



**Ingoi v Macharia & another (Environment & Land Case
648 of 2015) [2024] KEELC 5608 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5608 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 648 OF 2015**

**AA OMOLLO, J
JULY 25, 2024**

BETWEEN

MAURICE INGOI PLAINTIFF

AND

JOSIAH MACHARIA 1ST DEFENDANT

LANDAN MBOTE HUTHU 2ND DEFENDANT

RULING

1. The Plaintiff/Applicant filed a notice of motion dated 18th March 2024 supported by an affidavit sworn on the same date by Simeo Mugalavai Keyonzo seeking for the following orders;
 1. Spent
 2. That the firm of M/S S.M Keyonzo Advocates be permitted and allowed to act for the Plaintiff in this matter in the place of M/s Kwengu & Co. Advocates.
 3. Spent
 4. That pending the hearing and determination of the Plaintiff's/Applicant's application No. E079 OF 2024 (being an application for extension of time to file a Notice of Appeal and Record of Appeal) in the Court of Appeal, there be a Stay of Execution of Decree given herein on 9th June 2023.
 5. That the costs of this Application be provided for.
2. The motion was based on the grounds that in the month of September 2023, the Applicant approached the firm of M/s S.M Keyonzo Advocates to take over the conduct of this matter from M/s Kwengu & Co. Advocates who miscommunicated to them that a judgement had been delivered on 19th September 2023.



3. That based on the said misinformation, they filed a Notice of Appeal on 29th September 2023 against the said judgement and it was until 17th January 2024 when M/s S.M Keyonzo received a copy of the judgement that they noticed that the judgement was in fact delivered on 9th June 2023 and not 19th September 2023 as was informed.
4. The Applicant stated that because of the erroneous information given to M/s S.M Keyonzo Advocates, the Notice of Appeal filed on 29th November 2023 could no longer be used as a basis for filing a record of appeal thus making it necessary to file an application in the Court of Appeal extending time to file a fresh Notice of Appeal and a record against the said judgement.
5. He contended that the decree was drawn and signed on 18th October 2023 and the Respondents will enforce the same anytime by eviction of the Plaintiff/Applicant from the suit premises. Further, evidence has emerged that the Respondents are not in fact the owners of the suit premises, which evidence was not available at the hearing of the suit and had it been given to Court, then would have affected the decision of the court. Thus, it is necessary to maintain the status quo pending the intended appeal.
6. The Respondents filed grounds of opposition dated 10th June 2024 stating that there is no substantive appeal before the Court of Appeal to warrant the grant of an order for stay of execution noting that the Applicant's motion is founded on the provisions of Order 42 rule 6(1) of the *Civil Procedure Rules* 2010 in which the use of the words "appealed from" and "appeal is preferred" presupposes that the provision can only be invoked where there is an actual appeal pending hearing and determination and not where an applicant intends to appeal.
7. That as was held in the case of *Ena Investmnet Limited v Benard Ochau Mose & 2 others* [2022] eKLR, stay of execution is an order of court barring a decree holder from enjoying the fruits of his judgement pending determination of some issue in contention, after a judgement can only be contained in an appeal that has been properly lodged by an appellent.
8. The Respondents contended that the Applicant has not met the conditions for grant of stay of execution pending appeal stipulated under Order 42 rule 6(2) of the *Civil Procedure Rules*, 2010 and in support cited the Court of Appeal in the case of *Halai & another v Thornton & Turpin* (1963) Ltd [1990] Eklr in which the provision is interpreted and case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR where substantial loss was explained.
9. The Respondents stated that in addition to there being no substantive appeal before the Court of Appeal so as to establish sufficient cause and demonstrate substantial loss, the Applicant has not proposed to furnish security for the due performance of the Decree and in particular the payment of Kshs.690,170 together with interest.
10. Prayer 1, 2 and 3 of the motion stands dispensed with. The firm of Kwengu & co advocates vide a letter dated 27th September 2023 annexed as SKM1 in the supporting affidavit has expressed no objection to the present applicants taking over this matter. The remaining questions is whether to grant stay of execution pending hearing of the application dated E079 of 2024 filed before the Court of Appeal.
11. The principles to considered for granting an order of stay of execution are set out in order 42 of the *Civil Procedure Rules* and of the requirements being that there exists a duly lodged notice of appeal and the application be made without undue delay. The Respondents avers that in this case where no such notice of appeal was lodged in time, the orders should not be granted. The Applicant has explained the reason for the delay in filing the notice of appeal and the present application. He has annexed a copy of the application lodged before the court of appeal and proof of payment.



12. Whether the application for extension of time will succeed or not is not for my consideration. However, on the basis that there is a decree capable of being executed and so as not to render mute the exercise commenced by the Applicant, I shall grant them a temporary stay of execution. The stay will be conditional so as to balance his interests and the interests of the Respondents. I am guided by the decision in the case of *Absalom Dova v. Tarbo Transporters* [2013] eKLR, where it stated: -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

13. Therefore, I will grant the stay of execution of the decree pending the determination of Nairobi C.A. Civ application no. E079 of 2024 on terms that the Applicant deposits the sum of Kshs 690,170 within four months of the date of this ruling in a joint interest account of the advocates for the Applicant and Respondent in a bank of their choice. In default, the stay shall automatically lapse. The costs of the application to the Defendants/Respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY, 2024

A. OMOLLO

JUDGE

