



REPUBLIC OF KENYA



**Yegon v Sang & another (Environment & Land Case 54 of 2008)
[2024] KEELC 13292 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13292 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 54 OF 2008
LA OMOLLO, J
NOVEMBER 21, 2024**

BETWEEN

WILSON MALAKWEN YEGON PLAINTIFF

AND

PETER SANG 1ST DEFENDANT

GRACE MARITIM 2ND DEFENDANT

RULING

1. This ruling is in respect of the 2nd Defendant/Applicant's Notice of Motion application dated 16th March, 2024. The said application is expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 42 Rules 6 and Order 51 Rule 1 of the Civil Procedure Rules.
2. The application seeks the following orders;
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to stay execution of the entire judgement by Honourable Lady Justice Oundo M. Clausina delivered on the 22nd February, 2024 in this case pending hearing and determination of the appeal filed by the Applicants herein.
 - d. That in the alternative this Honourable Court be pleased to issue orders of status quo as regards the suit parcel pending hearing and determination of the appeal by the Applicant.
 - e. That costs of this application be provided.
3. The application is based on the grounds on its face and the supporting affidavit of one Grace Chemutai Maritim sworn on 16th March, 2024.



Factual Background.

4. The Plaintiff/Respondent commenced the present proceedings vide the Plaint dated 19th November, 2008 wherein he sought the following prayers;
 - a. A declaration that the Defendants are trespassers on the Plaintiff's land parcel number Kericho/Kipchimchim/2059 and an order that they deliver up vacant possession in default eviction order do issue.
 - b. Mesne profits from 2004 till (sic) vacation.
 - c. Cost of the suit and interest.
 - d. Any other or further relief.
5. The 1st Defendant who is deceased and the 2nd Defendant/Applicant filed a joint Statement of Defence and Counterclaim dated 9th December, 2008 where they sought the following orders;
 - a. That the Defendants (now the Plaintiffs) are the legally entitled to a portion of 128 ft x 122 ft to be excised from Kericho/Kipchimchim/2059. (sic)
 - b. That the Plaintiff (now the Defendant) be compelled by this Honourable Court to execute the relevant documents and transfer the same to the Defendants (now Plaintiffs) to facilitate the transfer of the said portion to them and in default of this Court do nominate the Executive officer in place of the Plaintiff (now the Defendant).
 - c. Costs of this Counter Claim be granted by this Honourable Court and any other relief that this Court deems fit to grant.
6. On 22nd February, 2024, the Court delivered judgement in this matter in the following terms;
 - a. A declaration that the Defendant is a trespasser on the Plaintiff's land parcel No. Kericho/Kipchimchim/2059 and therefore must deliver vacant possession within 30 days and in default an eviction order do issue.
 - b. The Plaintiff shall also have the cost of the suit and Counterclaim with interest at Court rate.
7. The application under consideration first came up for hearing on 19th March, 2024 when the Court directed that it be served upon the Respondents.
8. On 24th April, 2024 the 2nd Defendant/Applicant was granted leave to file a supplementary affidavit and on 20th June, 2024 the Court directed that the application be heard by way of written submissions.
9. On 25th July, 2024 the application was mentioned to confirm filing of submissions and reserved for ruling.

The 2nd Defendant/Applicant's Contention.

10. The 2nd Defendant/Applicant contends that the 1st Defendant is deceased and the suit against him abated.
11. The 2nd Defendant/Applicant also contends that this Court delivered judgement in this matter on 22nd February, 2024 in favour of the Plaintiff/Respondent.



12. The 2nd Defendant/Applicant further contends that she was dissatisfied by the Court's decision and instructed her advocates on record to file an appeal and that a Notice of Appeal dated 27th February, 2024 was filed.
13. It is her contention that the Plaintiff/Respondent also wrote the letter dated 27th February, 2024 requesting for certified copies of the judgement and proceedings.
14. It is also her contention that the Court in its judgement ordered her to vacate the suit property within thirty days from the date of the judgement failure to which an eviction order would issue.
15. It is further her contention that on 10th March, 2024 she received information from her tenants that the Plaintiff/Respondent had stuck vacation notices on the doors of the rental houses built on the suit property.
16. She contends that she is apprehensive that the Plaintiff/Respondent will execute the judgement to her detriment.
17. She also contends that she has an arguable appeal with high chances of success and as such the suit property ought to be preserved pending the outcome of the appeal.
18. She further contends that the appeal will be rendered nugatory unless the Court issues orders of stay of execution pending the hearing and determination of the intended appeal.
19. It is her contention that she stands to suffer substantial loss and irreparable prejudice, loss and damage if the orders of stay of execution are not issued.
20. It is further her contention that the Plaintiff/Respondent may sell or dispose of the suit parcels and the developments thereon given that he has begun to issue vacation notices to her tenants.
21. She contends that she is ready and willing to abide by any condition that will be given by this Honourable Court.
22. She also contends that the Plaintiff/Respondent will not suffer any prejudice if the application is allowed and that it is in the interest of justice that that she be allowed to exercise her right of appeal.
23. She ends her deposition by stating that the application has been filed timeously, in utmost good faith and that this Court has jurisdiction to grant the prayers sought.

The Plaintiff/Respondent's Response.

24. In response to the 2nd Defendant/Applicant's application, the Plaintiff/Respondent filed a Replying Affidavit sworn on 19th April, 2024.
25. He deposes that he opposes the grant of orders of stay of execution as sought by the 2nd Defendant/Applicant herein because the judgement delivered by this Court on 22nd February, 2024 was precise, detailed and well-reasoned. He adds that an appeal against the said judgement is a mere exercise in futility.
26. He also deposes that the suit property is not registered in his name and reiterates that the appeal is an exercise in futility no matter the outcome.
27. He further deposes that the 2nd Defendant/Applicant's aim is to delay justice and prevent him from enjoying the fruits of his judgement as the 2nd Defendant/Applicant will continue collecting rent and therefore enjoying and/or profiting from the suit property despite losing the suit.



28. It is his deposition that he is informed by his Advocates on record that on 22nd February, 2024 when the judgement was delivered, counsel for the 2nd Defendant/Applicant did not indicate to the Court her dissatisfaction and/or intention to appeal but rather prayed for thirty days to comply with the judgement.
29. It is also his deposition that the 2nd Defendant/Applicant thereafter filed a Notice of Appeal and the present application before the thirty days within which she was to vacate the suit property were up.
30. It is further his deposition that the orders sought in the present application are unenforceable as the suit property is registered to a third party who is not a party to this suit which fact is well within the knowledge of the 2nd Defendant/Applicant.
31. He deposes that the 2nd Defendant/Applicant opted not to join the said third party to the suit.
32. He also deposes that due to his financial status, he was forced to sell the suit property and transfer it to a third party who assisted him in financing this suit while undertaking to pay the balance of the consideration once the suit is concluded.
33. He further deposes that he has no intentions of taking any action that would frustrate the outcome of the intended appeal but does not expect the 2nd Defendant/Applicant to continue to enjoy the suit property after losing the suit.
34. It is his deposition that when he instituted the present suit in the year 2008, he was unemployed and he struggled hard to raise finances. He reiterates that this forced him to commence the sale and transfer of the suit property.
35. It is also his deposition that he will be mentally tortured and will incur further financial strain if he is prevented from enjoying the fruits of his judgement.
36. It is further his deposition that the conduct of the 2nd Defendant/Applicant shows that her only intention is to frustrate justice and to continue enjoying the occupation and use of the suit property to which she does not have proprietary interest.
37. He deposes that he is angry, exhausted, depressed, anxious and frustrated and he therefore pleads, begs and/or prays that justice be done and he be allowed to complete the sale of the suit property.
38. He ends his deposition by reiterating that he is unemployed with five school going children and is financially struggling to educate them. He adds that he has never enjoyed his inheritance owing to the 2nd Defendant/Applicant's encroachment.

The 2nd Defendant/Applicant's Response to the Plaintiff/Respondent's Replying Affidavit.

39. The 2nd Defendant/Applicant filed a supplementary affidavit sworn on 17th May, 2024.
40. She reiterates that she has an arguable appeal with high chances of success and as such the suit property ought to be preserved pending the appeal. She adds that her late husband is the registered owner of the suit property and she is therefore the legal beneficiary.
41. She deposes that she has been in occupation and/or possession of the suit property since it was purchased in the early 1970's and that the rental premises were developed upon taking possession. She adds that the same is clearly indicated in the ground report.
42. She also deposes that she has a constitutional right to appeal after being dissatisfied with the judgement.



43. She further deposes that the Plaintiff/Respondent sold the suit property to third parties while the suit was pending in order to defeat justice and the counterclaim that she had filed.
44. It is her deposition that the Plaintiff/Respondent has never been in possession of the suit property and he will therefore suffer no prejudice if the orders sought are granted.
45. It is also her deposition that she is advised by her advocates on record that the Plaintiff/Respondent has no interest in the suit property and he is not deprived in any way from enjoying the fruits of the judgement.
46. It is further her deposition that the Plaintiff/Respondent has begun executing the judgement to her detriment as he has started issuing vacation notices to her tenants and has also subdivided and fenced a portion of the suit land.
47. She reiterates her averments in her affidavit in support of her application and ends her deposition by stating that it is in the interest of justice that this Honourable Court grants the prayers sought.

Issues for Determination.

48. The 2nd Defendant/Applicant filed her submissions dated 22nd July, 2024 while the Plaintiff/Respondent filed his submissions dated 24th July, 2024.
49. The 2nd Defendant/Applicant relies on Order 42 Rule 6(2) of the Civil Procedure Rules and identifies the following issues for determination;
 - a. Whether the Applicant will suffer substantial loss if stay orders are granted. (sic)
 - b. Whether there was unreasonable delay in making the present application.
 - c. 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. (sic)
50. With regard to the first issue, the 2nd Defendant/Applicant relies on the judicial decision of *George Mutisya v Faith Mwendu Philip & another* [2020] eKLR and submits that she stands to suffer substantial loss if the Plaintiff/Respondent is allowed to proceed with execution of the judgement as she has built rental premises on the suit property where she has been collecting rent for more than forty years.
51. The 2nd Defendant/Applicant also submits that she is an old lady with no other source of livelihood apart from the income from the said rental premises.
52. With regard to the second issue, the 2nd Defendant/Applicant submits that the application under consideration has been timeously filed.
53. The 2nd Defendant/Applicant also submits that after judgement was delivered on 22nd February, 2024, she lodged a Notice of Appeal on 27th February, 2024 and filed the application under consideration on 18th March, 2024. She adds that this shows that she is determined to have the matter expeditiously concluded in accordance to the law.
54. On the third issue, the Defendant/Applicant relies on the judicial decision of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018]eKLR and submits that she is ready to provide security. She urges the Court to allow her application as prayed.
55. The Plaintiff/Respondent submits on whether the application satisfies the conditions for grant of orders of stay of execution.



56. The Plaintiff/Respondent relies on Order 42 Rule 6(2) of the Civil procedure Rules, the judicial decisions of Vishram Ravji Halai vs Thornton & Turpin Civil Application No. Nai 15 of 1990 [1990] KLR 365, James Wangalwa & another vs Agnes Naliaka Chesoto [2012] eKLR and submits that there are three conditions that the 2nd Defendant/Applicant must meet.
57. The first condition requires the 2nd Defendant/Applicant to demonstrate that unless the orders sought are granted, she will suffer substantial loss.
58. The Plaintiff/Respondent relies on the judicial decisions of Re Estate of Atanasio Karanu [2018] eKLR, James Wangalwa & another v Agnes Naliaka Chesoto [2012] eKLR, Socfinac Company Limited v Nelphat Kimotho Muturi [2013] eKLR and submits that the 2nd Defendant/Applicant has not demonstrated that the execution process will create a state of affairs that will negate the appeal process.
59. The Plaintiff/Respondent reiterates his averments in his Replying Affidavit and submits that stay of execution will only enable the 2nd Defendant/Applicant to continue collecting rent and profit from the suit property while he suffers.
60. The second condition is whether the application has been filed without unreasonable delay. The Plaintiff/Respondent relies on the judicial decision of Gianfranco Manenthi & another v Africa Merchant Assurance Company Limited [2019]eKLR, reiterates that the 2nd Defendant/Applicant had initially sought for thirty days to comply with the orders of the Court and submits that the filing of the present application came as a total surprise to him.
61. The Plaintiff/Respondent also reiterates that the 2nd Defendant/Applicant's application only intends to delay him from enjoying the fruits of his judgement.
62. The third condition is payment of security for costs. The Plaintiff/Respondent relies on the judicial decisions of Gianfranco Manenthi & another vs Africa Merchant Assurance Company Ltd [2019] eKLR, Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others [2014]eKLR and submits that the 2nd Defendant should furnish security.
63. The Plaintiff/Respondent submits that the 2nd Defendant/Applicant has not met the conditions provided for under Order 42 Rule 6(2) of the Civil Procedure Rules and urges the Court to dismiss the 2nd Defendant/Applicant's application.

Analysis and Determination.

64. I have considered the application, the response thereto, the supplementary affidavit and the submissions. The only issue that arises for determination is whether an order of stay of execution of the judgement and decree issued by this Court on 22nd February, 2024 should be granted pending the hearing and determination of the appeal.
65. Order 42 Rule 6 (2) of the Civil Procedure Rules provides as follows;

- “(2) No order for stay of execution shall be made under subrule (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.

(3) Notwithstanding anything contained in subrule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”

66. For the Court to grant an order of stay of execution, the 2nd Defendant/Applicant must demonstrate that she filed the application under consideration without unreasonable delay, that she will suffer substantial loss if the orders sought are not granted and that she is willing to deposit security for the due performance of the decree.

67. On whether the application was filed without unreasonable delay, a perusal of the Court record shows that judgement in the matter was delivered on 22nd February, 2024 while the application under consideration was filed on 18th March, 2024. There is no doubt that the application was filed timeously.

68. The 2nd Defendant/Applicant submits that she will suffer substantial loss if orders of stay of execution are not granted as the Plaintiff/Respondent has already commenced execution proceedings.

69. In the judicial decision of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR the Court observed as follows on what constitutes substantial loss;

“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....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.”

70. The 2nd Defendant/Applicant contends that she has been in occupation of the suit property for a period exceeding forty years. She also contends that she has built rental premises on the land and that the Plaintiff/Respondent has already issued notices to her tenants to vacate the suit property.

71. The Plaintiff/Respondent on the other hand deposes that the 2nd Defendant/Applicant has not demonstrated that she will suffer substantial loss if the orders sought are not granted.

72. In the judicial decision of *Karungu v Masira & another* (Environment & Land Case 540 of 2016) [2024] KEELC 5683 (KLR) (25 July 2024) (Ruling) the Court held as follows;

“22. Similarly, in the case of *Kabugua v Mwatata & another (Civil Appeal 1 of 2021)* [2023] KEELC 15715 (KLR) (20 February 2023, this Court held that:

Proof substantial (sic) loss is the cornerstone of applications for stay of execution. An Applicant must go a step further to prove such loss and not merely stating that he/she will suffer substantial loss.”

23. It should also be noted that where there is an order of eviction, it is not enough to say that a party shall be evicted, as that is a decree that was issued after the



parties have been heard and a case is determined. A mere mention of imminent eviction is not proof of substantial loss.” [Emphasis Mine]

73. As was held in the above cited judicial decision, imminent eviction is not proof of substantial loss. In the present case, the 2nd Defendant/Applicant contends that her tenants are likely to be evicted from the suit property if orders of stay of execution are not granted. It is my view that this contention is not sufficient to prove substantial loss.
74. On the issue of security for due performance of the decree, the Court in the judicial decision of Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR held as follows;
- “in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced in a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal. I do not see, why the same should not be applicable in this case.”
75. In the judicial Karungu v Masira & another (Environment & Land Case 540 of 2016) [2024] KEELC 5683 (KLR) (25 July 2024) (Ruling) the Court further held as follows;
- “In the interest of justice, I therefore grant stay of execution pending appeal on condition that the Applicant deposits Kshs. 500,000/= in a joint interest earning account of the Advocates for the Plaintiff and the 1st Defendant within 30 days failure to which the order lapses.”

Disposition.

76. The 2nd Defendant/Applicant has a right of appeal and should be allowed to exhaust this right. In the interest of justice and also in order that the appeal filed is not rendered nugatory, I am inclined to grant orders of stay of execution of the judgement delivered on 22nd February, 2024.
77. Consequently, the application dated 16/3/2024 is allowed in the following terms;
- a. Pending hearing and determination of the appeal filed by 2nd the Defendant/Applicants herein, a stay execution of the entire judgement of this court delivered on the 22nd February, 2024 is hereby granted .
 - b. The 2nd Defendant/Applicant shall deposit a sum of Kshs. 500,000/= as security for the due performance of the decree. The said amount shall be held in a fixed joint interest earning account in the names of counsel for both parties within 30 days of the date hereof.
 - c. In the event of failure to comply with (b) above, the orders of stay shall lapse.
 - d. The costs of this application shall be in the cause.
78. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 21ST DAY OF NOVEMBER, 2024.

L. A. OMOLLO

JUDGE.



In the presence of: -

Mr. Mutai for the Respondent.

Miss Wanjiru for the Defendant/Applicant

Court Assistant; Mr. Joseph Makori.

