



Consolata Catholic Mission Trustees (Registered) v Nyamu (Environment & Land Case 47 of 2020) [2024] KEELC 13471 (KLR) (20 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13471 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 47 OF 2020
OA ANGOTE, J
NOVEMBER 20, 2024**

BETWEEN

**THE CONSOLATA CATHOLIC MISSION TRUSTEES
(REGISTERED) PLAINTIFF**

AND

PAUL VARU NYAMU DEFENDANT

RULING

Background

1. Before this court for determination is the Defendant's/Applicants' Motion dated the 20th August, 2024 brought pursuant to the provisions of Sections 1A, 1B, 3A of the *Civil Procedure Act*, Cap 21 and Section 7 of the *Appellate Jurisdiction Act*, Cap 9 seeking the following reliefs
 - i. Spent
 - ii. Spent-That this Honourable Court be pleased to issue a temporary order of stay of execution of the Judgment delivered herein on the 31st July, 2024 pending the hearing and determination of this Application.
 - iii. That this Honourable Court be pleased to issue an order of stay of execution of the Judgment delivered herein on the 31st July, 2024 pending hearing and determination of the Defendants' Appeal.
 - iv. That the costs of this Application be in the cause.
2. The Application is based on the grounds on the face of the Motion and supported by the Affidavit of Paul Varu Nyamu, the Defendant/Applicant of an even date. He deponed that on the 31st July, 2024, this court delivered a judgment awarding the Plaintiff/Respondent his property, LR No 209/9944(suit



- property) by adverse possession and ordered him to effect a transfer thereof to the Respondent within 30 days failure to which the Deputy Registrar would effect the transfer.
3. Mr Nyamu deponed that being dissatisfied with the judgment, he filed a Notice of Appeal on the 13th August, 2024 and served the same upon the Respondent and that he had earlier applied for certified copies of the typed proceedings and judgement on the 31st July, 2024.
 4. He states that he is apprehensive that unless an order of stay of execution is issued, the Respondent will proceed to execute the decree to his detriment thereby rendering his appeal nugatory; that further, if execution proceeds against him, it will cause irreparable damage and that he will lose his property which he acquired at a considerable cost.
 5. He urges that he has a meritorious appeal with high chances of success and the interest of justice, as well as the overriding objective of the law, dictate that the application is allowed as prayed and that he is willing to abide by any conditions that the court may deem fit to impose on him as a condition for the grant of the orders of stay of execution sought.
 6. In response to the Motion, the Plaintiff/Respondent, through one of its Trustees, Brother Clarence Lukungu, swore a Replying Affidavit on the 30th August, 2024. He deponed that the Respondent is a corporate body, registered pursuant to the Land (Perpetual Succession Act), Cap 146 of the Revised Edition of the Laws of Kenya and that the Respondent comprises of a congregation of missionaries affiliated to the Roman Catholic Church committed to improving the living conditions of its surrounding communities through the provision of, inter alia, healthcare, education, food, clean water and social development.
 7. Brother Lukungu stated that that vide a judgment delivered on 31st July 2024, this court held that the Respondent had proved its claim for adverse possession in respect to the suit property and that the aforesaid judgment was consequent to a hearing on merits whereat the parties were accorded an opportunity to adduce oral and documentary evidence.
 8. He stated that as the registered owner of the suit property, the Applicant continues to hold the documents of title and has not offered to surrender the same and/or not to alienate the suit property pending the appeal and that he has further not set out what he considers to be arguable points that he intends to raise during the appeal.
 9. He contends that in the absence of grounds of appeal challenging the judgment, the application is fatal as the court will not be able to ascertain whether the intended appeal raises any triable or arguable issues which shall be rendered nugatory if the orders sought are not issued; that the Applicant's means are unknown and he has made no proposition for security and that the Motion is unmerited and should be dismissed.

Submissions

10. The parties orally submitted to the Motion on the 25th September, 2024. Mr Chebii for the Applicant submitted that they seek a stay of execution of the judgment pending appeal which is anchored on Order 42 Rule 6 of the Civil Procedure Rules and that he relies on the grounds set out in the Motion and supported by the Respondent's Affidavit.
11. He submitted that the Applicant is dissatisfied with the decision of the court and intends to appeal against the same at the Appellate Court; that he has filed a notice of appeal and sought for the court's proceedings; that the Applicant has seen the draft order of execution and there is need to stay the same and that the Applicant has a meritorious appeal with high chances of success.



12. Counsel submitted that the Applicant is the title holder and consequently, the stay will not prejudice the Respondent who is in possession of the suit property and has sought maintenance of the status quo and that they are willing to maintain the status quo.
13. In response, Mr Ngatia(SC), for the Respondent submitted that whereas the Motion substantially seeks a stay of execution pending appeal, no appeal has been filed and no effort made to file the same; that the Applicant has only sought for proceedings; that the Court of Appeal rules allow for the filing of a Record of Appeal without the proceedings which can later on be filed vide supplementary proceedings and that there is ultimately no appeal.
14. Counsel submitted that Order 42 mandates the provision of security and no offer with regards to the same having been made as herein, the court cannot grant a stay; that there has been no illustration of substantial loss; that on the contrary, it is the Respondent who will likely suffer substantial loss and that the land will be there as long as the Respondent is in existence.
15. He further stated that they have a problem with the maintenance of status quo but can consider the issue of the Applicant surrendering the title to the suit property and an inhibition being registered to guard against the transfer of the property.
16. The Respondent also relied on its digest of authorities dated the 24th September, 2024 in which reliance was placed on the cases of Chege vs Gachora[2024]KEHC where the court set out the pre-requisites for the grant of stay to wit demonstration by the Applicant that that substantial loss will result unless the stay is granted, filing of the Motion timeously, and the giving of such security for the due performance of the decree.
17. Counsel also pointed the court to the case of case of James Wangalwa & Another vs Agnes Naliaka Chesto[2021]eKLR where the court held that the fact of execution does not in itself amount to a demonstration of substantial loss. Reliance in this regard was also placed on the case of Matata & Another vs Rono & Another[2024]KEHC 2799 KLR.
18. As regards security for due performance of the decree, counsel referred the court to the cases of King'angi & 2 Others[2024]KEELC 3329 KLR, Gitahi & Another vs Warugongo[1988]eKLR and James Wangalwa(supra) all of which affirmed that the import of security is to ensure that the right of the opposing party is adequately protected.
19. In a rejoinder, Mr Chebii reiterated that they are ready to provide security including maintaining the status of the suit property; that the Respondent is not the church but its trustees who can sell the land being a private entity; that they have moved with speed and that the Applicant was previously acting in person.

Analysis & Determination

20. It is the Respondent's contention that the Motion is incompetent. Its claim in this respect is two-fold, first, that no substantive appeal having been filed there is no appeal before this court the basis of which this Motion can be founded.
21. Tied to this is the assertion that in the absence of grounds of appeal challenging the judgment, the court will not be able to ascertain whether the intended appeal raises any triable or arguable issues which shall be rendered nugatory if the orders sought are not issued and that this renders the Motion fatal.
22. Indeed, it is not disputed that the substantive appeal has yet to be filed and what is on record is the notice of appeal as well as a request for proceedings. The question that lends itself is whether a notice of appeal is sufficient for purposes of filing a Motion for stay of execution.



23. In the case of Stanley Kangethe Kinyanjui vs Tony Ketter, Salim Suleiman, Mawji Patel, Innocent Maisiba Toyo, Deputy Registrar High Court of Kenya at Eldoret, Paul Gicheru Of Gicheru & Co. Advs & Commissioner of Land [2013] KECA 378 (KLR) (22 February 2013) (Ruling), the Court of Appeal discussing the extent of its jurisdiction under Rule 5(2) (b)(stay of execution) noted thus:
- “i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge’s discretion to this court. See Ruben & 9 Others v Nderitu & Another (1989) KLR 459.
 - ii) The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
 - iii) The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. Halai & Another v Thornton & Turpin (1963) Ltd. (1990) KLR 365.[Emphasis mine]”
24. Taking a similar position, the East African Court of Justice in Attorney General of the Republic of Uganda vs East African Law Society & another [2013] eKLR posited:
- “On our part, we fully agree with the reasoning in Ujagar Singh (Supra) and the Sewankambo case (supra) and we respectfully associate ourselves with the position that a notice of appeal is a sufficient expression of an intention to file an appeal as rightfully submitted to us by Mr. Mwaka and that such an action is sufficient to found the basis for grant of orders of stay in appropriate cases.”
25. Finally, the court in Ongeche vs Molynd Credit Ltd & another (Environment & Land Case 136 of 2015) [2024] KEELC 1217 (KLR) (7 March 2024) (Ruling) persuasively held:
- “It is clear from the above that a party who wishes to appeal the judgment of this court to the Court of Appeal, and thereafter seek a stay of execution, does not have the laxity of going to sleep. It is that Notice of Appeal which will demonstrate sufficient cause and clothe this court with the jurisdiction to favourably consider an application for stay of execution pending appeal.”
26. It follows therefore that the filing of a notice of appeal is sufficient for purposes of an application for stay of execution and the court so holds.
27. As regards the contention that no arguability has been demonstrated there being no memorandum of appeal, the court reiterates that the pre-requisites for the grant of stay of execution are set out in Order 42 Rule 6 of the Civil Procedure Rule which can be summarized as demonstration of sufficient cause, substantial loss, timeous filing of the motion and deposit of security for due performance of the decree.
28. This is not to be confused with the requirement for seeking stay of execution at the Court of Appeal under the provisions of Section 5(2)(b). The Court of Appeal in Apungu vs Justinice Limited (Civil Application E218 of 2023) [2024] KECA 99 (KLR) (9 February 2024) (Ruling) considering the pre-requisites under this head as follows:
- “It is a long-standing principle that for an applicant to succeed in a rule 5 (2) (b) application, he or she must meet two requirements. Firstly, the applicant has to demonstrate that he



has an arguable appeal and, secondly, that the appeal will be rendered nugatory if the order sought is not granted.”

29. The aspect of arguability is not a matter for determination by this court when faced with a Motion for stay of execution pending appeal. Ultimately, it is the finding of the Court that this Motion is competent.
30. The law with respect to stay of execution pending Appeal is to be found under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules which provides as follows:

- “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.”

31. In *Vishram Ravji Halai vs Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal, discussing the High Court’s jurisdiction under this Order stated:

“The Superior Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

32. What arises from the foregoing is that the grant of orders of stay of execution is subject to the court’s discretion, the court in this respect being guided by the provisions of Order 42 rule 6 of the Civil Procedure Rules. The question of how the court should exercise this discretion was extensively discussed by the Court of Appeal in *Butt vs Rent Restriction Tribunal* [1982] KLR 417 which stated thus:

- “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.”
33. The Court is so guided.
34. By way of a brief background, the Respondent instituted the present suit vide a Plaint dated the 2nd March, 2020 seeking as against the Defendant, inter-alia, a declaration that it has acquired the suit property by way of adverse possession and consequently, the Respondent's title to the suit property has extinguished.
35. The matter proceeded for hearing and on the 31st July, 2024, this Court entered judgment for the Respondent finding that it had acquired the suit property by way of adverse possession. The Applicant's title was subsequently extinguished. The Court further directed that the Applicant executes the necessary documents to effect the transfer of the property to the Respondent failure to which the Deputy Registrar would undertake the same.
36. The Court also issued a permanent injunction restraining the Applicant from interfering with the Respondent's possession of the property. Aggrieved by this decision, the Applicant filed a notice of appeal. He asks this Court to stay the execution of the judgment pending the determination of the Appeal. In so doing, the Court will discuss whether the Applicant has met the prerequisites to warrant the order of stay of execution pending appeal.
37. Beginning with the aspect of sufficient cause, what constitutes the same was explicitly discussed by the Court in *Antoine Ndiaye vs African Virtual University* [2015] eKLR, which persuasively stated:
- “The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:
- a) The application is brought without undue delay;



- b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and
 - 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.”
38. The Court concurs. In determining whether the sufficient cause has been established, the court will examine whether the Applicant has satisfied the three mandatory prerequisites the grant of stay pending appeal.
39. The question of what constitutes unreasonable delay was discussed in the case of Jaber Mohsen Ali & another vs Priscillah Boit & another [2014] eKLR cited by the parties where Munyao J stated:
- “The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.”
40. The Court in Utalii Transport Company Limited & 3 Others vs NIC Bank Limited & Anor [2014] eKLR further stated:
- “Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so, on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court’s mind on the delay, caution is advised for courts not to take the word ‘inordinate’ in its dictionary meaning, but in the sense of excessive as compared to normality.”
41. The judgment sought to be appealed against herein was delivered on the 31st July, 2024 whereas the present Motion is dated the 20th August, 2024. This constitutes a period of approximately 3 weeks after the judgment. There has been no allegations of unreasonable delay. The court also does not consider that the Motion was filed after inordinate delay.
42. In Rhoda Mukuma vs John Abuoga [1988] eKLR, the court proffered the following definition of substantial loss:
- “Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being –
- (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and
 - (b) the applicant has given security. The discretion under rule 5(2)(b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone



of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory...”

43. Similarly, the court in *Century Oil Trading Company Ltd vs Kenya Shell Limited* as cited in *Muri Mwaniki & Wamiti Advocates vs Wings Engineering Services Limited* [2020] eKLR, held:

“The word 'substantial' cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words 'substantial loss' must mean something in addition to all different from that.”

44. The court's have also held that substantive loss must be demonstrated. This position was articulated by the Court of Appeal in *Kenya Shell Limited vs Benjamin Karuga Kibiru & Another* [1986] eKLR thus:

“It is usually a good rule to see if Order 41 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 cornerstone of both jurisdictions for granting stay.”

45. The Court in *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR similarly opined that the process of execution alone does not amount to substantial loss. It stated 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...”

46. The court is also alive to its duty to balance the interests of the Applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory, and the interests of the Respondent who is seeking to enjoy the fruits of his judgment. As expressed by Kuloba, J in *Machira T/A Machira & Co Advocates vs East African Standard* [2002] eKLR:

“To be obsessed with the protection of an Appellant or intending Appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way Applications for stay of further proceedings or execution, pending Appeal are handled. In the Application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court.”



47. It is the Applicant's contention that he stands to suffer substantial loss if stay is not granted. He opines that the Respondent will proceed to execute the decree to his detriment thereby rendering his appeal nugatory; that further, if execution proceeds against him, it will cause irreparable damage and he will lose his property acquired at a considerable cost.
48. In response, the Respondent avers that it will be more prejudiced by the grant of the stay orders as the Applicant who is still registered as the proprietor of the suit property is likely to dispose off the same.
49. The judgment of this Court mandates the transfer of the title over the property to the Respondent. It is trite that upon the transfer and registration aforesaid, the Respondent will become the proprietor of the suit property and will be vested with the statutory privileges underpinned by the provisions of section 24 and 25 of the *Land Registration Act, 2012* [2016].
50. One of the statutory rights and privileges that attach to ownership of a property is the right to sell, alienate, dispose of and/or charge same. Should the Respondent exercise its rights in this regard, it will negate and/or otherwise put the title of the suit property outside the purview of the appeal. This, the Court opines constitutes substantial loss.
51. Moving to the last issue regarding provision of security, its purpose was discussed by the Court in *Arun C Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others* [2014] eKLR, 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..... 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.”
52. While in *Focin Motorcycle C. Ltd vs Ann Wambui Wangui* [2018] eKLR, it was stated that:
- “Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground of stay.”
53. From the above persuasive decisions, it is clear that the issue of security is discretionary and it is upon the court to determine the same.
54. It is alleged by the Respondent that that the Applicants' means are unknown and that further, having made no proposition for security, the stay cannot be granted. Whereas the Applicant has not categorically “given its offer” as regards security, it has signaled its willingness to abide by the terms of the court in this respect. The Court considers this sufficient.
55. In the end, the court finds the Applicant's plea for stay of execution to be merited. Considering the entirety of the circumstances and in the interests of justice, the court orders as follows:
- i. A conditional stay of execution of the Judgment and Orders of 31st July, 2024 be and is hereby granted pending the hearing and determination of the intended appeal to the Court of Appeal.



- ii. An order does hereby issue that a restriction be registered against the title to the suit property prohibiting any dealings with the title i.e. charging, leasing, selling, transferring and/or any other interference with the status of the title pending the hearing and determination of the intended appeal.
- iii. The prevailing status quo as regards occupation of the suit property shall be maintained pending the hearing and determination of the Appeal. For avoidance of doubt, the status is that the Respondent is in possession and physical occupation of the suit property.
- iv. All the above orders are granted on condition that the Applicant shall deposit in court the sum of Kshs 5,000,000/= within 45 days from the date hereof in default of which the stay shall automatically lapse.
- v. Costs of the

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF NOVEMBER, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Ngatia for Plaintiff/Respondent

No appearance for Defendant

Court Assistant- Tracy

