



**Schering v Said & 2 others (Environment & Land Case 144 & 299 of 2021  
(Consolidated)) [2024] KEELC 5826 (KLR) (15 August 2024) (Ruling)**

Neutral citation: [2024] KEELC 5826 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 144 & 299 OF 2021 (CONSOLIDATED)**

**AE DENA, J**

**AUGUST 15, 2024**

**BETWEEN**

**THOMAS SCHERING ..... PLAINTIFF**

**AND**

**NEREAH MICHAEL SAID ..... RESPONDENT**

**AND**

**GERHARD HEIDUK ..... 1<sup>ST</sup> DEFENDANT**

**WOLFGANG GEORG JOHAN EHGARTNER ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**The application**

1. The Applicant herein by a Notice of Motion application dated 9/07/24 seeks for the discretionary relief of stay of execution pending appeal and for issuance of copies of the decree and certificate of delay. Judgement in this matter was rendered on 12/4/2024 where the court issued orders of stay of execution for a period of 90 days. On 12/7/2024 the application made under certificate of urgency was placed before Justice E K Wabwoto at Environment and Land Court Voi as the 90 days stay period was on the verge of lapsing and the applicant was apprehensive that execution would issue immediately. The Hon Judge issued the following orders;
  - i. The stay of execution orders issued on 12<sup>th</sup> April 2024 are hereby extended until the 24<sup>th</sup> July 2024
  - ii. The Respondent is hereby granted 7 days to file and serve his response to the application
  - iii. The Applicant shall have corresponding leave of 3 days if deemed necessary
  - iv. The application shall be heard interpartes on 24<sup>th</sup> July 2024 before lady justice A Dena



## Replying Affidavit

2. Thomas Schering the Plaintiff/Respondent in opposing the application swore a replying affidavit on 18<sup>th</sup> July 2024. It is averred that the application is incompetent and should be dismissed with costs for reasons that a 90-day stay of execution had already been issued by the court. That the further extension of the stay orders is sought on grounds that there has been challenges in acquiring court documents but from the record, the same were furnished to the Applicant within the time of the stay of execution earlier granted. That there is therefore unexplainable and unreasonable delay. That equity aids the vigilant and not the indolent. The Respondent states that two appeals have been filed by the applicant herein being Mombasa Civil Appeal No E127 of 2014 and Malindi Civil Appeal No E076 of 2024 and which both seek similar orders. That the same is fragrant abuse of the court process and forum shopping which should not be allowed. The court is urged not to grant the orders sought in the application.

## Further Affidavit

3. In response to the replying affidavit by the Respondent, the Applicant filed a further affidavit dated 23/7/2024 where it was averred that the Plaintiff's replying affidavit was for rejection having been witnessed and commissioned by an advocate working in the firm on record for the Plaintiff/Respondent rendering the application herein unopposed. However, on 24<sup>th</sup> July 2024 both Mr. Abidha and Ms. Mukoya counsels for the Applicant and Respondent respectively, agreed that the said affidavit will be replaced by another sworn before a different Commissioner for oaths and that the Respondent were at liberty to file a further affidavit. The impugned affidavit was replaced with the affidavit of Thomas Schering sworn on 24<sup>th</sup> July 2024 before Joseph A Kahindi Advocate and Commissioner for Oaths. The content remains the same.

## Submissions

4. Parties agreed to have the application canvassed by way of written submissions. The Applicants submissions were filed on 6<sup>th</sup> August 2024. There were no submissions filed on behalf of the Respondent The court has considered the submissions filed and the replying affidavit.

## Determination

5. The court is now tasked with making a determination on whether or not the Applicant is deserving of extension of the stay orders earlier granted and the certificate of decree and delay sought. The later have been provided.
6. The application is made under the provisions of Order 42 Rule 6 of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act. Order 42 rule 6(2) of the Civil Procedure Rules 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.



7. Arising from the law above the grant of an order of stay of execution is at the discretion of the court. Three requirements can be distilled from the above firstly that substantial loss may result to the applicant unless the order is made, secondly that the application has been made without unreasonable delay, and thirdly 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 *Butt Vs Rent Restriction Tribunal* [1982] KLR 417.

8. The Court of Appeal further stated thus; -

It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church (No 2)* 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

Megarry J, as he then was, followed *Wilson* (supra) in *Erinford Properties Limited v Cheshire County Council* [1974] 2 All ER 448 at p 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal’s decision being rendered nugatory should that court reverse the judge’s decision. The court will grant a stay where special circumstances of the case so require, per Lopes LJ in *the Attorney General v Emerson and Others* 24 QBD (1889) 56 at p 59. The special circumstances in this case are that there is a large amount of rent in dispute between the parties and the appellant has an undoubted right of appeal.

9. The first ground to be established is whether substantial loss may result to the Applicant unless stay of execution is granted. The applicant states that the judgment sum is astronomical and execution thereof will be difficult to recover since the Plaintiff is a foreigner who confessed that he has no gainful employment but lives off his wife who is also unemployed. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma vs 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.”

10. From the judgement, it is clear that the contest was as to the ownership of Kwale/Kinondo/2458 and Kwale/Kinondo/2459. In its findings and final orders, this court made a declaration that the suit plots were being held in trust for the Plaintiff by the 1<sup>st</sup> Defendant. The Land Registrar Kwale was to cancel all entries as pertains the 1<sup>st</sup> Defendant and enter the Plaintiffs name as proprietor. The 1<sup>st</sup> Defendant was further ordered to make a refund of the purchase price of Euros 122,000 to the Plaintiff less 12%. The Applicant’s worry is that if the properties are transferred, the Respondent could dispose of them and leave jurisdiction for he is a foreigner. Further that she will be exposed as her appeal even if successful will be of little use or mere paper judgment as she will not be in a position to recover either the properties and decretal amount.

11. Firstly, let me state that recovery of the suit properties shall be by dint of the orders of the Court of Appeal which orders will have to be obeyed, the same cannot be in vain as long as the subject is known. Indeed, it is not in dispute that the Plaintiff is not a Kenyan Citizen but it would be wrong for this



court to make this assumption just on the basis that the decree holder is a foreigner. It was incumbent upon the applicant to demonstrate that the Plaintiff will leave jurisdiction which to me has not been successfully proved.

12. But having stated the above for me the main consideration would be creating a balance as to the Decree holder enjoying the fruits of their judgement and the Defendant exercising her undoubted right of appeal and to ensure that the later would not be rendered nugatory. Further the court would also be minded if there would be undue hardship to the Respondent/Plaintiff if the stay were allowed. It has been averred that the Plaintiff is in occupation of the suit premises, which is not in dispute and which should be considered positively in terms of the enjoyment of the judgement herein. Therefore, in this regard the court sees no prejudice or hardship that will be occasioned to the Respondent as long as they still retain possession.
13. Additionally, I would be inclined to consider the Decretal amount involved which is the purchase price and creating a balance for both parties. A further consideration or answer would also lie in the requirement for security as seen in Sub Rule 1(b) herein. In this regard I'm guided by the decision in Jamii Bora Bank Limited & another Vs Samuel Wambugu Ndirangu CIVIL APPEAL NO. E030 (2021) EKLK where the learned judge upon an analysis of the rationale and objectives for the requirement for security proceeded to grant an order of stay of execution on the basis of security. The judge stated as follows; -

Security of costs.

23. The applicant ought to satisfy the condition of security. In the persuasive decision of the court observed: -

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls. Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the Respondent in the appeal.”

Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to



provide a bank guarantee as security for due performance of the decree.”

24. Similarly in *Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others* [2014] eKLR the court stated: - “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 the 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.”
14. From the above persuasive decision, it is clear that the issue of security is upon the court to determine, though an applicant could suggest what they have to offer which would also go to cement good will on their part. See the dictum of the Court in *Exclusive Mines Limited & Another –vs- Ministry of Mining & 2 Others* [2015] eKLR cited by the Applicant where the court stated that thus;
- “While the law leaves it to the Court’s discretion to make such orders as to security as it may deem fit, it is a good practice for an applicant seeking such an order to intimate to the Court his preparation to meet such orders as the Court may impose as this assists the Court while exercising its discretion in that respect”.
15. Notably, the applicant is ready to surrender to the Court, titles for properties Kwale/Galu/Kinondo 2458 and 2459 as security. On 12/4/2024 when judgement was delivered, this court granted stay of execution for a period of 90 days. From the record the court noted that it had in any case granted 90 days for liquidation of the purchase price. The court in its order granting the said stay emphasized the same was to enable the Defendant file appeal and obtain further orders of stay at the Court of Appeal. The Applicant has demonstrated the steps it has taken since then to institute the proceedings being Court of Appeal Mombasa Civil Appeal No. E127 of 2024 and Application No. E076 of 2024 the former being the substantive appeal and the latter being the application as clarified by the Applicants further affidavit sworn on 29/7/24. It has also been demonstrated that directions have been issued on the disposal of the application by the Court of Appeal where the application has also been certified urgent. However, the court has noted that hearing of the application shall be on notice depending with the court diary. I take cognisance of the fact that Applicant has no control over the Court of Appeal diary. For the purpose of extension of the orders it is my view that deposit of the two titles at this juncture should suffice awaiting the hearing of the application by the Court of Appeal.
16. What about the timeliness of the present application? It is contended by Counsel for the Applicant that proceedings were furnished on 21<sup>st</sup> June 2024 and this application filed on 9<sup>th</sup> July 2024. I must confess that this is attributable to the fact that the entire Kwale Court is served by one administrative assistant in this regard. Indeed, the court recognises that if an appeal had to be filed a Memorandum of Appeal which had be prepared in the context of the entire proceedings and not the judgement alone. I think the filing of the application in slightly over two months after the judgement cannot be rendered an inordinate delay given the circumstances of this case.
17. Is the Applicant therefore entitled to the orders sought? The application is made on two fronts that firstly to extend the stay of execution orders made by this court on 12/4/24, secondly to stay execution of the judgement delivered on 12/4/24 and decree pending hearing and determination of



the application filed before the court appeal and or the Appeal itself. I have already noted the efforts put in by the Applicant and what has been filed. It is in the interests of justice that this court intervenes pending the hearing of the said application before the Court of Appeal. The court therefore will limit the scope of its orders in this regard.

18. The upshot of the foregoing is that the application dated 9<sup>th</sup> July 2024 is hereby allowed in the following terms;
1. There be an extension of the orders of stay of execution in terms of the orders made on 12/04/2024.
  2. There be stay of execution of the judgement delivered on 12/04/24 and decree pending hearing and determination of the application filed at the Court of Appeal (Msa COAAPPL/E076/24.
  3. The Applicants shall deposit with the Court the titles for properties Kwale/Galu/Kinondo 2458 and 2459 as security within 30 days of this order.
  4. The orders herein shall automatically lapse upon the determination of the application in 2) above and the orders of the Court of Appeal with regard to the application therein shall kick in.
  5. The costs of this application to be costs in the appeal.

Orders accordingly.

**RULING DATED SIGNED AND DELIVERED THIS 15<sup>TH</sup> DAY OF AUGUST 2024**

**AE DENA**

**JUDGE**

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

Ms Mukoya for the Plaintiff

Mr. Abitha for the 1<sup>st</sup> Defendant

Mr. Daniel Disii - Court Assistant.

