



**Kanyi v Kariuki & another (Environment and Land Appeal
E042 of 2023) [2024] KEELC 5297 (KLR) (17 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5297 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E042 OF 2023
SM KIBUNJA, J
JULY 17, 2024**

BETWEEN

DAVID MUREITHI KANYI APPELLANT

AND

RAHAB NYANJAU KARIUKI 1ST RESPONDENT

**IRENE MAINA T/A IRENE MAINA COMPANY ADVOCATES 2ND
RESPONDENT**

RULING

1. The appellant filed notice of motion dated the 13th December 2023, seeking for the following prayers:
 - a. “Spent
 - b. Spent.
 - c. That this Honourable Court be pleased to issue stay of execution orders of the judgement and or decree made on the 30th November 2023 pending the hearing and determination of the appeal.
 - d. That costs of this application be provided for.”

The application is supported by the ten [10] grounds on its face marked (a) to (j) and supported by the affidavit of David Mureithi Kanyi, the appellant, sworn on 13th December 2023, inter alia deposing that the trial court in Mombasa CMC No. E194 of 2022; *Rahab Nyanjau Kariuki vs David Mureithi Kanyi & Irene Maina t/a Irene Maina & Co. Advocates* delivered a judgment on 30th November 2023, in which he was condemned to pay Kshs. 1,900,000, with interests to the 1st respondent plus costs to both respondents; that he was aggrieved by the said judgment that was delivered through email, and hence there was no stay of execution issued; that as the respondents may proceed to execute the said



judgment, he filed this application as execution would culminate in the appellant suffering irreparable damage and harm, and consequently render the appeal nugatory.

2. The application is opposed by the 1st respondent through the four (4) grounds of opposition dated 15th January 2024, that no explanation has been given to show that the appeal would be rendered nugatory if it succeeds; that the 1st respondent is entitled to her fruits of the judgement; that the appellant has not complied with the order of this court dated 13th December 2023 that the appellant deposit the decretal amount of Kshs. 1,900,000 in the names of the respective advocates of the parties within 30 days from the abovementioned date; and no security has been offered as required under Order 42 of the *Civil Procedure Rules*.
3. On the 18th January 2024, the court issued directions on filing and exchanging submissions. The learned counsel for the appellant and the 1st respondent filed their submissions dated the 14th February 2024 and 15th January 2024 respectively, which the court has considered.
4. The issues for the court's determinations are as follows:
 - a. Whether the appellant has met the threshold for stay of execution order to issue as sought.
 - b. Who pays the costs in the suit?
5. The court has after considering the grounds on the notice of motion and grounds of opposition, affidavit evidence by the appellant, submissions by learned counsel, superior courts decisions cited thereon, come to the following determinations:
 - a. The conditions for grant of stay of execution have been discussed ad nauseum in Kenyan courts and have been based on the provisions of Order 42 rule 6 of the *Civil Procedure Rules* which states 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 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 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.”



In the case of Butt versus. Rent Restriction Tribunal [1979] eKLR, the court restated that the power to issue stay of execution against judgement and decree is a discretionary one.

- b. In the case of *Consolidated Marine. vs. 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”.

And in the case of *Machira t/a Machira & Co. Advocates vs East African Standard (No. 2)* (2002) KLR 63, the court held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting 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”.

Having considered the two parties’ contentions in the application, and the position in the above decisions, I agree with the 1st respondent’s counsel submissions that there must be a balance between the appellant’s right to appeal, and the 1st respondent’s right to enjoy her fruits of judgment.

- c. To succeed in the application, the appellant is obligated to proof of substantial loss if the order is not granted, and provision of security. In regards to substantial loss the Court of Appeal in the case of *Mukuma vs Abuoga* (1988) KLR 645 the court stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

The appellant has deposed and submitted on the substantial loss as the apprehension that the respondents may execute the trial court’s judgement and or decree. The learned counsel for the appellant relied on among others the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR, but I find the appellant has not demonstrated what the substantial loss would be, if execution of Kshs. 1,900,000, which emanates from a valid court order is carried out. On that score or test, the application should fail.

- d. On the issue/requirement for security, the appellant and his counsel, either by inadvertence, or design did not address it through their deposition and submissions. They also did not address their failure to comply with this court’s order dated 13th December 2023, which ordered the appellant to deposit the decretal amount in an interest earning account in the names of



the parties' advocates within 30 days from the above mentioned date. I therefore agree with decision cited by the counsel for the 1st respondent on the purpose of security, in the case of *Arun C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates* [2014] eKLR where the court held that:

“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.”

The appellant having failed to offer security, and being in disregard of the order of 13th December 2023, does not deserve the order of stay of execution.

- e. Under Section 27 of the *Civil Procedure Act* Chapter 21 of Laws of Kenya, the costs always follow the event unless where there is a good reason to depart from that general rule. I find no cause in this matter to depart from that edict.
6. Flowing from the foregoing determinations, the court finds and orders as follows:
 - a. That the appellant's notice of motion dated the 13th December 2023 is without merit.
 - b. The application is dismissed.
 - c. The appellant to meet the 1st respondent's costs.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 17TH DAY OF JULY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Appellant : Mr Gitahi Gathu

Respondents: M/s Murage for 1st Respondent

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

