



Awke v Embakasi Ranching & another (Environment & Land Case E173 of 2022) [2024] KEELC 6851 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6851 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E173 OF 2022**

**JO MBOYA, J
OCTOBER 17, 2024**

BETWEEN

ABDULHAMID. S. AWKE PLAINTIFF

AND

EMBAKASI RANCHING 1ST DEFENDANT

JOHN MUCHIRI KANAI 2ND DEFENDANT

RULING

Introduction And Background:

1. The ruling herein relates to two [2] applications, namely, the application dated the 18th March 2024 filed by the 1st Defendant/Applicant; and the application dated the 6th June 2024 filed by the 2nd Defendant herein. Given that the ruling relates to two applications, it suffices to highlight the reliefs sought in respect of each application.
2. Vide the notice of motion application dated the 18th March 2024, the 1st Defendant/Applicant seeks for the following reliefs;
 - i.Spent
 - ii. That pending the hearing and determination of this Application, the Honourable Court be pleased to grant an Interim Order of Stay of Execution and/or Implementation of the Judgment of the Honorable Court rendered on the 26th day of February 2024, together with all consequential and/or incidental Orders.
 - iii. That the Honorable Court be pleased to grant Orders of Stay of Execution of the Judgment issued by this Honorable Court on the 26th day of February 2024, together with any consequential Orders arising therefrom and/or attendant thereto, pending the hearing and determination of the intended Appeal herein.



- iv. That the Honorable Court be pleased to grant any such further and/or other orders as may be deemed just, appropriate and/or expedient be granted.
 - v. Cost of this Application do abide the Appeal.
3. The subject application is premised on the grounds enumerated in the body thereof. In addition, the application is supported by the affidavit of Walter Kigera Waireri sworn; on the 18th March 2024 and wherein the deponent has annexed four [4] documents, including a copy of the notice of appeal filed on behalf of the 1st Defendant/Applicant.
 4. The Plaintiff/Respondent responded to the application beforehand vide a replying affidavit sworn on 24th July 2024 and wherein same [Plaintiff/Respondent] has contended inter-alia that the Applicant has neither established nor demonstrated the requisite ground to warrant the grant of an order of stay of execution pending the hearing and determination of the appeal.
 5. The second application is dated the 6th June 2024 and wherein the 2nd Defendant/Applicant seeks the following orders;
 - i.Spent.
 - ii. That there be a stay of execution of the decree herein and all other consequential orders pending the appeal in the Court of Appeal.
 - iii. That costs of the application be provided for.
 6. The instant application is anchored on the various grounds which have been enumerated in the body thereof. Furthermore, the application is supported by the affidavit of one John Muchiri Kanai [the deponent] sworn on the 6th June 2024 and to which the deponent has annexed three [3] sets of documents including a copy of a letter bespeaking proceedings and a notice of appeal.
 7. The Applications beforehand came up for directions on the 15th July 2024 whereupon the advocates for the respective parties agreed to canvass and dispose of same vide written submissions. In this respect, the court thereafter proceeded to and circumscribed the timelines for the filing and exchange of written submissions.
 8. Suffice it to point out that the Applicants proceeded to and filed written submissions dated the 18th July 2024; 5th September 2024 and whereas the Plaintiff/Respondent filed written submissions dated the 29th July 2024. For coherence, the three [3] sets of written submissions form part of the record of the court.

Parties' Submissions:

1st Defendant's/applicant's Submissions:

9. The 1st Defendant/Applicant filed written submissions dated the 18th July 2024 and wherein same [1st Applicant] has adopted the grounds contained at the foot of the application and reiterated the contents of the supporting affidavit. In addition, the 1st Applicant has highlighted and canvassed two [2] salient issues for consideration by the court.
10. Firstly, learned counsel for the 1st Applicant has submitted that the dispute beforehand touched on and concerned ownership of the suit property, namely, L.R No. Nairobi Block 105/14265 [formerly known as Plot C 163]. Furthermore, learned counsel for the 1st Applicant has submitted that the court



has since ordered and directed that the suit property be transferred and registered in favour of the Plaintiff/Respondent.

11. It has been contended that the implementation and enforcement of the judgment and decree of the court will culminate into the suit property being transferred to and registered in the name of the Plaintiff/Respondent. In this regard, learned counsel for the 1st Applicant has submitted that in the event the suit property is transferred and registered in the name of the Respondent, then the Plaintiff/Respondent shall be at liberty to alienate and dispose of the suit property.
12. Additionally, it has been submitted that in the event that the Plaintiff/Respondent is registered as the owner of the suit property in accordance with the judgment and decree of the court, then the 1st Applicant herein will be prejudiced and subjected to grave injustice.
13. In the premises, learned counsel for the 1st Applicant has submitted that the execution of the judgment and decree of the court shall therefore occasion substantial loss to the 1st Applicant and hence the necessity to grant an order of stay of execution pending the hearing and determination of the appeal.
14. In support of the submissions that substantial loss shall accrue, unless the orders of stay are granted, learned counsel for the 1st Applicant has cited and relied on inter-alia the case of Michael Ntuuthi Mitheo v Abraham Kivondo Musau [2021]eKLR; Visram Ravjihali v Thornton & Turpin [1990]eKLR; Nicholas Stephene Okaka & Another v Alfred Waga Wesonga [2022]eKLR and R. W. W v E. K. W [2019]eKLR.
15. Secondly, learned counsel for the 1st Applicant has submitted that the 1st Applicant herein is ready and willing to provide security as the court may order and/or direct. Furthermore, learned counsel has posited that provision of security exist for the core reason of balancing the rights and interests of the disputants.
16. As pertains to the provision of security, learned counsel for the 1st Applicant has cited and referenced the decision in the case of H G E v S M [2020]eKLR.
17. In a nutshell, learned counsel for the 1st Applicant has implored the court to find and hold that the 1st Applicant herein has established the requisite conditions to warrant the grant of the orders of stay of execution pending the hearing and determination of the intended appeal.

2nd Applicant's Submissions:

18. The 2nd Applicant filed written submissions dated 5th September 2024 and wherein same has reiterated the grounds contained at the foot of the application dated the 6th June 2024 as well as the averments in the supporting affidavit. Furthermore, the 2nd Applicant has thereafter highlighted and canvassed four [4] salient issues for consideration by the court.
19. First and foremost, learned counsel for the 2nd Applicant has submitted that the 2nd Applicant herein has since filed and served a notice of appeal and thus demonstrating his intention to challenge the judgment and decree of this court. In this regard, learned counsel has referenced the notice of appeal dated the 22nd May 2024 and which has been annexed and marked as JMK 1 [a] to the supporting affidavit.
20. Owing to the fact that the 2nd Applicant has since filed and served a notice of appeal, it has been contended that the 2nd Applicant has thus established the existence of a sufficient cause in the manner stipulated in Order 42 Rule 6 [2] [a] of the Civil Procedure Rules, 2010.



21. In support of the submissions that the 2nd Applicant has demonstrated the existence of sufficient cause, learned counsel for the 2nd Applicant has cited and referenced inter-alia the holding in Attorney General v The Laws Society of Kenya & Another [2013]eKLR and Wachira Karani v Bildad Wachira [2016]eKLR, respectively.
22. Secondly, learned counsel for the 2nd Applicant has submitted that the 2nd Applicant herein would suffer substantial loss, if the judgment and decree of the court are not stayed. In this regard, it has been contended that unless the orders of stay are granted the Plaintiff/Respondent will proceed to enter upon and take possession of the suit property and thus deny and deprive the 2nd Defendant/Applicant of his entitlement to the suit property.
23. Additionally, it has been submitted that the judgment and decree of this court would effectively lead to the eviction of the 2nd Defendant/Applicant from the suit property wherein the 2nd Defendant/Applicant has been occupying for more than 10 years.
24. Premised on the foregoing, it has been submitted that the eviction of the 2nd Defendant/Applicant from the suit property will no doubt occasion substantial loss to the 2nd Defendant/Applicant and hence the necessity to grant the orders of stay.
25. To buttress the submissions pertaining to substantial loss, learned counsel for the 2nd Defendant/Applicant has cited and relied on inter-alia the holding in James Wangalwa & Another v Agness Naliaka Chesetu [2012]eKLR and Ena Investment Ltd v Benard Ochao Mose & 2 Others [2022]eKLR.
26. Thirdly, learned counsel for the 2nd Applicant has submitted that the Application beforehand has been filed and mounted without unreasonable and inordinate delay. In this regard, counsel has posited that upon the delivery of the judgment of the court, the 2nd Applicant sought to change advocates and, in this regard, the current advocate came on record on or about the 19th April 2024. Thereafter, counsel has contended that same proceeded to and filed the current application on the 6th June 2024.
27. According to learned counsel for the 2nd Applicant, the time taken by the 2nd Applicant to file the instant application cannot be deemed to constitute unreasonable and inordinate delay or at all.
28. Finally, learned counsel for the 2nd Applicant has submitted that the 2nd Applicant is ready and willing to comply with and/or abide by such security as the court may order in the circumstances. In any event, learned counsel for the 2nd Applicant has posited that the 2nd Applicant will be amenable to depositing whatever monetary security in an escrow account in the names of the advocates for the respective parties.
29. Arising from the foregoing, learned counsel for the 2nd Applicant has contended that the 2nd Applicant has therefore met the threshold and the conditions for the grant of the orders of stay of execution in terms of the application dated the 6th June 2024.

Respondent's Submissions:

30. The Plaintiff/Respondent herein has filed written submissions dated the 29th July 2024 and in respect of which same has reiterated the contents of the replying affidavit sworn on the 12th July 2024 and thereafter highlighted two [2] salient issues for consideration by the court.
31. First and foremost, learned counsel for the Plaintiff/Respondent has submitted that the Applicants herein have neither established nor demonstrated that same [Applicants] shall suffer substantial loss if the orders of stay of execution pending appeal are not granted.



32. In particular, learned counsel for the Respondent has posited that other than averting to and mentioning the term [phrase] substantial loss, the Applicants have not placed before the court any empirical evidence to show/demonstrate that substantial loss is likely to accrue.
33. In the absence of evidence of substantial loss, learned counsel for the Respondent has submitted that the Applicants herein are therefore not entitled to an order of stay of execution, either in the manner sought or at all.
34. To this end, learned counsel for the Respondent has cited and referenced the holding in the case of Francis K Chabari & Another v Mwarania Gaichura Kairubi ELC APPEAL E010 OF 2021; Ezekiel Kagoya Wakagwi v Samuel Ngahu Mundui ELC NO 213 OF 2014 and Kenya Sell Ltd v Benjamin Karuga Kibiru & Another [1986]eKLR, respectively.
35. Secondly, learned counsel for the Respondent has submitted that in the event that the court is inclined to grant an order of stay of execution, then the court should decree provisions of security for the due performance of the decree that may ultimately arise. In any event, counsel has ventured forward and posited that the court ought to direct that the Applicants herein do deposit the sum of Kes.895, 475/= only in an escrow account in the names of the advocates of the respective parties.
36. Other than the foregoing, learned counsel for the Respondent has submitted that the Applicants have failed to meet and/or satisfy the requisite ingredients underpinning the grant of an order of stay of execution pending the hearing and determination of an appeal. Consequently and in this regard, counsel has implored the court to dismiss the two applications.

Issues For Determination:

37. Having considered the two [2] applications as well as the response[s] thereto and upon taking into account the written submissions filed on behalf of the respective parties, the following issues do emerge [crystallise] and are thus worthy of determination;
 - i. Whether the Applicants have established and demonstrated that same are bound to suffer substantial loss unless the orders sought are granted.
 - ii. If the court is inclined to grant the orders of stay, whether security ought to be provided and if so, the nature of security that would serve the interests of justice.

Analysis And Determination

Issue Number 1 Whether the Applicants have established and demonstrated that same are bound to suffer substantial loss unless the orders sought are granted.

38. The Plaintiff/Respondent herein filed the instant suit and wherein same [Plaintiff/Respondent] contended that the suit property, namely, L.R No. Nairobi Block 105/14266 [formerly plot C163] was duly allocated unto him by the 1st Defendant/Applicant herein. Besides, the Respondent contended that upon being allocated the suit property same made the requisite payments which were duly acknowledged and receipted by the 1st Defendant/Applicant.
39. Notwithstanding the foregoing, the Plaintiff/Respondent contended that the 1st Defendant/Applicant proceeded and caused the suit property to be registered in the name of the 2nd Defendant/Applicant and thereby denying and/or depriving him [Plaintiff/Respondent] of the rights to the suit property.



40. Suffice it to point out that the dispute beforehand was heard and determined by this court culminating into the judgment rendered on the 26th February 2024, whereupon the court found and held that the suit property lawfully belongs to the Plaintiff/Respondent. Furthermore, the court ordered and directed that the 1st Defendant does execute the requisite transfer instrument to facilitate the transfer and registration of the suit property in favour of the Plaintiff/Respondent.
41. On the other hand, the court also ordered and directed that the 2nd Defendant/Applicant does vacate and hand over vacant possession of the suit property to the Plaintiff/Respondent and in default, the court ordered that an order of eviction do issue as against the 2nd Defendant/Applicant.
42. Following the delivery of the judgment [details in terms of the preceding paragraphs] the Applicants variously filed their notices of appeal and whereby same intimated/ demonstrated their intention to appeal to the court of appeal. Suffice it to posit, that the notices of appeal filed by the Applicants herein are deemed to constitute an appeal for purposes of an application of stay of execution like the one beforehand. [See Order 42 Rule 6[4] of the Civil Procedure Rules, 2010].
43. Having filed the notices of appeal, the Applicants are now before the court and seeking for an order of stay of execution pending the hearing and determination of the intended appeal. In this regard, the Applicants have contended that unless the orders of stay are granted, same are disposed to suffer substantial loss.
44. I beg to underscore that the implementation and/or enforcement of the judgment of the court, which was rendered on the 26th February 2024, shall have substantial effect on both the Applicants. Instructively, the implementation of the judgment will culminate into the cancellation of the certificate of title in the name of the 2nd Defendant/Applicant as well as eviction of the said 2nd Defendant/Applicant.
45. Additionally, I am also alive to the fact that the implementation of the judgment will culminate into the suit property being transferred to and registered in the name of the Plaintiff/Respondent. Thereafter, the Plaintiff/Respondent shall become the lawful proprietor of the suit property. Suffice it to point out that the registration of the suit property, in the name of the Plaintiff/Respondent shall vest and confer upon the Plaintiff/Respondent the rights and privilege's underpinned by the provisions of Sections 24 and 25 of the [Land Registration Act](#) and hence the Plaintiff/Respondent shall be at liberty to alienate, deal with and/or dispose of the suit property, at will.
46. To my mind, the fact that the Plaintiff/Respondent may deal with, dispose of and/or otherwise deal with the suit property founds a basis for the apprehension that substantial loss may arise and/or accrue to the Applicants unless orders of stay of execution are granted.
47. On the other hand, it is also not lost on the court that the eviction of the 2nd Defendant/Applicant from the suit property will also have substantial and far reaching consequences. No doubt, the eviction, if levied, will occasion substantial loss.
48. In the premises, it is my finding and holding that the Applicants herein have established and demonstrated that same shall be disposed to suffer substantial loss, if the orders of stay sought are not granted. In this regard, there is no gainsaying that the Applicants have indeed satisfied the critical foundation upon which the grant of an order of stay of execution is anchored or premised.
49. To buttress the exposition of the law highlighted in the preceding paragraphs, I beg to adopt and reiterate the holding in the case [Kenya Shell Limited v Benjamin Karuga Kibiru & Ruth Wairimu](#)



Karuga (Civil Application 97 of 1986) [1986] KECA 94 (KLR) (Civ) (2 July 1986) (Ruling), where the court stated and observed as hereunder;

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 when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.

50. Other than the foregoing, it is also apposite to point out that the dispute beforehand touches on and concerns ownership of lands and hence where an appeal or a notice of appeal has been filed and the Applicants have demonstrated sufficient cause, it behooves the court to consider the application for stay of execution favourably. In this regard and taking into account the totality of the circumstances obtaining in the matter, I find it fit and expedient to grant an order of stay.
51. In arriving at the conclusion that the circumstances of the matter beforehand merits the grant of an order of stay of execution, I am duly persuaded and guided by the ratio decidendi in the case of Butt v Rent Restriction Tribunal (Civil Application 6 of 1979) [1979] KECA 22 (KLR) (Civ) (16 July 1979) (Ruling), where the court held as hereunder;

It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church (No 2)* 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

Issue Number 2 If the court is inclined to grant the orders of stay, whether security ought to be provided and if so, the nature of security that would serve the interests of justice.

52. Having found and held that the Applicants have established that same are disposed to suffer substantial loss, the next question that merits discussion relates to the issue of provision of security for the due performance of the decree that may ultimately arise.
53. To start with, there is no gainsaying that the Respondent herein has since been declared to be the lawful and legitimate owner of the suit property. In this regard, it suffices to posit that the Respondent is therefore entitled to enter upon and benefit from the ownership of the suit property.
54. Put differently, to the extent that the Respondent has a favourable decree from the court, the Respondent is obliged to partake of and benefit from the fruits of the decree. Indeed, every decree-holder should be allowed to enjoy the fruits of the decree unless there exists exceptional and peculiar circumstances.
55. Nevertheless, it is equally important to observe that even though the Respondent has a favourable judgment, the Applicants herein are conferred with an undoubted right of appeal. At any rate, the Appellants/Applicants have since invoked the right of appeal and filed the Notices of appeal.



56. To the extent that the Appellant, has filed the Notices of appeal, same now have a right to apply to the court to grant an order of stay of execution of the Judgment with a view to preserving the substratum of the appeal.
57. What arises from the foregoing, is the fact that both the Appellant/Applicant and the Respondent have competing rights which are being propagated before the court. On one hand, the Respondent seeks to realize the fruits of the judgment whilst on the other hand, the Appellants/Applicants are exercising their undoubted right of appeal.
58. Taking into account the competing rights espoused in the preceding paragraph[s], it is therefore the duty of this court to strike a delicate balance between the competing rights and to endeavour that the rights of both parties are equally protected, without either party being exposed to undue prejudice or grave injustice.
59. To be able to balance the competing rights of both the Applicant[s] and the Respondent, it behoves this court to call upon the Applicant/Appellant whose undoubted right of appeal is being protected to provide security for the due performance of the decree that may ultimately accrue. For good measure, the provision of security is intended to ensure that the Appeal is not merely calculated to delay the realisation of the Judgment of the Court.
60. In the circumstances, I find and hold that this is a fit and proper case to order and direct provision of security for the due performance of the decree that may ultimately accrue. See Order 42 Rule 6[2] [b] of the Civil Procedure Rules, 2010.
61. Furthermore and as concerns the importance of security, it suffices to reiterate the holding of the court in the case of *Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates, Nishit Raikundalia & Sapphire Trading & Marketing Ltd (Miscellaneous Civil Application 802 of 2010)* [2014] KEHC 2430 (KLR) (Commercial and Tax) (16 October 2014) (Ruling), where the court held thus;

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. The alternative security being offered presents several problems. The first one-the security is owned by another person. This is a civil suit where the Applicants are judgment-debtors. But, the Applicants seem to have borrowed from the criminal procedures where a person stands surety for the attendance of another in court.

Civil process is quite different because, in a 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 the 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.

62. Likewise, the role of security in an application for stay of execution pending appeal was also highlighted in the case of *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR, where the court stated and held thus;

“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. In *Arun C Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates Justice Gikonyo* the Court stated 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.”

63. Arising from the foregoing, I am persuaded that the Appellants/Applicants are obliged to provide security. In this regard, I decree that the Appellants/Applicants shall deposit into an escrow account the sum of Kes.1, 000, 000/= only which shall suffice to cover the costs of the proceedings before this court as well as costs to be incurred before the court of appeal.
64. For coherence, such security, shall be deposited in an escrow account within 45 days from the date of this ruling.

Final Disposition:

65. From the analysis [details highlighted in the body of the ruling], I come to the conclusion that the Appellants/Applicants have met and established the requisite conditions to warrant the grant of stay of execution pending the hearing and determination of the intended appeal.
66. Furthermore, I have also found and held that even though the Appellants/Applicants are entitled to an order of stay of execution, such order cannot issue without corresponding obligation, taking into account that the Respondent herein already has a valid judgment and decree of the court. In this regard, it behooves the Appellants/Applicants to provide security.
67. In the premises, the final orders of the court are as hereunder;
 - i. The Applications dated the 18th March 2024; and 6th June 2024 be and is hereby allowed.
 - ii. The Judgment of the court rendered on the 26th February 2024 and the consequential decree arising therefrom be and are hereby stayed pending the hearing and determination of the intended appeal to the court of appeal
 - iii. The Appellants/Applicants shall deposit the sum of Kenya Shillings One Million [Kes .1,000, 000/= only] being security for the due performance of the decree and same to be deposited in an escrow account in the names of the advocates for the respective parties.
 - iv. The security in terms of clause [iii] shall be deposited in a reputable bank/financial institution agreed upon by the advocates for the parties within 45 days from the date hereof.
 - v. In default to comply with cluses [iii] and [iv], the orders of stay herein shall lapse automatically and without further reference to court.
 - vi. Costs of the application shall abide the outcome of the intended appeal.
68. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF OCTOBER 2024.



OGUTTU MBOYA

JUDGE

In the Presence of;

Benson - Court Assistant.

Ms Mutua h/b for Mr. Macharia Gakuo for the 1st Defendant/Applicant

Mr. Ngata Kamau for the 2nd Defendant/Applicant

Mr. Job Marasi for the Plaintiff/Respondent

