



Katilem (Suing as the Personal Representative of the Estate of Tongolik Katilem) v County Government of West Pokot (Environment and Land Case 33 of 2019) [2024] KEELC 5286 (KLR) (15 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5286 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND CASE 33 OF 2019**

FO NYAGAKA, J

JULY 15, 2024

BETWEEN

ALICE CHEMINING KATILEM (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF TONGOLIK KATILEM) ... PLAINTIFF

AND

THE COUNTY GOVERNMENT OF WEST POKOT DEFENDANT

RULING

1. The Defendant brought a Notice of Motion dated 07/05/2024 and filed on the same date at 17:02 hours. Generally, it sought for an order of stay of execution pending Appeal. The Application was brought under Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Order 22 Rule 25, Order 42 Rule 6 and Order 52 Rules 1 & 4 of the *Civil Procedure Rules, 2010* and what he referred to as “all other enabling provisions of the law.” The Applicant sought for the following specific orders:
 1. spent
 2. spent
 3. That there be a stay of execution of the judgment and decree herein pending the hearing and determination of the appeal that was lodged in this Court by the Applicant pursuant to the Notice of Appeal dated 14th December 2023 and filed the same date.
 4. That the costs of this application be in the cause
2. The Application was supported by an affidavit sworn by the Philip Magal Ambole, learned counsel for the Defendant, on 07/05/2024. The grounds of the application were that this Court delivered judgment herein on 29/11/2023, the Applicant has preferred an Appeal from the judgement, the costs have been assessed on 23/02/2024, and the Respondent is likely to effect the court’s judgment and that



would greatly prejudice the Applicant while if the stay of execution is granted the Respondent will be prejudiced only for failure to be paid costs.

3. In the supporting affidavit learned counsel deponed on fairly the same content as the grounds of the application hence the court needs not repeat the same since it has been considered as the factual position of the applicant.

The Response

4. The Plaintiff/Respondent filed a Replying Affidavit sworn on 22/05/2024. She deposed that the Application was defective, misconceived, a non-starter and an abuse of the court process. She deponed that the application offended Order 22 Rule 25 and Order 42 Rules 1 and 6 of the Civil Procedure Rules. She reproduced the contents of the decree this Court gave. She deposed further that the Applicant took no steps to comply with the decree for six months since the delivery of the judgment. The Applicant was only awoken when it realized the period given by the Court was about to expire.
5. She continued that sixty days had elapsed since the date the Notice of Appeal was filed on 14/12/2023 yet no appeal had been filed. Further that the stay of execution granted since 28/02/2024 had since expired, and since delivery of the judgment it was five months and 23 days of inaction by the Applicant which was inordinate delay.
6. She deponed that she had since filed an application in the Court of Appeal to strike out the Notice of Appeal. She annexed and marked as ACK1 a copy of the Application and her Identity Card.

Submissions

7. The Applicant filed its written submissions dated 30/05/2024 on 31/03/2024. The Respondent filed hers dated 10/06/2024 on 11/06/2024. This Court has considered the submissions in the preparation of the Ruling herein.

Determination

8. This court has very carefully considered the Application, the affidavits both in support and opposition to it, the annexures thereto, the parties' submissions as well as the law. Three issues commend themselves for determination. These were:
 - a. Whether the court can issue stay of execution orders against declaratory and injunctive orders the applicant,
 - b. Whether the Applicant has satisfied the criteria for grant of stay of execution pending appeal,
 - c. Who to bear the costs of the Application,
9. It is worthwhile to start this analysis with the second issue, which is whether the Applicant has satisfied the requirements for grant of an order for stay of execution pending appeal.
10. The law on stay of execution of judgment is now well settled. For any court, of this level or the lower one, to grant the orders of stay of execution pending appeal, the party seeking orders of this nature must place himself/herself within the legal requirements of Order 42 Rule 6 of the Civil Procedure Rules. The provision states as follows:

“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. Courts have time and again pronounced themselves on the interpretation of this provision. Such decisions lay the basis for and expound on the conditions to be satisfied by an Applicant of this nature. I will cite only one which summarizes the conditions the law had in mind. In Civil Appeal No.107 of 2015, *Masisi Mwita - v- Damaris Wanjiku Njeri* (2016) eKLR, the Court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & Another.. v...Thornton & Turpin Ltd*, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-

“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.

“In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo... v...Straman EA Ltd* (2013) as follows:-

“In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory.”

These twin principles go hand in hand and failure to prove one dislodges the other”

12. Thus, this Court must consider whether the Applicant satisfied the conditions for stay of execution pending appeal. The first principle top consider is whether the Application has been brought without unreasonable delay. This Court notes that the Application was filed on the 07/05/2024. The judgment herein was delivered on 29/11/2024. The Application was therefore filed five months and ten days from the date of delivery of the judgment. This period is not the same as the one deposed to and submitted by the Respondent as five months and 23 days. However, it is almost the same. On its part the Applicant did not submit on the aspect of the long delay in bringing the application.
13. Regarding the argument that there exists an appeal, the Applicant filed a Notice of Appeal whose original is in the Court file was lodged on 14/12/2023. That was sixteen (16) days after the delivery of the judgment. This is a point that can only be taken up by the Plaintiff in the Court of Appeal and not here.
14. Looking at the steps the Appellant took herein, I am of the view that for the purposes of this application it satisfied this court that there is an appeal in place. I hold so because in terms of Rule 2(2) of the *Appellate Jurisdiction Act/* Court of Appeal Rules an “appeal”, in relation to appeals to the Court, includes an intended appeal;...”. And as stated in *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR, an appeal is deemed to have been filed once a notice thereof has been filed in the appropriate registry.



15. Further, in terms of Order 42 Rule 6(4) the Notice of Appeal filed on 14/12/2023 is deemed to have been an appeal filed. The provision is to the effect that:

“For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”
16. However, the question is whether the appeal is competent or not because it was submitted by the Respondent that it was not and she had moved the Court of Appeal to strike it out. Her argument was that sixty (60) days had elapsed from the time the Notice of Appeal had been filed yet no appeal had been filed. The Court does not agree with that argument because the Applicant could not have filed the Record of Appeal before receiving the certified typed proceedings, and from the record it received them on 17/05/2024.
17. The plausible argument would have been whether from the time the proceedings were received the sixty-day period had not elapsed. Besides that, the other argument would have been, as noted below, whether the Notice of Appeal was filed in time as required by law. But that as it may, that is not within the jurisdiction of this Court to determine: this Court can only note whether or not the time was complied with and leave it to the Court of Appeal to make a finding on it.
18. On the merits of the application then the first and paramount issue to consider is whether there was a delay on filing the instant application. This is because if the Court is to find that the same was inordinate will dismiss the same on that score and need not consider the merits of a ‘stale’ application.
19. This Court has carefully read through the supporting affidavit in order to find the reason for the delay, first in lodging the Notice of Appeal, which in terms of Rule 77(2) of the Court of Appeal Rules should have been filed within fourteen (14) days of the delivery of the judgment, and secondly the institution of the Application over five months and ten days of the delivery of the judgment. I have not found any. Further, the record shows that the proceedings herein were made ready and collected by Monica of the Applicant on 17/05/2024 hence the Appeal should have been filed by the time the appellant Rules stipulate. There is no evidence that steps contemplated by the law were ever taken. Thus, while I doubt the competency of the said appeal, and it is not within my jurisdiction to make a finding on the same, it would be remiss of the Court to grant the orders sought while it is alive to the fact that the appeal may not be proper one after all.
20. The Applicant only gave grounds of the application and deposition thereon to the effect that after the delivery of the judgment the matter proceeded for taxation of the party and party costs which was done on 23/05/2024 and the parties given 30 days stay of execution thereof. Then it deponed that it was apprehensive that execution would commence and that would prejudice it yet it has a good appeal with high chances of success. Thus, I find that the delay by the Applicant was grossly inordinate and unexplained. This court would therefore be wasting precious time to consider whether the Applicant has fulfilled the other conditions.
21. The upshot is that the Application is unmerited. It is dismissed with costs to the Respondent.
22. Further, to clear any doubt, this Court directs that the interim orders of stay issued earlier in favour of the Applicant should be and are hereby vacated, .
23. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA VIRTUALLY ORALLY VIA TEAMS PLATFORM THIS 15TH DAY OF JULY, 2024.

HON. DR. IUR FRED NYAGAKA



JUDGE ELC KITALE

Ruling delivered from 14:01 hours to 14:12 hours.

In the presence of:

Teti for the Plaintiff/Respondent

Songole for the Defendant/Applicant

