



Salim v Co-operative Bank of Kenya Limited & 2 others (Environment & Land Case 193 of 2021) [2024] KEELRC 2291 (KLR) (23 September 2024) (Ruling)

Neutral citation: [2024] KEELRC 2291 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 193 OF 2021
LL NAIKUNI, J
SEPTEMBER 23, 2024**

BETWEEN

HAMRAN AHMED SALIM PLAINTIFF

AND

THE CO-OPERATIVE BANK OF KENYA LIMITED 1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS 2ND DEFENDANT

THE REGISTRAR OF LANDS, KILIFI 3RD DEFENDANT

RULING

I. Introduction

1. This Honorable Court was tasked to make a determination on the filed Notice of Motion application dated 29th February, 2024 by Co – operative Bank of Kenya Limited, the 1st Defendant/Applicant herein. It was brought under the dint of Sections 1A, 1B, 3, 3A & 63(e) of the Civil Procedure Act Cap. 21 and Order 42 Rule 6 of the Civil Procedure Rules 2010.
2. Upon service of the application to the Respondents, while opposing it, they responded through filing of a Replying Affidavit dated 8th May, 2024.

II. The 1st Defendant/Applicant's case

3. The 1st Defendant/Applicant sought for the following orders: -
 - a. Spent.
 - b. Spent.
 - c. There be a stay of execution of the Judgment delivered on 13th February 2024, and the resulting decree, pending the hearing and determination of the intended appeal to the Court of Appeal.



- d. The costs of this application be costs in the intended appeal.
4. The application by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the Supporting Affidavit of –DUNCAN MATISERO, sworn and dated the same day with the application. The Applicant averred that:
- a. The Honourable Court, vide a Judgment delivered on 13th February 2024, dismissed the 1st Defendant's Counter - Claim and entered Judgment in favour of the Plaintiff herein.
 - b. The 1st Defendant/Applicant was aggrieved by the whole Judgment and had filed a Notice of Appeal dated 14th February 2024 at the Court of Appeal.
 - c. The 1st Defendant/Applicant believed that the intended appeal was not frivolous seeing that some of the points to be taken on appeal include:-
 - i. Whether the Learned Judge erred in declining jurisdiction to entertain the 1st Defendant/Applicant's Counter - Claim.
 - ii. Whether the Learned Judge erred in failing to determine the validity of the Plaintiff's suit absent summons to enter appearance.
 - iii. Whether the Learned Judge erred in finding that the Plaintiff had proven fraud against the 1st Defendant.
 - iv. Whether the Learned Judge erred in awarding general damages for conversion without interrogating whether that tort applied to land.
 - v. Whether the Learned Judge erred in awarding exemplary damages, particularly against people who were not parties to the suit
 - d. Despite the intended appeal, which was arguable, the Plaintiff had commenced extracting the decree in readiness for execution. A draft of the decree was sent to the 1st Defendant'/Applicants counsel for approval.
 - e. The Plaintiff would immediately thereafter require the Land Registrar Kilifi to implement the order directing the 3rd Defendant to cancel the charge in favor of the 1st Defendant.
 - f. Additionally, the Plaintiff would, either after taxation or upon waiving costs awarded, enforce the pecuniary awards against the 1st Defendant/Applicant.
 - g. If either of the facts in paragraphs 5 or 6 above were to happen, the 1st Defendant/Applicant would suffer substantial loss because:-
 - i. The Plaintiff would easily dispose the suit property for it will be unencumbered. The 1st Defendant/Applicant's charge would never be reinstated if the intended appeal succeeded after the property was sold.
 - ii. Apart from the suit property, which was charged to secure in excess of Kenya Shillings Eleven Million Three Twenty Five Thousand Six Seventy Seven Hundred and Fifty One Cents (Kshs. 11,325,677.51/=) the 1st Defendant/Applicant knew no other assets owned by the Plaintiff.
 - iii. There was therefore considerable doubt that the Plaintiff would be able to refund the pecuniary awards if paid out to him.



- iv. The occurrence of (a), (b) or (c) above would render the 1st Defendant/Applicant's success on the intended appeal an academic exercise.
- v. The 1st Defendant/Applicant's right to a fair hearing would therefore had been infringed.
- h. Upon delivery of the Judgment, the court granted an oral application for stay of execution pending the filing of a formal application. The stay of execution was to last for fourteen (14) days until 27th February 2024.
- i. This application, brought just two (2) days after the fourteen (14) days, had been brought without unreasonable delay.
- j. The 1st Defendant/Applicant was tier one commercial bank capable of paying the pecuniary award made here, in case its intended appeal was unsuccessful. Nonetheless, the 1st Defendant/Applicant was ready to abide by such order as to security as the court may deem just in the circumstances.
- k. It was in the interests of justice and fairness that the application be heard urgently and orders issued in the interim and ultimately

III. The Plaintiff/ Respondent's case

- 5. The Plaintiff/Respondent opposed the Notice of motion application dated 8th May, 2024 through an 18th paragraphed Replying Affidavit sworn by HAMRAN AHMED SALIM, the Plaintiff/ Respondent herein. The deponent averred as follows:-
 - a. The principles guiding the grant of a stay of execution pending appeal are well settled in law and had not been met by the Applicants.
 - b. The Application was an attempt by the Applicant to deny the Plaintiff the fruits of the Judgment delivered on 13th February 2024.
 - c. The process of extracting the decree as required by law was not in itself a reason and/or ground for grant of stay of execution of the Judgment.
 - d. The Applicant had not demonstrated any loss, financial or otherwise, that it would suffer should this Honourable Court decline the invitation to stay the execution of its Judgment.
 - e. The Plaintiff had been denied the use of its land owing to the irregular, wrongful and illegal charge by the 1st Defendant and therefore stay of execution of the Judgment would again mean a continuation of the wrongful actions of the Defendant.
 - f. The Plaintiff had a legal right to use and utilize its property especially after this Honourable Court property and correctly held that the Charge by the Applicant over the suit property was in itself wrongful and irregular.
 - g. This Honourable Court ought to decline the invitation by the Applicant to stay execution of the Judgment for there was no sufficient cause and or reason demonstrated by the Applicant to warrant this Honourable Court to exercise its discretion in granting the said orders.
 - h. The Applicant's interest in this matter was not the suit property, but payment of the monies advanced to the 1st Defendant/Applicant in the Counter - Claim.



- i. The Applicant would not suffer any prejudice if the Orders sought were not granted, as it still had a Claim for payment of the money advanced in its Appeal.
- j. The Applicant had not provided any security for satisfying the Decree as required by law and thus fell short of the principles for grant of stay of execution of the Judgment
- k. The Applicant had not deposited in court any such security for the due performance of such decree or order as may ultimately be binding on the applicant nor had they shown their intention to do so.
- l. However, in the unlikely event that this Honourable Court found merit in the Application, we beseech this Honourable Court to issue the following conditional orders:-
 - i. Payment of the Half Decretal Amount to the Plaintiff pending hearing and determination of the Appeal;
 - ii. Alternatively, for the entire decretal amount to be deposited in a joint interest earning account of the Plaintiff's and the 1st Defendant/Applicant firm of Advocates;
 - iii. Discharge of the Charge wrongfully registered against the suit property;
 - a. The 1st Defendant/Applicant's application was bad in law, devoid of any merit and ought to be dismissed with costs to the Plaintiff/Respondent.
 - b. In the event this court was persuaded to grant the orders of stay as sought, then this Honourable court ought to order that a security for costs be deposited in a joint interest earning account pending the determination of the appeal.

IV. Submissions

- 6. On 29th May, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 29th February, 2024 be disposed of by way of written submissions and all the parties complied. For some reason or the other, by the time of penning down this Ruling, the Honourable Court had not been able to access any of the filed submissions by the parties herein. Thus, it proceeded to make the determination based on its merit. Subsequently, on 24th June, 2024 a ruling date was reserved for 23rd September, 2024 accordingly.

V. Analysis & Determination.

- 7. I have carefully read and considered the pleadings herein by the 1st Defendant/Applicant, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
- 8. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
 - a. Whether the Notice of Motion application dated 29th February, 2024 seeking to stay execution of the Judgment made by Justice L. L. Naikuni delivered on 13th February, 2024 by this Honourable Court pending the hearing and determination of the Appeal is merited?
 - b. Whether the parties herein were entitled to the reliefs sought.
 - c. Who will bear the Costs of Notice of Motion application dated 29th February, 2024.



IssueNo. a). Whether the Notice of Motion application dated 29th February, 2024 seeking to stay execution of the Judgment made by Justice L. L. Naikuni delivered on 13th February, 2024 by this Honourable Court pending the hearing and determination of the Appeal is merited

9. Under this Sub – title, the main gist of the matter is on whether or not to grant Stay of Execution from a delivered Judgement or Decree of the Court. The law concerning stay of execution pending Appeal is found in the provision of Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, 2010 which stipulates as follows:

“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 sub rule (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.

10. It is trite law that stay of execution pending appeal is a discretionary power bestowed upon this court by the law. In the initial stages of building Jurisprudence around this legal aspect, the Court of Appeal in the case of “Butt v Rent Restriction Tribunal [1982] KLR 417” gave guidance on how a court should exercise the said discretion and held that:

- “ 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the Judge’s discretion.
- 3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- 4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.



5. The Court in exercising its powers under Order XLI rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
11. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in the provision of Sections 1A and 1B of the Civil Procedure Act, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Civil Procedure Act, cap. 21 or in the interpretation of any of its provisions.
12. The provision of Section 1A (2) of the Civil Procedure Act provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under the provision of Section 1B some of the aims of the said objectives are:- “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
13. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to which:
 - i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
 - ii. The application is brought without undue delay and
 - iii. 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.
14. I find issues for determination arising therein namely:
 - i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of judgment pending Appeal.
 - ii. What orders this Court should make
15. The purpose of stay of execution is to preserve the substratum of the case. In the case of “Consolidated Marine v 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”.
16. As such, for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.



17. As for the applicant having to suffer substantial loss, in the case of “Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga [1982-1988] KAR 1018” the Court of Appeal pronounced itself to the effect that:

“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 rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

18. The Court of Appeal in the case of “Mukuma v 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.”

19. The Applicant has a burden to show the substantial loss they are likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Applicant to the Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. {See the case of “Absalom Dora v Turbo Transporters [2013] (eKLR)”}.

20. As F. Gikonyo J stated in the case of:- “Geoffery Muriungi & another v John Rukunga M’imonyo suing as Legal representative of the estate of Kinoti Simon Rukunga (Deceased) [2016] eKLR” and which wisdom I am persuaded with: -

“.....the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or “rendering the appeal nugatory” within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal...”

Issue No.b). Whether the parties herein were entitled to the reliefs sought

21. Under this sub heading, the Honourable Court now wishes to apply the above legal principles to the instant case. From the proceedings, the Applicant herein filed an application dated 29th February, 2024 seeking orders to stay the Judgment in this matter delivered by this Honourable Court on 13th February, 2024. According to the applicant, the said Judgment dismissed the 1st Defendant’s counterclaim and entered judgment for the Plaintiff. The 1st Defendant is aggrieved by the whole judgment and has filed a Notice of Appeal dated 14th February, 2024.

22. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under Order 42 Rule 6. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicants unless stay of execution is granted; and thirdly such security as the court orders for the due performance of such decree or order as may ultimately be binding on them has been given by the Applicant.

23. Regarding the pre-requisite conditions evolving from the law is on substantial loss occurring to the Appellants. The court has already deliberated on this aspect and taken into consideration of it from



the case of:- “Kenya Shell Limited (Supra)”. From the surrounding facts and inferences of the instant case, I am strongly persuaded that indeed, the 1st Defendant/Applicant has proved that it will suffer substantially if the orders for stay of the execution are not granted as prayed. For that reason, the application should succeed.

24. On the second issue to determine is where the application for stay of execution was made without inordinate delay. From the record, the judgment being appealed against was delivered on 13th February, 2024 and the application herein was filed on 29th February, 2024, the Notice of appeal on 14th February, 2024. This application was filed after about 16 days after the judgment. Clearly, in this Honourable Court’s assessment, the application was made timeously without any delay. Indeed, the application was filed expeditiously and without undue delay.
25. On the last condition as to provision of security, I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. Has made no provisions for security in his application.
26. This provision of the law notwithstanding from the face value, this court is not bound by the type of security offered by an applicant. It can make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal.
27. In saying so I seek refuge from the case of “Aron C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates” 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.”

28. Therefore, in the interest of justice and fairness, it behooved the Applicant herein to furnish security as stipulated by the law. Stay of execution is exactly what it states. It is an order of the court barring a Decree Holder from enjoying the fruits of his Judgment pending the determination of some issue in contention. It matters not whether the issue in contention is the amount awarded in the Judgment Debt, or liability or legality of the extracted warrants as in this case. Where a party seeks to stay execution, the Court must be guided by the parameters set out in the provision of Order 42 Rule 6 of the Rules.
29. The Court observed in the case of:- “Gianfranco Manenthi & Another v Africa Merchant Assurance Company Limited [2019] eKLR”, thus:-

“..... 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 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 degree in order to enjoy the fruits of his judgment in case the appeal fails.

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 judgement involves a money decree. The court would order for the release of the deposited decretal amount to 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. (Underlining mine for emphasis)

30. As already demonstrated in the case of “James Wangalwa & Another v Agnes Naliaka Cheseto (Supra)” the three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive and not disjunctive. It is my finding that the Applicant herein, though they brought this Application without undue delay and adequately demonstrated the substantial loss that they would suffer as stipulated by sub-rule 2b.
31. According to the Plaintiff/Respondent none of the conditions above have been fulfilled by the Applicant herein. The application does not establish any factor which shows 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 Applicant has not demonstrated any loss, financial or otherwise, that it will suffer should this Honourable Court decline the invitation to stay the execution of its Judgment.
32. In the result, I am persuaded to grant the order for stay of execution but strictly on condition that the Applicants shall furnish security being a reasonable sum equivalent to the outstanding amounts in contention being a sum of Kenya Shillings Thirteen Million (Kshs. 13,000,000/-).

IssueNo. c). Who will bear the Costs of Notice of Motion application dated 29th February, 2024.

33. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh v Tarchalan Singh (2014) eKLR” and Cecilia Karuru Ngayo v Barclays Bank of Kenya Limited, [2014] eKLR”.
34. In the case of “Hussein Muhumed Sirat v Attorney General & Another [2017] eKLR”, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In this case, this Honourable Court has reserved its discretion in not awarding costs.

VI. Conclusion & Disposition

35. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to the Preponderance of Probabilities and balance of convenience. Ultimately in view



of the foregoing detailed and expansive analysis to the application, this court arrives at the following decision and makes the following orders:-

- a. That the Notice of Motion application dated 29th February, 2024 be and is hereby found to have merit and hence allowed subject to the fulfilment of the Pre – Conditions stated herein.
- b. That this Honourable Court do hereby issue an order to stay the execution of its decree arising from the Judgment of this Honorable delivered on 13th February, 2024 pending the hearing and determination of the Intended appeal in the Court of Appeal.
- c. That an order be and is hereby made directing the 1st Defendant/Applicant to deposit a sum of Kenya Shillings Thirteen Million (Kshs. 13,000, 000/-) as security deposit for the performance of the decree from the Judgement of this Honourable Court in a Joint Escrow bank account of a reputable Commercial bank to be held in the names of the Law firms of Messrs. Muriu Mungai & Company Advocates and the Messrs. Khalid Salim & Company Advocates Within The Next Thirty (30)days from the delivery of this Ruling pending the hearing and determination of the appeal.
- d. That failure to adhere with the condition under Clause (c) herein above of this Ruling the Notice of Motion application dated 29th February, 2024 shall automatically stand dismissed thereof and execution of the Decree shall ensue procedurally as provided for by law
- e. That there shall be no orders as to costs.

It Is So Ordered Accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 23RD DAY OF SEPTEMBER 2024.

.....
HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Kongere Advocate for the 1st Defendant/Applicant.
- c. M/s. Nafula holding brief for Mr. Khalid Salim Advocate for the Plaintiff/ Respondent.

