



**Azubedi v Ikumbu (Environment & Land Case 178 of 2015)
[2024] KEELC 14122 (KLR) (18 December 2024) (Directions)**

Neutral citation: [2024] KEELC 14122 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 178 OF 2015
A OMBWAYO, J
DECEMBER 18, 2024**

BETWEEN

SAID ABDALLA AZUBEDI PLAINTIFF

AND

SAMUEL MBUGUA IKUMBU DEFENDANT

DIRECTIONS

1. There are two applications before me. The first application is brought by Samuel Mbugua Ikumbu, hereinafter referred to as the judgment debtor/applicant. The same is dated 15th November 2024 seeking a stay of execution of the judgment made on 9th October 2024 pending the hearing and determination of the intended appeal against the said judgment. The application is based on grounds that the applicant being dissatisfied with the said judgment has lodged an appeal and applied to be supplied with the proceedings of the court. According to the applicant, the appeal has very high chances of success. That the respondent has been granted orders of specific performance in relation to a land sale agreement and that the applicant was ordered to unconditionally transfer the property to the respondent. The suit property comprises rental property that is currently managed by a property agent. The respondent has started interfering with the management of the property and has applied for the termination of the management agreement. The applicant laments that execution of the judgment will render the intended appeal nugatory and therefore stay of execution should be granted. Moreover, that substantial loss will be occasioned if stay of execution pending appeal is not granted. The applicant is willing to furnish security for the due performance of the decree emanating from the judgment. The supporting affidavit of the applicant reiterates the grounds in support of the application.
2. The respondent filed grounds of opposition whose gist is that the application offends the negative order doctrine forbidding a grant of stay of execution. Moreover, the applicant has not demonstrated how stay of execution would render the appeal nugatory. The respondent contends that the order sought if granted will deny the respondent the fruits of his judgment as it would deny him the rights of possession and collection of rent.



3. The applicant submits that execution will create a state of affairs that will irreparably affect or negate the very essential core of the appeal if stay of execution is not granted. The appeal will be rendered nugatory if stay of execution is not granted. Moreover, the applicant submits that the application has been brought to court without unreasonable delay.
4. The respondent on his part submits in agreement with the applicant that the application was made without unreasonable delay. The applicant is willing to abide by any such order of the court in relation to security for the due performance of the decree.
5. On the issue of substantial loss, the respondent submits that the applicant has not demonstrated substantial loss. The respondent contends that no scintilla of evidence of substantial loss has been demonstrated by the applicant. Moreover that the applicant has not substantiated how the appeal will be rendered nugatory. The respondent submits that the substratum of the suit is L.R NO NAKURU MUNICIPALITY BLOCK 6/135 and that if the intended appeal succeeds the suit property will still be available to the applicant. That if the appeal fails, the applicant will be paid a balance of Ksh 55,000,000 upon execution of the transfer.
6. The respondent further submits that the order being sought to be stayed is negative and therefore the application seeks stay of execution of an order incapable of being executed.
7. I have considered the application and do restate that the principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:

“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.
8. I have carefully perused the application, grounds of opposition and the rival submissions and the provisions of order 42 Rule 6 of the civil procedure rules 2010 and do find that the application was filed without unreasonable delay in the circumstances of the case as the application was filed within 36 days of the delivery of the judgment.
9. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“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.”



10. On the issue of substantial loss, the applicant has not demonstrated to the court how he will suffer substantial loss when the respondent is supposed to pay him Khs 55,000,000.
11. The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”
12. The applicant has never been in possession of the property and has never collected rent from the property and therefore the appeal cannot be rendered nugatory if stay is not granted as the status quo will remain the same. Having found that the applicant will not suffer any substantial loss, the application is dismissed with costs.
13. The second application is dated 24th October 2024 wherein the applicant is the decree holder who prays that the property management agreement dated 15th September 2023 between the firm of Musembi Ndolo and co advocates and Kagucia and company advocates be terminated and that all the monies deposited at Absa Bank NakuruA/C NO 2049858526 be released to the decree holders advocate Musembi Ndolo A and Co advocates. The applicant seeks an order that the firm Muigai Commercial Agencies be deemed to have ceased acting as joint appointed property management agent from the date the judgment was delivered on 9th October 2024. Lastly, that Muigai Commercial Agencies Ltd do render and file a comprehensive account report of all monies collected and received and deposited in respect of Nakuru Municipality Block5/133 from the 15th September 2023 to the 9th October 2024.
14. The application is based on grounds that this court issued an order on the 1st March 2023 for the appointment of a property management agent for collection of rent with effect from 1st June 2023 until the hearing and determination of the suit. The advocates eventually entered into a consent and appointed Muigai Commercial agency as the manager of the property in issue. The term of the agreement was the determination of the suit or an order of the court. The suit was determined on the 9th of October 2024 in favour of the plaintiff as the counter claim was dismissed. Despite the determination of the suit by the court, Muigai commercial agencies continue to manage the property. The supporting affidavit reiterates the contents of the grounds of the application. I have considered this application and do find that the applicant is entitled to enjoy the fruits of the judgment entered on the 9th of October 2024 and there being no order of stay of execution of decree or judgment pending appeal, the application is allowed and I do order that the property management agreement dated 15th September 2023 between the firm of Musembi Ndolo and co advocates and Kagucia and company advocates be and is hereby terminated and that all the monies deposited at
15. Absa Bank NakuruA/C NO 2049858526 be released to the decree holders advocate Musembi Ndolo A and Co advocates. The firm of Muigai Commercial Agencies be and is hereby deemed to have ceased acting as joint appointed property management agent from the date the judgment was delivered on 9th October 2024. Lastly, that Muigai Commercial Agencies Ltd do render and file a comprehensive



account report of all monies collected and received and deposited in respect of Nakuru Municipality Block5/133 from the 15th September 2023 to the 9th October 2024 within the next 30 days. Costs of the application to the decree holder.

SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO

NAKURU ENVIRONMENT AND LAND COURT

ENVIRONMENT AND LAND COURT DATE: 2024-12-18 10:03:09

