



**Gituro v Kiama (Environment and Land Appeal E031 of 2024)
[2024] KEELC 14068 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 14068 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E031 OF 2024**

JG KEMEI, J

DECEMBER 19, 2024

BETWEEN

JULIUS KIBERA GITURO APPELLANT

AND

ELIZABETH NJERI KIAMA RESPONDENT

RULING

1. Before Court is the Appellant/Applicant's Application dated 22/4/2024 seeking in the main stay of execution of Judgment delivered in Ruiru SPMELC No. E15 of 2023 on 14/3/2024 pending the hearing and determination of his appeal. The Applicant also prays for costs of the Application. The Application is premised on grounds on its face that in the impugned Judgment the trial Court dismissed the Applicant's suit and being aggrieved, the Applicant wishes to appeal against it vide his Memorandum of Appeal dated 4/4/2024. That inter alia the trial Court directed the Court's Executive Officer to execute necessary documents to effect transfer of the title in the Respondent's favor and unless the stay orders are granted, his appeal shall be rendered nugatory hence the Application.
2. The Application is supported by the Supporting Affidavit of even date of Julius Kibera Gituro, the Applicant. He averred he is the sole proprietor of land known as Ruiru East/Juja East Block 2/40931 (the suit land). That on 19/6/2020 the Applicant entered into a sale agreement with the Respondent for the sale of the suit land which was breached for want of payment of the entire purchase price. That the Applicant then moved to Court in a bid to recover his land and inter alia the Court found the sale agreement void but proceeded to issue specific performance orders by directing the Respondent to pay the balance of Kshs. 1.6 Million to the Applicant in exchange of the transfer of the suit land to the Respondent. That the Applicant has requested for typed proceedings (JKG3) for purposes of filing an appeal and he is apprehensive that absent any stay orders, the Respondent will obtain the title deed in her name and may dispose of the suit land to third parties.



3. The Application is opposed by the Respondent, Elizabeth Njeri Kiama who swore her Replying Affidavit on 31/5/2024. Resisting the stay orders, she avowed that her Advocate's forwarded cheques for the payment of Kshs. 1.6 Million as ordered by the trial Court and in contrast the Applicant despite having obtained a copy of the title deed from her Advocates, has refused to effect transfer of the suit land. That in the meantime the Respondent continues to incur financial loss by paying rent of Kshs. 40,000/- monthly having been frustrated from completing her house on the suit land. She urged the Court if it was persuaded to grant stay orders, to direct the Applicant to pay her monthly rent of Kshs. 40,000/- or deposit such sum of money as security for appeal.
4. In rebuttal the Applicant filed a Further Affidavit dated 18/7/2024. He deponed that the transactions that took place post-Judgment do not form the gist of the grounds in his appeal and that his decision to decline the cheques for Kshs.1.6 Million was informed by his disagreement with the impugned Judgment, the subject of appeal.
5. On 2/7/2024 directions were taken for parties to prosecute the Application by way of submissions.
6. The Applicant through the firm of Achillah T.O & Co. Advocates filed submissions dated 22/7/24. Two issues were framed for determination; whether the Applicant's motion is merited and who should pay the costs of the Application.
7. It was argued that the purpose of an Application for stay of execution pending appeal is to preserve the subject matter in dispute so as to strike a balance between the Right of Appeal and in the event the appeal is successful, it is not rendered nugatory. That in this case the Respondent being in possession of the suit land may transfer the suit land to a third party to the detriment of the Applicant. Further that the trial Court having found that the sale agreement was void, there was no basis to grant specific performance orders. That the instant Application was filed timeously and it is in the interest of justice that it be allowed.
8. On the other hand, the Respondent filed submissions dated 4/10/2024 through the firm of Byron & Partners. Drawing a singular issue for determination which is whether the Applicant should be granted stay of execution pending appeal, the Respondent outlined the provisions of Order 42 rule 6 as the relevant law in an Application of this nature. It was posited that the Applicant has not demonstrated any substantial loss he stands to suffer if the Application is declined. Moreover, that the Applicant has in his possession the original title deed of the suit land and already received a deposit of Kshs. 3.2 Million. That no security has been offered by the Applicant and in view of the forgoing, the Application ought to be dismissed with costs.
9. The sole issue for determination is whether the Application is merited.
10. Concerning the prayer for stay of execution, the legal provisions for stay of execution pending appeal are anchored in Order 42 rule 6 (1) & (2) of the [Civil Procedure Rules](#) that;-
 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the Application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on Application being made, to consider such Application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.
 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.”
11. The jurisdiction to grant stay lies at the discretion of this Court and is exercised on the basis of sound and settled principles, not arbitrarily or capriciously on a whim or in consideration of any extraneous matters. In the case of *Butt Vs. Rent Restriction Tribunal* [1982] KLR 417 the Court of Appeal gave guidance on how a Court should exercise discretion in an Application for stay of execution and held that: -
 1. The power of the Court to grant or refusal an Application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle is 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. (sic) (trial Court Judgement).
 3. A judge should not refuse a stay if there is a good ground for granting it merely because in his opinion a better remedy may be available to the Applicant at the end of the proceedings.
 4. 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 of costs as ordered with cause the order for stay of execution to lapse.”
12. Has the Applicant satisfied the conditions set in Order 42 rule 6 (2) of the *Civil Procedure Rules* above? The Applicant contends that much as he would like to comply with the orders of the trial Court, he also wishes to challenge the impugned Judgment on appeal. That he is apprehensive of execution of the Judgment in the event that the Executive Officer of the trial Court executes the necessary documents of transferring the suit land to the Respondent to his detriment.
13. It is trite that execution on its own does not amount to substantial loss because it is a lawful process. See the case of *James Wangalwa & Another Vs. Agnes Naliaka Cheseto* [2012] eKLR where the Hon Court held;

“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.”
14. The same position was adopted by Kimaru, J (as he then was) in *Century Oil Trading Company Ltd Vs. Kenya Shell Limited Nairobi (Milimani)* HCMCA No. 1561 of 2007 where he stated that:-

“The word “substantial” cannot mean the ordinary loss to which every Judgement 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...Where execution of a money decree is sought to be stayed, in considering whether the Applicant will suffer substantial loss, the financial position of the Applicant and that of the Respondent becomes an issue. The Court cannot shut its eyes where it appears the possibility is doubtful of the Respondent refunding the decretal sum in the event that the Applicant is successful in his appeal. The Court has to balance the interest 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 interest of the Respondent who is seeking to enjoy the fruits of his Judgement.”

15. Although strictly speaking the Applicant has not demonstrated the substantial loss he stands to suffer if the order of stay is not granted in light of the circumstances of this case, the Court in balancing the rights of the parties that is the right of the Judgement Creditor to enjoy the fruits of the Judgment and the right of the Applicant to ventilate his appeal, will grant the orders but on terms.
16. On whether the Application was timeously filed, I note that the impugned Judgment was delivered on 14/3/2024 and the Application was filed on 24/4/2024 barely ten days later and in the circumstances, it was timeously filed.
17. The Applicant deponed that he was ready and willing to furnish security and to that end I order that he deposits the sum of Kshs 500,000/- in a joint interest account pending the hearing and determination of the appeal.
18. Final orders for disposal;
 - a. The Application is allowed on terms.
 - b. The Applicant to deposit the sum of Kshs 500,000/- in a fixed deposit account in the joint names of the two counsel within the next 60 days.
 - c. The Applicant is directed to file and serve the record of appeal within the next 90 days from the date hereof
 - d. In the event that the Applicant fails to comply with any of the timelines above the orders granted herein shall lapse automatically.
 - e. Costs shall be paid by the Applicant
19. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 19TH DAY OF DECEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Achillah for the Applicant

Kori HB Ogutu for the Respondent

Court Assistant – Phyllis

