



REPUBLIC OF KENYA



**Mwanzia v Mwakio & another (Land Case Appeal E015 of 2024)
[2024] KEELC 6175 (KLR) (Environment and Land) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6175 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
LAND CASE APPEAL E015 OF 2024
EK WABWOTO, J
SEPTEMBER 24, 2024**

BETWEEN

ANN SYOMBUA MWANZIA APPELLANT

AND

WILHELM MWANDAU MWAKIO 1ST RESPONDENT

SIBLINAH MAJALA MWANDAU 2ND RESPONDENT

RULING

1. The application before this court is a Notice of Motion dated 28th day of August 2024 seeking for the following orders:-
 1. Spent...
 2. That this Honorable court be pleased to stay or set aside the contempt of court order dated 28th August 2024 and any consequential orders thereto pending hearing and determination of this application.
 3. That this Honorable court be pleased to order the immediate release of the Applicant from being remanded at Taveta Police Station pending hearing and determination of the Application and the Appeal.
 4. That this Honorable court be pleased to stay or set aside the contempt of court order dated 28th August 2024 and any consequential orders thereto pending hearing and determination of the Appeal.
 5. That costs of this application be borne by the respondents.



2. The application is brought on the grounds on the face of it and it is supported by the affidavit sworn on 16th September 2024 by Mwazighe Micar.
3. In opposition to the said application, the Respondents filed a Replying Affidavit sworn by Siblinah Majala Mwandau on 19th September 2024.
4. During the plenary hearing of the application, Learned Counsel Mr. Mwandotto made oral submissions on behalf of the Applicant while Learned Counsel Mr. Omulama made oral submissions on behalf of the Respondents.
5. It was the Applicant's case that on 28th August 2024, the lower court delivered a ruling citing her in contempt of the orders and decree issued on 15th June 2023 and ordered her to be remanded for 6 months and or pay a fine of Kshs. 200,000/=
6. The Applicant contended that no penal notice was issued warning her of any consequences and that she had not been granted an opportunity to be heard.
7. The Respondent in opposition to the application submitted that the application is an abuse of the court process and that the Applicant has no right of audience for failing to purge the contempt.
8. As to whether or not the Applicant had not been granted an opportunity to be heard, it was submitted that the Applicant had participated in the application that had been filed before the lower court and as such the trial court found her to be in contempt.
9. In respect to the lack of a penal notice it was submitted that courts have previously held that knowledge of the Order is sufficient and failure to include a penal notice cannot be a reason for non-compliance. The court was urged to dismiss the application.
10. The court has considered the application, rival affidavits filed and oral submissions made and is of the view that the main issue for consideration is whether the application is merited to enable this court grant the reliefs sought.
11. Under Order 42 rule 6 of the Civil Procedure Rules, an applicant seeking a stay order pending appeal is duty bound to prove the following elements; that he or she is likely to suffer substantial loss in the event a stay order is not granted; that the application has been filed within reasonable time; that security for due performance of the decree or order has been deposited or a proposal to do so has been made and or, whether after taking into consideration the circumstances of the case, there is any other sufficient cause to warrant the court to issue the order of stay.
12. It must however be borne in mind that to grant or not to grant a stay of execution order is a matter of discretion by the court seized of the matter. See [*Butt v Rent Restrictions Tribunal CA No Nai 6 of 1979*](#) where the court held that the prayer to grant stay of execution is discretionary and should be exercised in such away as not to prevent an appeal. In other words, the court must reasonably balance both the applicant's and respondent's interest and weigh on the merits and demerits in granting or not granting the order.
13. However, it is settled law that proof of likelihood of suffering substantial loss is the cornerstone for granting stay of execution orders. In the case of *Kenya Shell Limited v Benjamin Karuga Kabiru & another* [1986] eKLR Platt J had this to say:

“ ... 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 unless an appeal would be rendered nugatory by some other event. Substantial loss in



its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without evidence it is difficult to see why the respondents should be kept out of their money.”

14. Similar position was held in the case of Halai and another v Thornton and Turpin [1963] Limited [1990] eKLR 365 where the court expressed itself that:

“Thus, the Superior court’s discretion is tethered by three conditions. firstly, the appellant must establish sufficient cause; secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant a stay, and thirdly the applicant must furnish security”.

15. The Applicant herein has not appealed against the judgment and decree of 15th June 2023 issued by the lower court which forms the subject of execution. The Applicant has moved this court in respect to a Ruling that was delivered by the lower court on 28th August 2024, seeking to stay and or set aside the orders that found her to be in contempt of court.

16. In the course of these proceedings it emerged that the Applicant had already been committed to serve 6 months in prison after failing to pay a fine of Kshs. 200,000/=.

17. The Applicant argued that the orders upon which she was cited for contempt did not have penal notice and further that she was not granted an opportunity to be heard in respect to the contempt proceedings before the lower court. As to whether or not the Applicant was granted an opportunity to be heard, the court has perused the Ruling delivered by the lower court on 28th August 2024 and the court notes that the Learned Magistrate held that “...the Defendant failed to put in a reply to the application where she was cited for contempt in which the Plaintiff sought to have her incarcerated for six months.” The said ruling does not indicate whether the Learned Magistrate was indeed satisfied that the Applicant herein had been properly served noting the consequences of the nature of contempt proceedings and in the circumstances the court is of the view that the Applicant may be prejudiced with the continued incarceration since her liberty is at stake should the appeal succeed.

18. Contempt of Court is in the nature of criminal proceedings therefore, proof of a case against a contemnor is higher than that of a balance of probability since liberty of the subject is at stake. See the case of Gatharia K. Mutikika v Baharini Farm Limited [1985] KLR 227.

19. In view of the foregoing, it is evident that any prejudice that may be suffered if the orders sought are not granted, will be on the part of the Applicant. Considering that the Applicant has already been committed to 6 months in prison for contempt after failing to pay the fine of Ksh 200,000/- it will be an academic exercise for this court to grant a stay against the ruling of orders issued by the lower court on 28th August 2024. The court can only consider at this stage whether or not to grant the order for release of the Applicant pending the hearing and determination of her appeal.

20. In a nutshell, the application dated 16th September 2024 partly succeeds as follows: -

- a. That pending the hearing and determination of this Appeal, the Applicant herein, Ann Syombua Mwanzia is hereby released on condition that she deposits security of Kshs. 50,000/= in court.
- b. The Applicant to file and serve her record of appeal within 30 days from today.
- c. Costs of this application shall abide the outcome of the appeal.

It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 24TH DAY OF SEPTEMBER 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Mwazinghe for the Applicant.

Mr. Omulama for the Respondents.

Court Assistant; Mary Ngoira and Norah Chao.

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