



**Kemboi v Kimetei (Environment & Land Case 006 of 2024)
[2024] KEELC 6039 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6039 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 006 OF 2024
A OMBWAYO, J
SEPTEMBER 19, 2024**

BETWEEN

BENARD KIPSANG KEMBOI APPELLANT

AND

VERONICA KIMETEI RESPONDENT

RULING

Brief Facts

1. The Applicant filed the instant application dated 5th April, 2024 seeking the following orders:
 1. Spent.
 2. Spent.
 3. That this Honourable court be pleased to issue an order of extension of the stay of execution orders of the Honourable V.O Adet delivered on the 12th day of February, 2024 until hearing and determination of the appeal.
 4. That status quo be maintained pending determination of the Appeal.
 5. That the costs of this application be provided for.
2. The Application was based on grounds set out and supported by the Affidavit of Benard Kipsang Kemboi the Appellant/Applicant herein sworn on 5th April, 2024. The Applicant stated that as advised by his advocates, judgment was delivered on 12th January, 2024 where the court ordered him to vacate the suit property failure which he would be evicted within 30 days. He stated that being aggrieved by the judgment, he filed an appeal. He further stated that if the judgment was not stayed, the appeal shall be rendered nugatory. He also stated that he also filed an application in the subordinate court where he was granted conditional stay orders of 60 days through an order dated 12th February, 2024.



3. The Applicant further stated that he has been in occupation of the suit property as it is their residence and that if the said orders are not extended, there is risk of his family being homeless. He stated that if the stay orders are not extended, the Respondent would proceed to execute the orders without further notice rendering the appeal nugatory. The Applicant also stated that he would be willing to abide by any condition set by this court. In conclusion, he urged the court to exercise its discretion and issue stay of execution orders.

Response

4. The Respondent did not file any response.

Submissions

5. Counsel for the Applicant filed his submissions dated 19th April, 2024 where he gave a background of the case and identified two issues for determination. First is whether the Applicants will suffer any loss if the application is not allowed. Counsel submitted that the suit property was the only residence for the Applicant and his family and in the event the said orders are not stayed or set aside, the Applicant and his family would be homeless. He relied on the case of *Mutua Kilonzo V Kioko David Machakos* [2008] eKLR and *Kenya Shell Limited V Benjamin Karuga Kibiru & another* [1986] eKLR. The Applicant went on to submit on issues which were not relevant to the instant application.

Analysis and Determination

6. This court has carefully considered the application and the main issue for determination is whether the order for stay of execution pending appeal should issue.
7. This court is alive to the fact that the principles governing the grant of an order for stay of execution pending appeal are now settled. The relevant law is provided for under Order 42 Rule 6 1(2) of the *Civil Procedure Rules* which states as follows: -
 - (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."
8. In *RWW V EKW* (2019) eKLR the court held as follows:

".....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."
9. It is noteworthy that grant of an order for stay of execution pending appeal is discretionary in nature whose purpose is to preserve the subject matter of the appeal. In this case, judgment was delivered on 12th January, 2024 and the Defendant/Applicant filed a Memorandum of Appeal on 19th January, 2024, record of appeal on 9th August 2024 and the instant application on 12th April, 2024. It is a fact that the time from which judgment was delivered to the time this application was brought before



court, the same translates to about three (3) months. This court finds that the application has thus been brought without unreasonable delay.

10. On the issue of substantial loss, the Applicant averred that he stands to suffer substantial loss if the Respondent executes the judgment since together with his family they would be rendered homeless as a result of the eviction. It is not in dispute that there was a stay of execution order of 60 days was issued by the subordinate court which have since lapsed. It is therefore this court's view that as long as the appeal is still pending, execution of the judgment may cause the Applicant to suffer loss due to eviction. It is not in dispute that the Applicant has also expressed that he is ready to abide by the terms and conditions that the court shall be inclined to impose.
11. The Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how such discretion should be exercised as follows:
 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, 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."
12. In the upshot, this court shall exercise its discretion and instead of extension of the stay orders, I order that the status quo be maintained pending the hearing and determination of the appeal. It is so ordered. The appeal is admitted accordingly. The lower court file to be availed within 10 days. In the meantime, the appellant to file and serve submissions within 15 days, the respondent to file and serve within 15 days of service, judgment on 31 of October 2024.

RULING DATED, SIGNED AND DELIVERED THIS 19TH DAY OF SEPTEMBER 2024

A.O.OMBWAYO

JUDGE

