



**Ngugi v Omogo (Environment & Land Case 216 of 2012)  
[2024] KEELC 6240 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6240 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 216 OF 2012  
JM ONYANGO, J  
SEPTEMBER 25, 2024**

**BETWEEN**

**SAMUEL WAGORO NGUGI ..... PLAINTIFF**

**AND**

**NICODEMUS HONGO OMOGO ..... DEFENDANT**

**RULING**

1. Before me is a Notice of Motion dated 5<sup>th</sup> April, 2024 through which the Defendant seeks the following orders: -
  - a. Spent
  - b. That pending the hearing and determination of this application, there be a stay of execution of the judgment and decree of the Environment and Land Court delivered on 9<sup>th</sup> February, 2022 and decree issued on 1<sup>st</sup> December, 2023.
  - c. That pending the hearing and determination of the intended appeal before the Court of Appeal, there be a stay of execution of the judgment and all consequential orders arising from the judgment and decree of the Environment and Land Court herein.
  - d. That the costs of this application be in the cause.
2. The grounds put forward in support of the Motion are set out on the face of it and in the Supporting Affidavit sworn by the Defendant on 5<sup>th</sup> April, 2024. In summary, the Defendant's case is that on 9<sup>th</sup> February, 2022 this court delivered a judgement cancelling his title to the suit property, land parcel number Eldoret Municipality/Block 5/60. The court also ordered his eviction therefrom in order to grant vacant possession to the Plaintiff without his involvement. Aggrieved by the decision of the court, the Defendant lodged an appeal against the entire judgment in the Court of Appeal.



3. The Defendant deponed that he received a Notice from Ms. Ngigi Mbugua & Company Advocates to vacate the suit property. That the process of execution had been commenced by the Plaintiff and it would result in the Defendant's forceful eviction from the suit property, which is his matrimonial home where he resides with his family, rendering them homeless. He deponed that he and his family have over the years undertaken improvements on the matrimonial home which cost a substantial sum which would be lost if the Plaintiff is allowed to proceed with execution. He thus sought a stay of execution of the judgment pending hearing and determination of the Appeal, stating that he filed the present application timeously and it was in the interest of justice that it be allowed.
4. Vide the Grounds of Objection dated 17<sup>th</sup> April, 2024 the Plaintiff opposed the Application herein on the following grounds: -
  - a. The Application is res judicata as a similar application was made on 2<sup>nd</sup> March, 2022 and a ruling made on 23<sup>rd</sup> September, 2022.
  - b. No proper appeal so called exists to oust the judgment of the court on record as the one in place was filed out of time and without leave of court.
  - c. Having pronounced itself by way of a judgment and through a ruling, the court is devoid of the requisite jurisdiction to re-open and rehear the motion proffered.
  - d. Execution of a court decree is a lawful consequence of the legal process and cannot be the basis of an application.
  - e. The applicant is guilty of laches.
5. The court issued directions that the Application be canvassed by way of written submissions and the parties complied and filed their respective written submissions.

#### **Defendant/Applicant's Submissions\*\***

6. Counsel for the Defendant's filed Submissions dated 8<sup>th</sup> May, 2024. Counsel submitted that the doctrine of res judicata is embodied in Section 7 of the *Civil Procedure Act*. For the elements to res judicata counsel cited the cases of John Florence Maritime Services Limited & Another vs Cabinet Secretary Transport & Infrastructure & 3 Others (2021) KESC 39 (KLR), Uhuru Highway Development Ltd vs Central Bank of Kenya (1999) eKLR and Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others (2017) eKLR. Counsel argued that the plea of res judicata does not apply to this case because not all the matters in controversy between the parties have been resolved, he relied on Suleiman Said Shahbal vs Independence Electoral & Boundaries Commission & 3 Others (2014) eKLR.
7. Counsel argued that the judgment was obtained ex-parte, it cannot be deemed res judicata. Further, that the said judgment is not final as it is the subject of an appeal and will only obtain finality upon determination by the Court of Appeal. Counsel submitted that the instant case falls under the exceptions to the doctrine of res judicata as he did not have his day in court, and Counsel faulted the trial judge for not adhering to Article 159(2)(d) of *the Constitution* in that regard. It is the Defendant's case that only the Court of Appeal can determine the competency of his Appeal, however, the Plaintiff had not applied to strike it out as an indication that it was improper. Counsel for the Defendant called on the right to fair trial as guaranteed in Article 25 of *the Constitution* of Kenya as well as the African Charter on Human and Peoples Rights. He also cited the case of Evans Odhiambo Kidero & 4 Others vs Ferdinand Ndungu Waititu & 4 Others, *Petition No. 18 of 2014* among other cases and international instruments on the same.



8. On the principles governing the grant of stay pending appeal, Counsel submitted that they are set out at Order 42 Rule 6(2) of the Civil Procedure Rules and cited *Shell vs Kibiru & Another* (1986) KLR 410. He submitted that if stay is not granted, the Defendant is likely to suffer loss as his matrimonial home is situated on the suit property. That the same is owned and occupied by the Defendant and his family, thus, eviction therefrom will not only render them homeless but also render the appeal an academic exercise. On security for costs, Counsel submitted that the same are discretionary and not meant to punish the judgment debtor (*Arun Sharma vs Ashana Raikundala T/A Raikundala & Co. Advocates & 2 Others* (2014) eKLR). Counsel prayed that should the court be inclined to demand for security as a condition for stay, the same should be reasonable. Counsel added that the application was filed without unreasonable delay. He referred the court to the case of *Butt vs Rent Restrictions Tribunal* (1982) KLR 417 and prayed that the application herein be allowed.

### **Plaintiff/Respondent's Submissions\*\***

9. In the Plaintiff's Submissions dated 12<sup>th</sup> June, 2024 his Advocate on record submitted that a similar application dated 2<sup>nd</sup> March, 2022 was made by the Defendant and a ruling delivered on 23<sup>rd</sup> September, 2022 dismissing it. That the Defendant's claim that he did not participate in the litigation does not change the fact that the Plaintiff is entitled to the suit land as its proprietor. Counsel submitted that the Defendant's Application had not met the pre-requisites for grant of a stay pending appeal as set out in Order 42 Rule 6 of the Civil Procedure Rules. Counsel was of the view that the alleged loss of a matrimonial home was not sufficient proof of substantial loss, and that it is only fair that the Plaintiff be allowed to proceed with execution. He relied on *James Wangalwa & Another vs Agnes Naliaka Cheseto* (2012) eKLR.
10. On whether the application was made without unreasonable delay, Counsel pointed out that the judgment was delivered on 9<sup>th</sup> February, 2022 whereas the instant application is dated and filed on 5<sup>th</sup> April, 2024 more than 2 years later. Counsel also pointed out that the court in its judgment granted the Defendant 60 days stay of execution which had lapsed at the time of filing this application, and there is no grounds furnished for the delay in filing it. Counsel submitted that the condition on timeous filing had thus not been met and relied on the case of *Gianfranco Manenthi & Another vs Africa Merchant Assurance Co. Ltd* (2019) eKLR).
11. On security for costs, Counsel submitted that although the same is crucial under Order 42 Rule 6(2), the Defendant had not demonstrated any willingness to deposit security, only asking the court to be reasonable. Counsel referred the court to the case of *Arun C. Sharma vs Ashana Raikundalia T/A Rakundalia & Co. Advocates & 2 Others* (2014) eKLR. Counsel argued that there is no proper appeal in existence to oust the judgment of the court as the one in place was filed out of time and without leave of court. Counsel urged the court to find no merit in the application and dismiss it.

### **Analysis and Determination\*\***

12. Having considered Application, the Grounds of Opposition, the rival submissions filed as well as the legal authorities cited therein, the two main issues for determination are:-
- a. Whether the Application is re judicata
  - b. Whether the Defendant has satisfied the conditions for grant of an order of stay of execution pending appeal



**a. Whether the Application is res judicata**

13. The Plaintiff alleged that the matters raised in this application are res judicata, the same having been raised in a previous application dated 2<sup>nd</sup> March, 2023 and determined on 23<sup>rd</sup> September, 2022. The Defendant's submissions on this allegation seem to suggest that the claim of res judicata was raised as against the entire suit and the judgment arising therefrom. This is however not the case. It is not the suit or judgment that has been flagged for being res judicata but this instant application for stay of execution. That being the case, it is necessary that this issue be dealt with first as it goes to the root of the jurisdiction of the court to entertain the application herein. This is because, if it happens that the application is indeed res judicata, the court would have no jurisdiction to entertain it or take any further steps thereon. Without jurisdiction, the court's only possible course would be to strike out the application for being res judicata.

14. The doctrine of res judicata is embodied at Section 7 of the Civil Procedure Act which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation (1): The expression ‘former suit’ means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation (2): For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation (3): The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation (4): Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation (5): Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation (6): Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.’

15. These elements were summarized by the Supreme Court in the case of John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (2021) KESC 39 (KLR) as follows:-

“We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- a. There is a former Judgment or order which was final;
- b. The Judgment or order was on merit;



- c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
  - d. There must be between the first and the second action identical parties, subject matter and cause of action”.
16. For the doctrine to apply, the matters in issue must be similar to those which were previously in dispute between the same parties. Those issues must have been determined on merit by a court of competent jurisdiction. A court will also invoke the doctrine in instances where a party raises issues in an application that they raised or ought to have raised in a previous application between the same parties.
17. The subject in issue is the application dated 2<sup>nd</sup> March, 2022 which sought among other prayers an order of stay of execution pending appeal, as well as pending review and/or setting aside of the judgment delivered on 9<sup>th</sup> February, 2022. The Court delivered its ruling thereon on 23<sup>rd</sup> September, 2022. The court was seized with the requisite jurisdiction to entertain the application, of that there can be no doubt. The court considered the application and determined that it had no merit and thus dismissed it. The decision of the court was thus made on merit, and having been made in this suit, there can also be no doubt that the parties involved therein are the same parties in the instant application.
18. It is evident that all the ingredients have been met for the application of the doctrine of res judicata. There are however exceptions to the doctrine of res judicata. The Supreme Court in the John Florence Case (Supra) discussed two exceptions to the doctrine of res judicata. The Court stated as follows: -
- “ 84. Just as the Court of Appeal in its impugned decision noted that rights keep on evolving, mutating, and assuming multifaceted dimensions it may be difficult to specify what is rarest and clearest. We however propose to set some parameters that a party seeking to have a court give an exemption to the application of the doctrine of res judicata. The first is where there is potential for substantial injustice if a court does not hear a constitutional matter or issue on its merits. It is our considered opinion that before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well address the factors for and against exercise of such discretionary power.
  - 85. In the alternative a litigant must demonstrate special circumstances warranting the court to make an exception.”
19. In *Uhuru Highway Development Limited v Central Bank of Kenya & 2 others* (1996) eKLR, the Court of Appeal held that:-
- “But we need not rely entirely on the Indian Authorities. Here at home in the case of *Mburu Kinyua vs Gachini Tuti* (1978) K.L.R. 69 the majority of this court held that a second application to set aside a judgement entered ex-parte would be res-judicata when the fact upon which it was based were known to the appellant. The dissenting judgement of Madan J. A. (as he then was) is the one which Mr. Sharma and Mr. Rebello asked us to follow in contradistinction to the judgements of Wambuzi and Law JJ.A., Madan J. A. said this:
- ‘... Moreover, the liberty to present more than one application is always subject to the Court’s power to prevent abuse of its process, including mulcting the offending party in costs. It is also of course subject to the rule of res judicata including what is laid down in explanation (4) to section 7, unless a special



circumstance is present in which event I would be content to follow the following dictum of Wilgram V-C, in *Henderson vs Henderson* (1843) 67 E R 313, 319, which the Privy Council described as the locus classicus of this aspect of res judicata, in *Yat Tung Investment Co. Ltd. Vs Dao Hrng Bank Ltd.* (1975) AC 581, 590:

... The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.’

With due respect, Madan J. A. does not say that a party can continue coming to court ad infinitum until such time as the courts conscience is clear. What he says is that the principle of res-judicata applies to a matter properly adjudicated upon by court but he was of the opinion that there was no full or proper adjudication as some of the facts disclosed in the second application were not before the superior court judge when he heard the first application...”

20. The court further relied on the decision of Law J. A. in the same case when he said:

“To sum up my view of this aspect of the case, an applicant whose application to set aside an ex parte judgement has been rejected has a right of appeal. Alternatively, he may apply for a review of the decision, under section 80 of the *Civil Procedure Act*. He can only successfully file a second application if it is based on facts not known to him at the time he made the first application. If the facts were known to him, his second application will be dismissed as res judicata, as happened here. The position otherwise would be intolerable. A decree-holder could be deprived of the benefit of his judgement by a succession of applications to set aside the judgement and judges would in effect be asked to sit an appeal over judges...”

21. From the foregoing, it is clear that once an application within a suit has been heard and determined under the requisite principles on merit, a similar application cannot be brought unless there are new facts that could not be brought before the court in the earlier application. The question therefore is whether the circumstances surrounding the instant application qualify as “special circumstances” to bring it under the permissible exceptions to the doctrine of res judicata. Such exceptions as envisioned by the court may be on account of new facts that could not have been brought earlier even with exercise of due diligence, which merit a rehearing and possible departure from the previous ruling.

22. The Notice of Appeal that has been annexed by the Defendant as “NHO 2” in this instant Application indicates that it was lodged in respect of the Ruling of 23<sup>rd</sup> September, 2022 and not the judgment of the court delivered on 9<sup>th</sup> February, 2022 as alleged in the Defendant’s Supporting Affidavit.

23. I have perused the file and note that there is a Notice of Appeal dated 9<sup>th</sup> February, 2022 on record that was lodged against the entire judgment of the court delivered on the same date. Notably, prayer 4 of the Application dated 2<sup>nd</sup> March, 2022 sought a stay of execution pending appeal. However, the Notice of Appeal on the basis of which this prayer was made was vide notice dated on 16<sup>th</sup> March, 2022 withdrawn. As a consequence of the withdrawal, the court did deal with the Application for stay of execution pending the review or setting aside of the judgment, rightly noting the withdrawal of the appeal. The court further noted in its ruling that the Defendant had asked it to make its determination without any regard to the appeal or prejudice thereto. It is therefore misleading for the Defendant to



claim that he had lodged an overwhelming appeal against the entire judgment of the court when in fact, the said appeal was withdrawn.

24. The Notice of Appeal dated 7<sup>th</sup> October, 2022 relates to the ruling of 23<sup>rd</sup> September, 2022. Since there is no indication that the said appeal was withdrawn, this court can only presume that there is an appeal pending in the superior court. The doctrine of res judicata is precluded from application where it can be shown that there is a new state of facts that did not exist at the time of the making of the previous decision. The ruling of the court delivered on 23<sup>rd</sup> September, 2022 and the Notice of Appeal arising therefrom are facts that did not exist at the time of the earlier decision. For this reason, going by the above analysis, the doctrine of res judicata is exempted from application in this instance.

**b. Whether the Defendant has satisfied the conditions for grant of an order of stay of execution pending appeal**

25. The power of a court to grant stay of execution is discretionary, which discretion must not be exercised in a way that prevents a party from pursuing its appeal. The purpose of an order of stay of execution is to preserve the subject matter in dispute so that the same is not rendered nugatory should the appeal overturn the trial court's decision. The court however, must balance the interests of the parties and considering the circumstances of the case. The Court of Appeal in *RWW vs EKW (2019) eKLR* addressed itself on the matter of stay of execution pending appeal as hereunder:-

“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.<sup>9</sup> 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.”

26. The law governing the granting of orders for stay of execution pending appeal is to be found at Order 42 Rule 6(1) and (2) of the Civil Procedure Rules which stipulates as follows: -

“6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.”

27. In summary therefore, the conditions for grant of an order for stay of execution pending appeal are that:

- i. Sufficient cause has been established
- ii. The court is satisfied that substantial loss may result unless the order is made
- iii. The application has been made without unreasonable delay; and
- iv. Such security as the court orders for the due performance of such decree or order

28. The first requirement is that sufficient cause must be established for the grant of the order of stay of execution. It is under this head that courts require that the intended appeal must be arguable, in other words that it raises triable issues. The importance of showing that an appeal raises triable issues is that it establishes that the same would be rendered nugatory, should the decision of the appellate court overturn that of the trial court. The court does not go into determining the success of the Appeal, it is only interested in whether the appeal raises reasonable grounds. In *Kuko & another vs Ali & another; Robinson (Interested Party) (Civil Application E023 of 2023)* (2024) KECA 305 (KLR) the Court of Appeal held that:

“8. The principles applicable in the exercise of this courts unfettered discretion under Rule 5(2) (b) to grant an order of stay of proceedings are now well settled. Firstly, the applicant has to satisfy that it has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice, that it is an appeal that is not frivolous and or idle. Secondly, an applicant has to demonstrate that unless an order of stay of proceedings is granted the appeal or intended appeal would be rendered nugatory. See the case of Multimedia University & Another Vs. Professor Gitile N. Naituli [2014] eKLR.”

29. The court went on to explain further that:-

“20. It follows therefore that, to succeed in an application for a stay of execution, the applicants must show that their intended appeal is arguable. Once this has been established, the applicants must also demonstrate that if their appeal were to be successful, it would be rendered nugatory absent stay. This principle was demonstrated in the case of Trust Bank Limited & Another v Investech Bank Limited & 3 Others [2000] eKLR.

In the case of Dennis Mogambi Mang'are v Attorney General & 3 Others [2012] eKLR, this Court held that:

“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration.”

On whether or not the applicants have established a valid basis for an arguable appeal, the applicants merely stated that they have an arguable appeal with high chances of success. They did not expound on the issues they intend to raise in



their appeal which they stated had already been filed. The respondents stated that the applicants were challenging a 30% share of the estate in question. To our minds, no single issue has been raised by the applicants in this application to show that they have an arguable appeal.”

30. The only way the trial court handling an application for stay of execution can determine whether an appeal raises triable issues, is to consider the grounds raised in the Memorandum of Appeal. Under Rule 84(1) of the Court of Appeal Rules on the institution of appeals, the Memorandum of Appeal ought to have been filed within 60 days from the date of lodging of the Notice of Appeal. This application having been brought almost 2 years after the filing of the said Notice of Appeal, this court presumes that a Memorandum of Appeal was filed for there to be a competent appeal. However, it is unclear whether the Memorandum of Appeal was in fact filed as the same was not exhibited in the instant application. Thus the court is unable to determine whether the grounds raised therein are triable. It follows therefore, that the Defendant failed on this ground.
31. In addition, Rule 6(2) of the Court of Appeal Rules requires that the Notice of Appeal be filed Seven (7) days from the date of the decision Appealed from. The ruling herein was delivered on 23<sup>rd</sup> September, 2022 whereas the Notice of Appeal dated 7<sup>th</sup> October, 2022 and although it is not clear the date it was filed, it shows that it was lodged in the same month. Even assuming that the Notice of Appeal was filed the same date, still that would make it 7 days late as the deadline for filing the same was 30<sup>th</sup> September, 2022. There is no indication that leave was sought to expand time within which to bring the appeal. Nevertheless, this court will restrain itself from entertaining any questions regarding compliance with statutory timelines in filing the Appeal or whether leave was obtained to file it out of time. These are questions for the Court of Appeal itself to deliberate on, and should thus be taken up with the superior court.
32. The second requirement is that the court has to be satisfied that substantial loss may result unless the order is made. In *Samvir Trustee Limited vs Guardian Bank Limited (2007) eKLR*, the court held that:-
- “It is my humble view that for the applicant to obtain a stay of execution, it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss.”
33. The alleged loss as can be gathered from the Defendant’s application and Supporting Affidavit is that his matrimonial home is built on the suit property and resides thereon with his family. He claims that evicting him will render them homeless. It is trite that execution is a legal process and a natural consequence of litigation. The Defendant cannot thus claim that he stands to lose his matrimonial home if the Plaintiff is allowed to proceed with execution and evict him as the basis for the element of substantial loss. Substantial loss was explained in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto (2012) eKLR*, that:-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

34. It is a fact of this case that the Defendant defaulted on a charge he had entered into with M/S Kenya National Assurance Co. Ltd using the suit property as security. The suit property and the matrimonial home standing thereon was therefore lost when the property was put up for sale vide public auction whereupon the Plaintiff purchased it. Execution herein would only be actualizing the said sale and the Plaintiff's ownership of the suit property, a fact that the judgment herein confirmed. The Court noted in the judgment herein that the Plaintiff was lawfully registered as the owner of the suit property and nullified the purported cancellation by the Land Registrar. The Defendant now being a trespasser thereon, was ordered to grant vacant possession thereof to the Plaintiff, and when he failed to do so, he was served with a notice to vacate the suit property. Execution herein is a legal process that will put the Plaintiff who is now the owner of the suit property in possession. For the foregoing reasons, the Defendant has also failed to prove substantial loss.
35. On whether the current application for stay was made without unreasonable delay, it must be noted that the ruling appealed against was delivered on 23<sup>rd</sup> September, 2022. The application herein was filed on 5<sup>th</sup> April, 2024 approximately 1 year 6 months from the date of the ruling. No explanation or reason has been given why the Defendant waited that long to bring the application, given that he claims that his matrimonial home where he resides with his family stands on the suit property. The Defendant has not explained what he has been doing during that period, and it is obvious that he felt no threat that he would lose his home. In any event, the Defendant was given sixty days stay of execution in the judgment and still made no plans to vacate the property.
36. Later, when his application for stay of execution and review of judgment was dismissed and he filed the Notice of Appeal, he made no effort to seek a stay, choosing instead to sit pretty and enjoy the land at the expense of the Plaintiff. He only moved to this court when he was served with a Notice to vacate the property. In any event, the Notice to vacate which is dated 4<sup>th</sup> January, 2024 and served on his Advocates on record on 8<sup>th</sup> January, 2024 gave the Defendant a further Sixty (60) days to vacate the property. As per the Notice, the Defendant had up to 4<sup>th</sup> March, 2024 to vacate the suit property. He not only failed to comply but he waited two more months past the deadline to file the instant Motion. No reasonable explanation has been given for the long delay in bringing this instant application, or at all, and the result is that the Defendant has failed on the condition of timeous filing of the application.
37. As to security of costs, in *Focin Motorcycle Co. Limited vs Ann Wambui Wangui & Another* (2018) eKLR, the court held that:-
- “Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”
38. The Plaintiff has correctly pointed out that the Defendant did not express any willingness to furnish or abide by any order made by the court with regards to security for costs. There is no guarantee that even if the court is reasonable in the order for security as the Defendant asked of it, that the Defendant will abide by such an order.



39. Consequently, the Defendant has not satisfied any of the conditions for the grant of the order of stay pending appeal. For foregoing reasons, he has not demonstrated that he is entitled to the orders sought in the application dated 5<sup>th</sup> April, 2024. The upshot is that the said Application lacks merit and is therefore dismissed with costs to the Plaintiff.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2024.**

.....

**J.M ONYANGO**

**JUDGE**

**In the presence of;**

1. Mr. Simiyu for the Plaintiff/Respondent
2. No appearance for the Defendant/Applicant

Court Assistant: Brian

