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

23. What arises from the foregoing is that the grant of orders of stay of execution is subject to the court's discretion, the court in this respect being guided by the provisions of Order 42 rule 6 of the Civil Procedure Rules. The question of how the court should exercise this discretion was extensively discussed by the Court of Appeal in *Butt vs Rent Restriction Tribunal* [1982] KLR 417 as follows:

“1. 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.

2. The general principle 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.



3. 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.
 4. 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.
 5. 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.”
24. Further to the above, this court is now enjoined to give effect to the overriding objectives in the exercise of its powers as expressed in Section 3 of the *Environment and Land Court Act* and Section 1A of the *Civil Procedure Act*, to wit, the just, expeditious, proportionate and affordable resolution of disputes. The court is so guided.
 25. By way of a brief background, the Plaintiffs instituted this suit claiming, inter-alia, that they, as the administrators of the Estate of Sadrudin Shamsudin Ismail Nurani, were the absolute owners of the suit property and the transfer of the property by the 1st Defendant to the 2nd Defendant was fraudulent and a nullity.
 26. On its part, the 1st Defendant maintained that he had the requisite capacity to deal with the suit property and that the sale of the suit property was necessary to liquidate the liability held with the 3rd Defendant.
 27. The 2nd Defendant maintained that it was a bona fide purchaser for value not having any notice of any deficiency in the 1st Defendant’s capacity at the time of the sale and purchase of the suit property whereas the 3rd Defendant stated that it did not breach any duty to the deceased’s estate.
 28. The matter proceeded for hearing and vide the Judgment entered on the 13th June, 2024, this court found merit in the Plaintiffs’ claims. In the Judgment, the court issued, inter-alia, a declaration that the sale and transfer of the suit property to the 2nd Defendant was illegal and a declaration that the Plaintiffs as the legal administrators of the Estate of the deceased are the absolute owners of the suit property.
 29. The court further granted permanent injunctive orders restraining the Defendants from interfering with the suit property; mandatory injunctive orders directing the rectification of the lands register to cancel the transfer of the property to the 2nd Defendant and transfer the same into the names of the Plaintiffs as the legal administrators of the Estate of the deceased; and mandatory injunctive orders directing the 2nd Defendant to give vacant possession of the suit property to the Plaintiffs.
 30. Aggrieved by this decision, the 2nd Defendant intends to appeal to the Court of Appeal. It asks this court to stay the execution of its Judgment of 13th June, 2024 and the Decree arising therefrom pending determination of the appeal.
 31. At the onset, the court notes that the 2nd Defendant has substantially submitted on the arguability of the Appeal. The court wishes to reiterate that its jurisdiction to grant a stay of execution pending appeal is derived from Order 42 Rule 6 of the Civil Procedure Rules. As correctly stated by the Plaintiffs, this



provision does not contemplate or require the court to assess the arguability of the pending appeal as a condition precedent for granting a stay.

32. This position is well-founded. It would be both procedurally improper and logically untenable for this court to assess the arguability of an appeal arising from its own decision. The court will disregard any arguments under this head.
33. Similarly, the Plaintiffs cannot be heard to argue that in seeking for an order of stay, the Court is being asked to reconsider its position of sanitize any illegal acts. The mandate of the court when it is called upon to stay execution pending appeal is simply to consider the same guided by the considerations in Order 42 Rule 6 of the Civil Procedure Rules.
34. Moving to the pre-requisites under Order 42 Rule 6(2), the court will begin with the aspect of sufficient cause. What constitutes the same was explicitly discussed by the court in *Antoine Ndiaye vs. African Virtual University* [2015] eKLR, which persuasively stated as follows:

“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:

- a) The application is brought without undue delay;
- b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and
- c) 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.”

35. The court concurs. In determining whether sufficient cause has been established, the court will examine whether the 2nd Defendant/Applicant has satisfied the three mandatory prerequisites for the grant of stay pending appeal.
36. The question of what constitutes unreasonable delay was discussed in the case of *Jaber Mohsen Ali & another vs Priscillah Boit & another* [2014] eKLR where Munyao J stated as follows:

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of *Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012* the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.”

37. The Judgment sought to be appealed against herein was delivered on the 13th June, 2024 whereas the present Motion was filed on 25th June, 2024. This constitutes a delay of two weeks. There has been no any allegations of unreasonable delay. The Court therefore finds that there was no unreasonable delay in filing the Motion by the 2nd Defendant.



38. In *Rhoda Mukuma v John Abuoga* [1988] eKLR, the Court proffered the following definition of what amounts to substantial loss:

“Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security. The discretion under rule 5(2)(b) is at large, but as was pointed out in the *Kenya Shell* case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory...”

39. Similarly, the court in *Century Oil Trading Company Ltd vs Kenya Shell Limited* as cited in *Muri Mwaniki & Wamiti Advocates Vs Wings Engineering Services Limited* [2020] eKLR, held as follows:

“The word 'substantial' cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words 'substantial loss' must mean something in addition to all different from that.”

40. Courts have also held that substantive loss must be demonstrated. This position was articulated by the Court of Appeal in *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR thus:

“It is usually a good rule to see if Order 41 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.”

41. The Court in *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR similarly opined that the process of execution alone does not amount to substantial loss. The court stated 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. This is what substantial loss would entail...”

42. The court is also alive to its duty to balance the interests of an Applicant who is seeking to preserve the status quo pending the hearing of the appeal so that the appeal is not rendered nugatory, and the interests of a Respondent who is seeking to enjoy the fruits of his judgment. As expressed by Kuloba, J in *Machira T/A Machira & Co Advocates vs East African Standard* [2002] eKLR:

“To be obsessed with the protection of an Appellant or intending Appellant in total disregard or fitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and



normally must be put into effect by the way Applications for stay of further proceedings or execution, pending Appeal are handled. In the Application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court.”

43. The 2nd Defendant’s director deponed that the 2nd Defendant stands to suffer substantial loss if the stay is not granted. It is his position in this regard that the 2nd Defendant is the registered proprietor of the suit property and has been in possession thereof and that if stay is not granted, the Plaintiffs will have their title to the suit property cancelled with the consequence that its appeal will be rendered nugatory, a loss un compensable by damages.
44. On their part, the Plaintiffs assert that the 2nd Defendant will not suffer any loss if the stay orders are not granted because it has a remedy against the persons it allegedly paid the purchase price to; that in any event, the suit property remains in the position it was in before the transfer, no development having taken place and that in fact, the 2nd Defendant has made an attempt to dispose off the suit property after the Judgment and granting it a stay will enable it deal with the suit property under the guise of escalating the matter to the Court of Appeal.
45. The Judgment of this court mandates the transfer of the title over the suit property to the Plaintiffs. It is trite that upon the transfer and registration aforesaid, the Plaintiffs will become the proprietors of the suit property and will be vested with the statutory privileges underpinned by the provisions of Section 24 and 25 of the Land Registration Act.
46. One of the statutory rights and privileges that attach to ownership of a property is the right to sell, alienate, dispose of and/or charge same. Should the Plaintiffs exercise its rights in this regard, it will negate and or otherwise put the title of the suit property outside the purview of the appeal. This, the Court finds, constitutes substantial loss.
47. Moving to the last issue regarding provision of security, its purpose was discussed by the Court in *Arun C Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, thus:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”
48. In *Focin Motorcycle C. Ltd vs Ann Wambui Wangui* [2018] eKLR, it was stated as follows:

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground of stay.”
49. From the above persuasive decisions, it is clear that the issue of security is discretionary and it is upon the court to determine the same.



50. It is alleged by the Plaintiffs that the 2nd Defendant has not given any provision of security. The 2nd Defendant has indeed not given any security or expressed its willingness to furnish security for the due performance of the decree.
51. As a matter of fact, they have urged the court to ignore the issue of security because this is a non-monetary claim. The 2nd Defendant has referred this court to its earlier decision in *Mbwele Muoki & Dennis Muoki v Justus Mutie Kioko*(supra) where it held that as the decree was in respect to a piece of land, an order for security for the due performance of the Decree was not necessary.
52. However, this court's observation in the *Mbwele Muoki* case (supra) should not be interpreted as suggesting that the requirement for security can be outrightly ignored. Instead, it means that the circumstances of that particular case did not necessitate such an order.
53. Indeed, even in cases involving land, the court retains the discretion to require security if deemed necessary. At the very least, an Applicant is obligated to demonstrate a willingness to comply with any such orders the Court may issue in this regard.
54. Notwithstanding the foregoing, the Court has carefully considered the specific circumstances of this case and the need to balance the rights and interests of both parties. The Plaintiffs pointed this court to an alleged advertisement of the suit property.
55. While it has not been demonstrated that the advertisement in question originated from or was placed by the 2nd Defendant, it highlights a legitimate and pressing concern. Specifically, it underscores the real and imminent risk of the property being disposed of by any of the parties herein, depending on the party holding the title document.
56. In the circumstances, the Court finds the Motion to be merited and proceeds to grant a conditional stay in the following terms:
 - i. A stay of execution of the Judgment and Orders of 13th June, 2024 be and is hereby granted pending the hearing and determination of the intended appeal.
 - ii. An order does hereby issue that a restriction be registered against the title to the suit property, L.R No 1160/230 (Original No 1160/11/20) prohibiting any dealings with the title, that is charging, leasing, selling, transferring, alienating, developing and/or in any other manner interfering with the current status of the land and the title pending the hearing and determination of the intended appeal.
 - iii. Each party to bear its/his/her own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF FEBRUARY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Ongweny for Plaintiffs

Mr. Ludenya for Koech for 1st Defendant

Mr. Rao holding brief for Gachuhi for 2nd Defendant/Applicant

Court Assistant: Tracy

