



**Masaza v Gosi & 2 others (Environment & Land Case
85 of 2021) [2024] KEELC 5505 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5505 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 85 OF 2021**

AE DENA, J

JULY 26, 2024

BETWEEN

MOHAMMED ABDALLA MASAZA PLAINTIFF

AND

MOHAMMED ABDALLA GOSI 1ST DEFENDANT

LAND REGISTRAR KWALE 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. This ruling is subject of the application filed before court on 1/2/2024. The same is filed under the provisions of section 1, 1A, 1B, 3 & 3A of the *Civil Procedure Act*, Order 42 rule 6, Order 22 Rule 22 and all enabling provisions. The application is for the following orders; -
 1. Spent
 2. That pending interpartes hearing hereof, this Honourable court be pleased to issue temporary stay of execution of its judgement delivered on 14/11/2023.
 3. That pending the hearing and determination of the appeal filed herewith this court be pleased to order stay of execution of the judgement delivered on 14/11/2023 including the wanton destruction being mete by the Defendant upon the Appellant's property.
 4. That costs be provided for.
2. The application is premised upon 9 grounds listed on its face and the supporting affidavit of Mohamed Abdalla Masaza the Plaintiff/Applicant herein. It is averred that vide its judgement delivered on 14/11/2023 in favour of the 1st Defendant the court issued orders for the Plaintiff to move out of the land within 6 months from 14/11/2023 and which period lapsed on 14/5/2024. It is alleged that



before the said time, the Defendants descended on the suit property where the Plaintiff resides and started cutting trees by using chain saws and carrying away timber.

3. The Applicant states he filed a Notice of Appeal on 20/11/2023. The Applicant states that he requested for typed proceedings vide letter dated 16/11/2023. That his advocate on record is in the process of compiling a Record of Appeal. The Applicant states that the Defendant's actions of destroying his trees are bound to cause him irreparable loss and damage. The Applicant states that he is willing to abide by any conditions set by the court.
4. Upon the matter being placed before me *ex parte* on 2/2/2024 under certificate of urgency, which I certified urgent. The application is opposed by the 1st Defendant's replying affidavit filed on 12/2/2024. The deponent Mohammed Abdalla Gosi avers that he is the registered owner of the suit property Kwale/Ngombeni/2390. That he has lived on the property his entire life being 85 years. He avers that the Applicant herein does not qualify to be granted the orders sought for failure to demonstrate the loss likely to be suffered and if anything, the cut trees can be quantified and an award of damages can suffice.
5. It is averred that the Plaintiff has forcefully put up a house on the suit property most recently and cannot purport to have been in occupation of the suit property from before. That the instant application is a ploy by the applicant to delay vacating the suit property and should not be allowed by the court.
6. The 2nd and 3rd Defendants did not participate in the application.
7. The application was dispensed by way of written submissions. The Applicant's submissions were filed before court on 27/2/2024. The 1st Defendant's submissions were filed electronically. The court has considered the submissions.

Determination

8. I have considered the application, the response and the submissions filed by the parties to buttress their assertions. The main issue for determination is whether the Applicant has met the threshold for grant of orders of stay pending appeal. The purpose and objective of the 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. v Nampijja & another*, Civil App. No 93 of 1989 (Nairobi), the Court held that: -

“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”.
9. The power to grant Orders of Stay of Execution is discretionary. The Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how such discretion should be exercised 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, 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”.
10. Further the principles guiding the grant of a stay of execution pending appeal are set 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.
11. Arising from the above statutory provisions, 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 substantial loss may result to the applicant unless the order is made,
 - b. that the application has been made without unreasonable delay, and
 - c. 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. See [Antoine Ndiaye v African Virtual University](#) [2015] eKLR.
12. The first ground to be established is whether substantial loss may result to the Applicant unless stay of execution is granted. What amounts to substantial loss was expressed by the Court of Appeal in the case of [Mukuma v Abuoga](#) (1988) KLR 645 where their Lordships stated that;
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory”.
13. It is clear from the Judgement herein the contest was on the ownership of the suit property Kwale/ Ngombeni/2390. In my final orders, the 1st Defendant was declared the lawful owners of the suit property and a permanent injunction together with eviction orders issued against the Applicant. Earlier on, it was noted that the Applicant had invaded the suit property and proceeded to construct thereon and took occupation of the same. I do not wish to belabour much on the findings in the judgement, however in the event that the Court of Appeal overturns my findings, then the Applicant would have indeed suffered loss in the event that demolition of his property takes place. It is also noted as per the photographs attached to the application that the 1st Defendant is cutting down trees on the suit property. In this regard I’m guided by the holding in [Kenya Shell Limited v Benjamin Karuga](#)



Kigibu & Ruth Wairimu Karuga [1982-1988] KAR 1018 where the Court of Appeal pronounced itself 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 rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

14. It is safe to therefore grant the orders sought pending the hearing and determination of the appeal. I find that the issue of substantial loss has been proved.
15. The instant application was filed on 1/2/2024 which was 3 months after the judgement of this court. I find that the same has been filed within a reasonable period of time considering the time had given to vacate.
16. On the issue of security for costs, the Applicant has not made any proposal as to what he intends to deposit as security for costs but has deponed he is ready to abide by any order of the court. The court will take it upon itself to render a decision on the same. All in all, the rest of the components to be satisfied in securing a stay of execution pending appeal have been met.
17. Accordingly, I hereby grant stay of execution of the judgement rendered on 14/11/2023 and the resultant decree dated 14/11/2023 in the following terms;
 1. The Applicants shall deposit a sum of Kshs 100,000/= in the court’s account being Security for Costs for the due performance of the decree within 45 days from the date of this Ruling.
 2. The Applicants to file the Record of Appeal within 45 days from the date of this Ruling.
 3. Failure to comply with orders (a) and (b) hereinabove, Orders of stay herein issued shall automatically lapse.
 4. Costs of the Application to abide the Appeal.

Orders accordingly.

RULING DATED SIGNED AND DELIVERED THIS 26TH DAY OF JULY 2024.

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A.E DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Mkomba holding brief for Mr. Mutugi for Plaintiff

Ms. Chesaro for Defendants

No appearance for Attorney General

Mr. Daniel Disii - Court Assistant

