



**Soy Developers Limited v Kenagri Products Limited & 4 others (Environment & Land Case 132 of 2015) [2024] KEELC 13452 (KLR) (20 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13452 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 132 OF 2015  
OA ANGOTE, J  
NOVEMBER 20, 2024**

**BETWEEN**

**SOY DEVELOPERS LIMITED ..... PLAINTIFF**

**AND**

**KENAGRI PRODUCTS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**DEPOSIT PROTECTION FUND BOARD (AS LIQUIDATORS OF POST BANK CREDIT LIMITED (IN LIQUIDATION)) ..... 2<sup>ND</sup> DEFENDANT**

**ASL LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**M/S CYPERR PROJECT INTERNATIONAL LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**THE CHIEF LANDS REGISTRAR ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. Before this Court for determination is the 3<sup>rd</sup> Defendant's/Applicant's Notice of Motion dated 24<sup>th</sup> July, 2024 brought pursuant to the provisions of Sections 3 & 13(5)(a) of the *Environment and Land Court Act*, Sections 1A, 1B, 3A of the *Civil Procedure Act*, Cap 21, and Order 42 Rule 6 of the Civil Procedure Rules, 2010 seeking the following reliefs:
  - i. That this Honourable Court be pleased to order a stay of execution of the judgment and orders made on 11<sup>th</sup> July, 2024 and any other consequential orders arising therefrom, pending the hearing and determination of the intended appeal.
  - ii. That this Honourable Court be pleased to issue any other order as it may deem just and appropriate in the circumstances.
  - iii. That the costs of this Application be provided for.



2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Katrik Patel, the 3<sup>rd</sup> Defendant's finance director of an even date, who deponed that the 3<sup>rd</sup> Defendant/Applicant is the registered proprietor of the property known as L.R No 209/11151 situated in Upper hill Nairobi (suit property) having purchased the same from the 2<sup>nd</sup> Defendant in the year 2006 and that it has been in open and continuous occupation of the suit property for a period of 18 years.
3. The 3<sup>rd</sup> Defendant's finance director deponed that sometime in the year 2015, the Plaintiff instituted this suit claiming among others that its acquisition of the property was fraudulent; that the 1<sup>st</sup> and 5<sup>th</sup> Defendants also contested its ownership alleging defects in the 2<sup>nd</sup> Defendant's exercise of its statutory power of sale and that the matter proceeded for hearing and judgment delivered in favour of the Plaintiff.
4. It was Mr Patel's contention that despite dismissing the claims against the 3<sup>rd</sup> Defendant, the court nullified its ownership of the suit property and directed that the Plaintiff be registered as the proprietor; that the 3<sup>rd</sup> Defendant is aggrieved by the judgment and intends to appeal and that it has filed a Notice of Appeal and requested for typed copies of the proceedings.
5. The 3<sup>rd</sup> Defendant's finance director averred that the 3<sup>rd</sup> Defendant has an arguable appeal with overwhelming chances of success on account of multiple errors by this court, to wit, impeaching its title despite finding no fraud had been proved against it, failing to award it the full value of the suit property, making orders that are contra statute, ultra vires, and contravening the principles of stare decisis and res judicata among others.
6. According to Mr. Patel, the 3<sup>rd</sup> Defendant is apprehensive that unless the orders sought are granted, the Plaintiff will proceed with execution of the decree, transfer the suit property and dispose of the same to a third party before the intended appeal is heard and determined moving the property beyond recall and occasioning it substantial and/or irreparable harm and that further, the Plaintiff is likely to take steps to change the character of the suit property to its detriment.
7. He posited that due to the foregoing, the interests of justice mandate that the property be preserved pending determination of the appeal; that the 3<sup>rd</sup> Defendant is ready and willing to abide by any order issued for due performance of the decree; that the Motion was filed timeously and the intended appeal will be expeditiously prosecuted and that no prejudice will be occasioned to the Plaintiff in the event the orders sought are granted.
8. The 2<sup>nd</sup> Defendant, through its Assistant Director Bank Resolution, Caroline Mutungi filed a supporting affidavit to the Motion on the 1<sup>st</sup> October, 2024. She deponed that the 2<sup>nd</sup> Defendant fully supports the Motion; that as advised by Counsel, it is unnecessary for the 2<sup>nd</sup> Defendant to file a similar application to avoid a multiplicity of applications and in order to save the courts' time.
9. Ms Mutungi, associated herself with the averments contained in the Affidavit by Mr. Kartik Patel, further deponing that as advised by Counsel, the pre-requisites for the grant of stay of execution pending appeal are establishment of substantial loss should the stay not be granted; timeous filing of the Motion and provision of security for due performance of the decree.
10. She deponed that the 2<sup>nd</sup> Defendant has already lodged an appeal and has vide its draft Memorandum of Appeal demonstrated arguable grounds; that should the stay not be granted, the Plaintiff will proceed with execution of the decree triggering the 3<sup>rd</sup> Defendant to claim against it the Kshs 23million adjudged to it and that the Plaintiff having not demonstrated its capacity to refund this sum should the appeal succeed, it will suffer substantial loss.



11. It was urged that the Motion has been filed timeously and the 2<sup>nd</sup> Defendant is ready and willing to abide by any reasonable security as may be ordered by the court and that as upheld by the Supreme and Appellate courts, this court should in determining this Motion, undertake to promote substantive justice.
12. In opposition to the Motion, the Plaintiff filed a Replying Affidavit as well as Grounds of Opposition. The Replying Affidavit dated 12<sup>th</sup> September, 2024 was sworn by the Plaintiff's Director, Sammy Boit Arap Kogo, who deponed that the Motion is incompetent, incurably defective and ought to be dismissed for the reasons that it is res judicata, barred by the doctrine of issue estoppel and seeks to have the Court sit on appeal of its own Motion.
13. Mr Boit deponed that vide the Motion, the 3<sup>rd</sup> Defendant is inviting the judge to review his judgement and find that the court made errors of law and fact worth escalating to the Court of Appeal contra to the principle of functus officio and stare decisis and that in any event, the 3<sup>rd</sup> Defendant has not demonstrated a prima facie arguable case as its contention that the court erred in not upholding it as a bonafide purchaser for value is untenable in light of the decision in *Dina Management Limited vs County Government of Mombasa & 5 Others*[2023]KESC 30(KLR).
14. As regards the arguability of the appeal, the deponent averred that during the trial, the Plaintiff duly demonstrated its proprietorship of the suit property setting out its acquisition thereof; that whereas it entered into an agreement with the 1<sup>st</sup> Defendant for the sale of the property, the 1<sup>st</sup> Defendant did not keep its part of the bargain and subsequently did not acquire any proprietary interest therein and that consequently, notwithstanding the fact that the 3<sup>rd</sup> Defendant was not a participant in the fraud, it did not obtain good title to the suit property and the court was correct in so finding.
15. Mr Boit urged that the court was justified in making the orders that it did which orders have a strong basis, are un-impeachable and don't contravene any principles as alleged; that the 3<sup>rd</sup> Defendant has not adduced any evidence to prove that the Plaintiff has any intent to dispose of the suit property and has not supplied the court with security for costs and that the 3<sup>rd</sup> Defendant will not suffer any loss having not occupied the suit property nor erected any structures thereon.
16. It was urged that the fact that execution has been put into motion does not by itself amount to substantial loss and that the scales of justice tilt in favour of denial of the orders sought by the 3<sup>rd</sup> Defendant.
17. Vide the grounds dated the 17<sup>th</sup> September, 2024, it was averred that:
  - i. That the Application is res judicata. That after the Honourable Court delivered its judgement on the 11<sup>th</sup> July, 2024, the Applicant herein made a similar application for the stay of execution of the said judgement.
  - ii. That further, the Applicant is barred by the doctrine of issue estoppel from re-litigating an issue that had already been litigated and determined by the Court; that the issue of stay of execution was litigated and a determination given on the 11<sup>th</sup> July, 2024 and that accordingly, the Applicant cannot be allowed to sustain a stale claim basing on that issue.
  - iii. That the Honourable Court lacks jurisdiction because it is functus officio.
  - iv. That further, the Applicant has not demonstrated a prima facie case with high chances of success. It is an inveterate principle of law that a party who has no right in law cannot have a prima facie case.



- v. That the Applicant has not satisfied the threshold for the grant of stay of execution of the judgment delivered on 11<sup>th</sup> July, 2024.
  - vi. That otherwise, the said Application is frivolous, vexatious and otherwise an abuse of the court process.
18. None of the other parties filed any responses. Counsel for the 1<sup>st</sup> and 5<sup>th</sup> Defendants however indicated to the court that they support the Motion. The parties filed submissions and bundles of authorities which I have considered.

### **Analysis and Determination**

19. Having carefully considered the pleadings and rival submissions by the parties, the issue that arise for determination is whether the 3<sup>rd</sup> Defendant/Applicant has met the threshold for the grant of stay of execution pending appeal.
20. Vide its Replying Affidavit and Grounds of Opposition, the Plaintiff contests the legitimacy of the present Motion. The Plaintiff argues that this court is devoid of jurisdiction to entertain the matter on the basis that the present Motion is res judicata, barred by the doctrine of issue estoppel, and functus officio.
21. The substantive law on res judicata is found in Section 7 of the [Civil Procedure Act](#), which provides that:
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
22. It is clear from the forgoing that the doctrine of res judicata applies to bar subsequent proceedings when there has been adjudication by a court of competent and/or concurrent jurisdiction which conclusively determined the rights of the parties with regard to all or any matters in controversy. [See the Supreme Court Judgment in *John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 others* [2021]KESC 39 (KLR).]
23. Intricately tied to this principle, is the doctrine of issue estoppel which was described by the House of Lords in *Arnold & Others vs National Westminster Bank PLC* (1991) 2 A.C thus:
- “Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue.”
24. According to the Plaintiff, this court already rendered itself on the question of stay of execution pending appeal and consequently, the same cannot be re-litigated. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants refute this assertion stating that the stay granted was conditional pending the present formal Motion and as such, this doctrine is inapplicable.
25. The Court has considered the record. On 11<sup>th</sup> July, 2024, after the delivery of its judgment, Counsel for the 3<sup>rd</sup> Defendant sought for the certified copies of the judgment and proceedings and a 45-days stay of execution to enable them file an appeal. The court granted a 30-days stay.



26. It is apparent that what the 3<sup>rd</sup> Defendant sought on the 11<sup>th</sup> July, 2024 was in the nature of stay of execution anticipated under Order 42 Rule 6(5) of the Civil Procedure Rules which provides thus:

“An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.”

27. This is generally a temporary measure granted immediately after judgment. Such a plea is informal and, as is evident in this case, does not involve any litigation and adjudication. It does not bar a subsequent formal application for stay of execution. The court rejects the plea that it is precluded by the doctrine of issue estoppel from determining this Motion.

28. Turning to the question of whether the court is functus officio, the Plaintiff urges that it is, having rendered itself on the issue of stay of execution. Further, it is contended, having finally determined the matter, this Court is precluded from reconsidering the same as urged by the 3<sup>rd</sup> Defendant. This is refuted by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

29. The doctrine of functus officio embodies the legal principle of finality, ensuring that once a court has fully rendered its decision, it has exhausted its jurisdiction over that matter. Discussing the same, the Supreme Court in *Raila Odinga & Others vs IEBC & Others* [2013] eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius, in “The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law” (2005) 122 SALJ 832 in the following words:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

30. Order 42 Rule 6 (2) of the Civil Procedure Rules allows this court to entertain an application for stay of execution after rendering its Judgment. Having found that it is not precluded from determining the plea for stay of execution, it not being res judicata, this court finds that it is not functus as regards the same.

31. On the second aspect, it is indeed trite that once a court has determined a matter, it exhausts its jurisdiction over the same. Nonetheless, like with all principles, there are exceptions. These were highlighted by the Court in *Mombasa Bricks & Tiles Ltd & 5 Others vs Arvind Shah & 7 Others* [2018] eKLR, thus:

“I understand the doctrine, like its sister, the res- judicata rule to seek to achieve finality in litigation. It is a way of a court saying, ‘I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level’. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits.

It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes. As was held by the court of Appeal in *Telkom Kenya Ltd vs John Ochanda*, the bar is only upon merit-based decisional



engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.

.....There are several proceedings that can only be undertaken after judgment and not before. The following are just but examples; Application for stay; Application to correct the decree; Application for accounts; Application for execution including garnishee applications; Applications for review; Application under section 34 of the Act.

If one was to accede to the position taken by the judgment debtor that the court is *functus officio* then it would mean that the provisions of law providing for such proceedings are otiose or just decorative and of no substance to the administration of justice.”

32. As already stated above, an application for stay of execution pending appeal forms part of the matters that the Court is vested with jurisdiction to undertake after judgment. As to whether the court can reconsider its decision within the ambit of a Motion for stay of execution is another matter all together to be discussed when determining the pre-requisites for the grant of stay and whether they have been met.

33. Ultimately, it is the finding of the Court that this Motion is competent.

34. The law with respect to stay of execution pending Appeal is to be found 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.”

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

“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.”



36. 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 in *Butt vs Rent Restriction Tribunal* [1982] KLR 417 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.”

37. Further to the above, courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. This Court is so guided.

38. The dispute herein revolved around the proprietorship of the suit property, registered in the name of the 3<sup>rd</sup> Defendant and claimed by the Plaintiff as well as the 1<sup>st</sup> and 5<sup>th</sup> Defendants.

39. It was the Plaintiff's case that the 1<sup>st</sup> Defendant fraudulently charged the property to the 2<sup>nd</sup> Defendant who thereafter sold the same to the 3<sup>rd</sup> Defendant and that ultimately, no title passed from it to the 1<sup>st</sup> Defendant or any of the subsequent parties.

40. The 2<sup>nd</sup> Defendant on its part maintained that it duly sold the property pursuant to its statutory power of sale on account of default by the chargee being the Plaintiff, under the directorship of the 1<sup>st</sup> and 5<sup>th</sup> Defendants, and that the 3<sup>rd</sup> Defendant's title could not be impugned.

41. The 1<sup>st</sup> and 5<sup>th</sup> Defendants asserted that they duly acquired the Plaintiff company and subsequently the property. They however contested the legality of the property's sale by the 2<sup>nd</sup> Defendant to the 3<sup>rd</sup> Defendant in the exercise of its statutory power of sale. The 3<sup>rd</sup> Defendant maintained that it was a bonafide purchaser for value having no knowledge of any fraudulent dealings prior to its acquisition of the property.

42. The matter proceeded for hearing and vide the judgment delivered on the 11<sup>th</sup> July, 2024, this Court found merit in the Plaintiff's claim granting it, inter-alia, permanent injunctive orders restraining interference with the suit property, and mandatory injunction directing the rectification of the lands



register to reflect the name of the Plaintiff, under the Directorship of Sammy Arap Kogo and Antoinette Boit, as the registered owner of the suit property.

43. The court also partially found merit in the 3<sup>rd</sup> Defendants' cross-claim granting it, inter-alia, Kshs 23million to be paid to it by the 2<sup>nd</sup> Defendant, and not the current market value of the land as claimed.
44. Aggrieved by this decision, the 3<sup>rd</sup> Defendant intends to appeal to the Court of Appeal. It is asking this court to stay the execution of the judgment pending determination of the aforesaid appeal.
45. Before embarking on whether the 3<sup>rd</sup> Defendant has met the pre-requisites for the grant of the orders sought, the court notes that the 2<sup>nd</sup> Defendant has filed a "supporting affidavit" in support of the present Motion. The present Motion has however been brought by the 3<sup>rd</sup> Defendant on its own behalf. This means that the 2<sup>nd</sup> Defendant's supporting affidavit exists in vacuum, a position untenable in law.
46. Further still, apart from merely supporting the 3<sup>rd</sup> Defendant's case, the 2<sup>nd</sup> Defendant sets out reasons as to why it too, is entitled to orders of stay of execution pending appeal. Essentially, the 2<sup>nd</sup> Defendant is attempting to litigate its case for stay through the 3<sup>rd</sup> Defendant's Motions, a position that is not permissible in law.
47. It is a cardinal principle of law that parties are bound by their pleadings. This legal position was reaffirmed by the Court of Appeal in the case of David Sirona Ole Tukai vs Francis Arap Muge & 2 Others [2014] eKLR thus:

"In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case as is pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense."

48. Indeed, the court itself is as bound by the pleadings of the parties. Whereas the court will not strike out the 2<sup>nd</sup> Defendant's affidavit, it will not consider any arguments for stay of execution at the behest of the 2<sup>nd</sup> Defendant.
49. The 3<sup>rd</sup> Defendant is required to prove that there is sufficient cause to entitle it to an order of stay of execution pending appeal. What constitutes 'sufficient cause' was explicitly discussed by the Court in Antoine Ndiaye vs African Virtual University [2015] eKLR, as follows:

"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.”
50. In determining whether sufficient cause has been established, the court will examine whether the 3<sup>rd</sup> Defendant has satisfied the three mandatory prerequisites to the grant of stay pending appeal, starting with the issue of unreasonable delay.
51. 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.”
52. The Court in Utalii Transport Company Limited & 3 Others vs NIC Bank Limited & Another [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.”
53. The judgment sought to be appealed against herein was delivered on the 11<sup>th</sup> July, 2024 whereas the present Motion was filed on 24<sup>th</sup> July, 2024. This constitutes a two-week period between the judgment and the Motion. There has been no any allegations of unreasonable delay. The Court also does not consider that the Motion was filed after inordinate delay.
54. The next issue is whether the Applicant has established that it will suffer substantial loss unless an order of stay is granted. 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...”



55. 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.”

56. Courts 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.”

57. 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...”

58. The court is also alive to its duty to balance the interests of an Applicant who is seeking to preserve the status quo 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 cautioned 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.”

59. It is the 3<sup>rd</sup> Defendant’s contention that it stands to suffer substantial loss if stay is not granted. It opines that the Plaintiff will proceed with the execution of the decree, transfer the suit property to its name



and may dispose the same to a third party thus throwing the property beyond recall, and which harm cannot be remedied by an award of damages.

60. In response, the Plaintiff asserts that in the event the judgment and decree are executed, the 3<sup>rd</sup> Defendant will not suffer any loss not having been in occupation and possession of the property nor erected any structures thereon and any loss they suffer can be compensable by way of damages and that in any event, there has been no demonstration that the Plaintiff intends to dispose off the property.
61. Considering the circumstances herein, the judgment of this court mandates the transfer of the title over the property to the Plaintiff. It is trite that upon the transfer and registration aforesaid, the Plaintiff 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.
62. However, does the execution of the Judgment in itself amount to substantial loss. I don't think so. As stated in the above decisions, 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.
63. Indeed, the evidence before this court shows that the 3<sup>rd</sup> Defendant has never taken physical possession of the suit land, either by way of developing it or putting it to any commercial activity. The land has remained vacant since the 3<sup>rd</sup> Defendant bought it. That being the case, and unlike the case where a party will be evicted from land in execution of a Judgment, the execution of this court's Judgment will not affect the 3<sup>rd</sup> Defendant in that regard.
64. Although the 3<sup>rd</sup> Defendant has argued that the Plaintiff has not shown that it has means to compensate it in the event it succeeds in the court of appeal, the law does not put that burden on the Respondent. To the contrary, it is the 3<sup>rd</sup> Defendant who is supposed to give security for the due performance of the decree.
65. Ultimately, the court finds that the 3<sup>rd</sup> Defendant has not demonstrated that it will suffer substantial loss should the stay be declined.
66. 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.”

67. 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.”

68. 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. It is alleged by the Plaintiff that the 3<sup>rd</sup> Defendant has not given any provision of security.
69. Indeed, while this is the position, the court notes that the 3<sup>rd</sup> Defendant has indicated that it is willing to abide by the terms of the court in this respect. The court considers this sufficient.
70. Considering that the court has already stated that the issue of substantial loss has not been established by the 3<sup>rd</sup> Defendant, I shall grant the order for stay of execution on condition that the 3<sup>rd</sup> Defendant provides security for the due performance of the decree. The security will be dependent on the value of the suit property.
71. During the hearing of the suit, the court was informed that the suit property is valued at more than Kshs. 500 Million. That being the case, the 3<sup>rd</sup> Defendant, which is a limited liability company, and whose financial status are not known to this court, should provide security for the due performance of the decree and costs, by depositing Kshs. 500M in a joint interest earning account of the advocates of both parties, pending the hearing and determination of the appeal.
72. For those reasons, the 3<sup>rd</sup> Defendant’s application dated 24<sup>th</sup> July, 2024 is allowed as follows:
  - a. A conditional stay of execution of the Judgment and Orders of 11<sup>th</sup> July, 2024 be and is hereby granted pending the hearing and determination of the intended appeal to the Court of Appeal.
  - b. The order of stay is granted on condition that the 3<sup>rd</sup> Defendant deposits Kshs. 500 Million in a joint interest earning account (fixed account) to be opened and held in the names of the Plaintiff’s and the 3<sup>rd</sup> Defendant’s advocates within 30 days of this Ruling.
  - c. The order of stay of execution to lapse if the said money is not deposited as stated in (b) above.
  - d. Each party to bear its costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Issa for Kamau Korori for 3<sup>rd</sup> Defendant

Mr. Munyua for Plaintiff

Court Assistant: Tracy

