



Co-operative Bank of Kenya Limited v Mwangangi (Environment and Land Appeal E012 of 2023) [2024] KEELC 7179 (KLR) (29 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7179 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E012 OF 2023
TW MURIGI, J
OCTOBER 29, 2024**

BETWEEN
CO-OPERATIVE BANK OF KENYA LIMITED APPLICANT
AND
JOB WILSON MWANGANGI RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion dated 17th January, 2024 brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules in which the Appellant/Applicant seeks the following orders: -
 - 1) Spent.
 - 2) Spent.
 - 3) That there be a stay of execution of the court's judgment/decree in Kilungu PMCC ELC Case No E019 of 2021 (Job Wilson Mwangangi v Co-operative Bank of Kenya Ltd) delivered on 8th December, 2023 pending the hearing and determination of the appeal herein.
 - 4) That the costs of this application be in the cause.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Philip M. Mulwa Advocate sworn on even date.

The Applicant's Case

3. The Applicant averred that being aggrieved by the judgement delivered on 8th December, 2023 in Kilungu PMCC ELC Case No E019 of 2019 it lodged an Appeal to this court on the issues raised before the trial court. According to the deponent, the trial court did not grant a stay of execution at the time it delivered the judgment.



4. He further averred that the Respondent instructed auctioneers to execute the decree who have since served a proclamation notice upon the Appellant. That unless a stay of execution is granted, execution may proceed and the Respondent may be unable to refund the decretal sum if the appeal is eventually heard and allowed.
5. He contended that the appeal raises valid points of law and has overwhelming chances of success. He further contended that the application has been made without unreasonable delay and urged the court to allow the same as prayed.

The Respondent's Case

6. The Respondent filed a replying affidavit sworn on 20th March, 2024 in opposition to the application. He averred that the application is untenable as the order of stay of execution is in respect of costs. He contended that the court has no jurisdiction to grant a stay of execution on costs unless the application is made through a reference in accordance with Rule 11 of the [*Advocates \(Remuneration\) Order, 1962*](#). He further averred that the reliefs sought have been overtaken by events as the Appellant has already paid the costs.
7. The Respondent contended that there is nothing to stay since the trial court awarded declaratory orders owing to the fact that the Respondent and his family are in possession of the suit property. It was further contended that the Applicant has not met the conditions for the grant of the orders sought. The Respondent averred that he is in possession of the suit property together with his siblings and hence the allegation that his whereabouts are unknown is baseless. He urged the court to dismiss the application with costs.
8. The application was canvassed by way of written submissions.

The Appellant's Submissions

9. The Appellant filed its submissions dated 19th April, 2023.
10. On its behalf, Counsel submitted that the Applicant has met the conditions set out in Order 42 Rule 6 (2) of the [*Civil Procedure Rules, 2010*](#).
11. On the first condition, Counsel submitted that the Applicant will suffer substantial loss if it releases the title deed for the suit property as the Respondent may dispose the land to third parties. Counsel submitted that the title deed was used to secure a loan facility and that recovery of the same will be difficult if this court finds that the appeal is merited. Counsel argued that the appeal will be rendered nugatory if an order of stay of execution is not granted.
12. Counsel went on to submit that the application has been made without unreasonable delay as judgment was delivered on 8th December, 2023 while the application herein was filed on 17th January, 2024.
13. On security for costs, Counsel argued that no security is due since the Appellant has already paid the costs of the suit.
14. Concluding his submissions, Counsel urged the court to allow the application as prayed. To buttress his submissions, Counsel relied on the case of [*James Wangalwa & another v Agnes Naliaka Cheseto*](#) [2012] eKLR



The Respondent's Submissions

15. The Respondent filed his submissions dated 14th May, 2024.
16. On his behalf, Counsel identified the following issues for the court's determination: -
 - i. Whether this Honourable Court has jurisdiction to grant the orders sought?
 - ii. Has the Appellant/Applicant established a case to warrant grant of the reliefs sought?
17. On the first issue, Counsel submitted that the Applicant ought to have filed a reference in accordance with Rule 11 of the *Advocates (Remuneration) Order, 1962*. Counsel argued that the order for stay of execution of costs has been overtaken by events since the Appellant had paid the costs.
18. Counsel further argued that the judgment herein is incapable of being stayed as the orders granted by the subordinate court are declaratory in nature.
19. With regards to the second issue, Counsel submitted that the Appellant has not met the threshold for grant of stay of execution pending appeal. Reference was made to the submissions filed in the subordinate court in support of the argument that it was a condition precedent to the letter of offer dated 24th September, 2010 that a comprehensive insurance policy be in place before the credit facility could be advanced.
20. Counsel urged the court to find that the Appellant has not established that it will suffer substantial loss if the reliefs sought are not granted. Counsel further submitted that the Appellant has not demonstrated that the appeal will be rendered nugatory because the Respondent and his family are people of means and being in possession of the suit property since birth, there was no possibility of interference thereof.
21. To buttress her submissions, Counsel relied on the list and bundle of authorities dated 14th May, 2023.

Analysis And Determination

22. Having considered the application, the respective affidavits and the rival submissions, the only issue that arises for determination is whether the Applicant has satisfied the conditions for the grant of stay of execution pending appeal.
23. The Applicant contended that this court lacks jurisdiction to grant the orders sought for the reason that the application herein is not a reference filed in accordance with Rule 11 of the *Advocates (Remuneration) Order 1962*. It is trite law that jurisdiction is everything and without it a court cannot take one step. It is not in dispute that the Appellant has paid the costs of the suit. The application herein shows that the Appellant is seeking for a stay of execution of the judgment/decree and not on costs. I therefore find that this court has the requisite jurisdiction to hear and determine this application. The Applicant is seeking for a stay of execution of the judgment delivered on 8th December 2023 pending the hearing and determination of the Appeal herein.
24. Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules* outlines the guiding principles to be met for the grant of stay and provides that;
 - 6(1) 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.

- 6(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 of costs for the performance of such decree or order as may ultimately be binding on him has been given by Applicant.
25. In considering an application for stay of execution, I am guided by the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 where the Court of Appeal gave the following guidelines;
- “The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicants at the end of the proceedings. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
26. The grant of an order of stay of execution is a discretionary one. In the case of *RWW v EKW* (2019) eKLR the court held that;
- “...the purpose of an application for stay of execution pending an appeal is to preserve the subject 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 the 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 damages.”
27. The court is therefore called upon to balance both the successful party so as not to hinder him from his fruits of judgment and those of the appellant whose appeal may succeed and be rendered nugatory if stay of execution is not granted.
28. Going by the above provisions of the law, it is clear that in an application for stay of execution pending appeal the applicant must satisfy the following three conditions: -
- a. The court is satisfied that substantial loss may result to the Applicant unless the order is made.
 - b. The application has been made without unreasonable delay.
 - c. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the Applicant has been given by the Applicant.



29. 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.”

30. The Court is therefore called upon to balance the rights of the successful party so as not to hinder him from his fruits of judgment and those of the Appellant whose Appeal may succeed and be rendered nugatory if stay of execution is not granted.

31. The court will now determine whether the Applicant has satisfied the conditions upon which the orders can be granted.

32. On the first condition of proving that substantial loss may result unless an order of stay is granted, the Applicant should not only state that it is likely to suffer substantial loss, it must prove that it will suffer substantial loss if stay orders are not granted.

33. In so finding, I am persuaded by the holding in the case of *Charles Wabome Gethi v Angela Wairimu Gethi* (2008) eKLR where the Court of Appeal held that:-

“...it is not enough for the Applicants to say that they live or reside on the suit land and they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”

34. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma v Abuoga* (1988) KLR as follows:-

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory”.

35. In *Tropical Commodities Suppliers Ltd and others v International Credit Bank Ltd (in Liquidation)* the court defined substantial loss as follows;

“substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal....”

36. The record shows that judgment was delivered on 8th December 2023 by Hon. Makoyo in the following terms:

1. An order hereby issues of permanent and perpetual injunction restraining the Defendant, its agents, servants, employees and/or otherwise howsoever from trespassing, letting, alienating, entering, occupying, residing on, remaining on or otherwise claiming title or interest whatsoever in the suit property or any part thereof and/or in any other way interfering with the Plaintiff's quiet possession of the suit property parcel of land known as LR No Machakos Konza North Block 1/1210, Makueni County.
2. A declaration hereby issues that the Defendant's actions of advertising the suit property through its authorized agents White Silver Auctioneers Being Lr No



Machakos Konza North Block 1/1210, Makueni County together with the buildings, fittings and investments therein, for sale by way of public auction, which sale by public auction to be conducted on 18th November, 2021 is unlawful.

3. A declaration that the loan facility for the suit property being LR No Machakos Konza North Block 1/1210, Makueni County was duly insured; and
 4. The Plaintiff shall have the costs of the suit together with interest.
37. The Applicant contended that the consequences of the judgment is that ,it has to release the title deed used to secure the loan. The Applicant is apprehensive that if it releases the title, the Respondent may dispose off the suit property to third parties which will make the process of recovery difficult in the event that the appeal herein succeeds.
38. The Applicant contended that it will suffer irreparable loss as the appeal would be rendered nugatory if the orders sought are not granted.
39. The Respondents on the other hand argued that the Applicant will not suffer any loss since it is not in occupation of the suit property and has no substantial structures thereon.
40. It is not in dispute that the Respondent is in possession of the suit property where he resides together with his siblings.
41. The Respondent has already commenced the execution process. The Applicant is apprehensive that if it releases the title deed, the Respondent may dispose off the suit property to third Parties. Both parties herein relied on the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR wherein the court observed as follows: -

“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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein v Chesoni* [2002] 1 KLR 867, and also in the case of *Mukuma v Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...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.”

42. Based on the material placed before me I find that the Applicant will suffer substantial loss if the Title deed is released to the Respondent and thereafter disposed off to third parties,



43. In an application for stay of execution pending Appeal, an Applicant must satisfy the Court that the application has been made without unreasonable delay. It is not in dispute that the judgment was delivered on 8th December 2023. The present application was filed on 17th January 2024. I find that it was filed without delay.
44. On the last condition as to the provision of security for costs, Order 42 Rule 6 (2) (b) of the Civil Procedure Rules is couched in mandatory terms to the effect that the Applicant must furnish security for the due performance of the order or decree. In the case of Arun C Sharma v Ashana Raikundalia T/A Raikundalia & Co. Advocates and 2 others (2014) eKLR, the court held that:-
- “The purpose of the security under Order 42 is to guarantee 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 applicant 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 a security for the 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.”
45. Although the Applicant has not offered security for costs, it can be directed by the court to do so. In the end I find that the Applicant has satisfied the conditions required for the grant of an order of stay of execution pending appeal.
46. The upshot of the foregoing is that the application dated 17th January 2024 is allowed in the following terms:-
- i. An order of stay of execution of the judgment/decreed delivered by Hon. F. Makoyo, SPM on 8th December, 2023 is hereby granted pending the hearing and determination of the appeal.
 - ii. The Applicant shall deposit the title deed for the suit property within seven(7) days from the date of this ruling.
 - iii. The Applicant shall deposit Kshs 200.000/= within fourteen (14) days from the date hereof and in default the stay orders shall automatically lapse.
 - iv. Costs to abide with the outcome of the Appeal.

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HON. T. MURIGI

JUDGE

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 29TH DAY
OCTOBER, 2024.**

In the presence of:

Kioko holding brief for Mutinda for the Applicant.

Atenga holding brief for Ms Kamende for the Respondent.

Court assistant Steve

