



**Karungu v Masira & another (Environment & Land Case
540 of 2016) [2024] KEELC 5683 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5683 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 540 OF 2016**

MAO ODENY, J

JULY 25, 2024

BETWEEN

PENINAH INYANJE KARUNGU PLAINTIFF

AND

CHRIS MASIRA 1ST DEFENDANT

MARY W KINYANJUI 2ND DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 6th October, 2023 by the Defendant/Applicant seeking the following orders:
 - a. Spent
 - b. Spent
 - c. That pending hearing and determination of the intended Appeal, this Honourable Court be pleased to order stay of execution of the Judgement and decree delivered by Hon. Justice Njoroge Francis Mwangi on the 22nd September 2023 and all consequential orders arising therefrom.
 - d. That costs of this Application be provided for.
2. The application was premised on the grounds on the face of the application and on the annexed affidavit of Chris Masira, the 1st Defendant sworn on 6th October, 2023 where he deponed that he has built a home on the suit property where he resides with his family and unless stay is granted, the Appeal shall be rendered nugatory and he shall suffer irreparable loss and damage.



3. The Plaintiff/Respondent opposed the application vide a replying affidavit dated 26th October, 2023 where she deponed that she has suffered and continues to suffer irreparable loss by the presence of the Defendants and or their interference with the suit premises.
4. She also stated that the same has caused her a lot of insecurity in the school and lack of trust in the parents who feel like the school is on the verge of closing down, thus withdrawing students. The respondent further stated that the Defendants have refused and or neglected to satisfy the decree of the court and thus denying her the enjoyment of the fruits of the decree.

1st Defendant/applicant's Submissions

5. Mr. Oumo relied on Order 42 Rule 6 (2) and Section 3A of the *Civil Procedure Rules* and submitted that the Applicant is willing to offer security as the court orders for due performance of the Decree and or abide by any directions and conditions as may be given by the court.
6. Counsel further submitted that the Applicant has made the application timeously without any unreasonable delay as the judgment was delivered on 22nd September, 2023 electronically and a certified copy of the judgment issued on the 27th September 2023. That the application was filed in court on the 6th October 2023 which is less than 30 days.
7. Mr. Oumo submitted that the appeal and the record of appeal has been filed and served on all the parties and substantial loss is likely to result unless the orders of stay are granted owing to the fact that the Applicant has made substantial developments of his matrimonial home on the land and any eviction will occasion damage which may not be compensated by money.
8. Counsel relied on the case of *Samvir Trustee Limited v Guardian Bank Limited (Under Receivership)* [2007] eKLR and Section 1A (2) of the *Civil Procedure Act* and urged the court to allow the application as prayed as the Applicant has an arguable appeal.

2nd Defendant's Submissions

9. Ms. Towet, counsel for the 2nd Defendant identified three issues for determination as to whether the application was filed without unreasonable delay, whether the applicant shall suffer substantial loss if the order sought is not granted and the issue of security.
10. Counsel relied on the cases of *Charles Ngigi Ndungu v Joseph Kimani Gatheca & 2 others* [2020] eKLR and *Michael Mugo Ileri v Nelson Ntiga Ikou & another* [2017] eKLR and submitted that the application has been made without unreasonable delay.
11. Counsel further submitted that the applicant is in possession of a portion of the suit land while the 2nd Defendant runs a school in the remaining portion and that the parties entered into a sale agreement knowing clearly that the 2nd Defendant's title was absolute having been issued in a court process that has never been challenged.
12. Counsel prayed that the status quo be maintained pending the appeal and relied on the cases of *Mukuma v Abuoga* [1988] KLR 645, *Consolidated Marine v Nampijja & Another*, Civil App No 93 of 1989 (Nairobi) and *James Peter Kinyungu Mbadi v Ngumbao Goda Dzombo & 72 others* [2021] eKLR.
13. Counsel submitted that the court in exercising its discretion to determine the issue of security considering that there is no specific sum being demanded. Further that the court should consider Plaintiff's relationship with the 2nd Defendant being that of mother and daughter-in-law. Counsel



relied on the case of *Butt v Rent Restriction Tribunal* [1979] and urged the court to use its discretion in favour of the Applicant.

Plaintiff/respondent's Submissions

14. Ms. Mugweru, counsel for the Plaintiff submitted that the applicant has not met the threshold for grant of stay of execution as provided for under Order 42 Rule 6 of the *Civil Procedure Rules*, 2010. Further that the Applicant has approached the court under the provisions of Order 12 Rule 7 of the *Civil Procedure Rules*, 2010 and therefore the prayers sought cannot be issued under the orders relied upon.
15. Counsel relied on the case of *Mukuma v Abuoga* KLR 645 and submitted that the present application is not made in good faith by reason that its sole purpose is to assist the Applicant to sneak back into the school compound and enhance his illegal activities therein.
16. Counsel submitted that additionally, the Applicant alleges that the Plaintiff/ Respondent will proceed with execution, which does not amount to substantial loss as the applicant must establish factors, which show that the execution, which 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.
17. Counsel submitted that the applicant has not demonstrated that he is willing to provide security and or that he is capable of offering security in the event the court so directs and urged the court to dismiss the application with costs.

Analysis And Determination

18. The issue for determination is whether the applicant has met the threshold for grant of stay of execution as provided for under Order 42 Rule 6 of the *Civil Procedure Rules*.
19. Order 42 rule 6 of the *Civil Procedure Rules* provides:

“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.”
20. From the record Judgment was delivered on 22nd September, 2023 electronically and a certified copy issued on the 27th September 2023 with the application filed on 6th October 2023 therefore the same was filed without undue delay.
21. The cornerstone of an application for stay of execution is proof that a party will suffer substantial loss if such orders are not granted as was held in the case of *Kenya Shell Limited v Kibiru* [1986] KLR 410, as follows:

“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 corner stone of both jurisdictions for granting a 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”.



22. Similarly, in the case of *Kabugua v Mwatata & another* (Civil Appeal 1 of 2021) [2023] KEELC 15715 (KLR) (20 February 2023, this court held that:

“Proof substantial loss is the cornerstone of applications for stay of execution. An Applicant must go a step further to prove such loss and not merely stating that he/she will suffer substantial loss.”

23. It should also be noted that where there is an order of eviction, it is not enough to say that a party shall be evicted, as that is a decree that was issued after the parties have been heard and a case is determined. A mere mention of imminent eviction is not proof of substantial loss.

24. In the Court of Appeal case of *RWW v EKW* (2019) eKLR the court held as follows:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

25. A grant of stay of refusal is discretionary as was held in the case of *Butt v Rent Restriction Tribunal* [1979] eKLR, where the Court of Appeal stated what ought to be considered in determining whether or not to grant stay of execution pending appeal. The court explained that the power of a court to grant or refuse an application for stay of execution is discretionary, and the discretion should be exercised in such a way so as not to prevent an appeal.

26. The purpose of stay pending appeal is to preserve the substratum of the case especially in land matters where the character of the suit property may be changed while the appeal is pending.

27. On the issue of security for the due performance of the decree, the Applicant stated that he is ready and willing to offer security. In the case of *Ena Investment Limited v Benard Ochau Mose & 2 others* [2022] eKLR, the court considered the purpose of security at paragraph 27 which was stated in *Arun C. Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, as follows:

“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.”

28. In the interest of justice, I therefore grant stay of execution pending appeal on condition that the Applicant deposits Kshs. 500,000/ in a joint interest earning account of the Advocates for the Plaintiff and the 1st Defendant within 30 days failure to which the order lapses. Costs of the application to abide by the outcome of the appeal.



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

M. A. ODENY

JUDGE

