



Masila & 2 others v Krotonite Enterprises Limited (Miscellaneous Application 31 of 2018) [2024] KEELC 14028 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14028 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
MISCELLANEOUS APPLICATION 31 OF 2018**

LL NAIKUNI, J

DECEMBER 18, 2024

RULING

**IN THE MATTER OF: APPLICANTS ENTITLED TO BY VIRTUE OF
ADVERSE POSSESSION OF 25 YEARS ALL THAT PIECE OF LAND
KNOWN AS L.R. NO. MN/III/5612 REGISTERED AS CR.58960**

AND

**IN THE MATTER OF: SECTION 38 OF THE LIMITATIONS
OF ACTIONS ACT CAP 22 LAWS OF KENYA**

BETWEEN

HUSSEIN SULEIMAN MASILA 1ST APPLICANT

LILIAN KAVUTI MUSYOKA 2ND APPLICANT

IBRAHIM LUGUSA ALUDA 3RD APPLICANT

AND

KROTONITE ENTERPRISES LIMITED RESPONDENT

RULING

I. Introduction

1. This Honorable Court was tasked to make a determination on the filed Notice of Motion application dated 1st October, 2024 by Krotonite Enterprises Limited, the Defendant/Applicant herein. It was brought under the dint of the provision of Order 42 Rule 6(1) the Civil Procedure Rules, 2010 and Rule 8 of the Employment and Labour Relations Court (Procedure) Rules) (sic).



II. The Defendant/Applicant's case

2. The Applicant sought for the following orders: -
 - a. Spent.
 - b. Spent
 - c. That there be a stay of execution of the judgement and decree given by this Court on 18th September 2024 pending the hearing and determination of the Appeal the Defendant intends to file in the Court of Appeal.
 - d. That the costs of this application be provided for.
3. The application by the Applicants herein was premised on the grounds, testimonial facts and averments made out under the 8 paragraphed Supporting Affidavit of – FARAJ MANSUR ABEID SAID, a Director of Kryptonite-Enterprises Limited which had been sued in this suit as Krotonite Enterprises Limited, the Defendant herein sworn and dated the same day with the application. The Applicant averred that:
 - a. Judgement was delivered in this suit on 18th September 2024. Being dissatisfied with the judgement and decree of this court, the Defendant intends to appeal from that decision to the Court of Appeal and has filed a Notice of Appeal and a letter requesting for certified proceedings of the Court both of which have been served upon the Plaintiffs' Advocates. Annexed in the affidavit and marked as "FMAS - 1" copies of the Notice of Appeal and letter seeking certified copies of the proceedings both of which have been served upon the Plaintiff's counsel.
 - b. In the judgment of this court the court has awarded the suit premises namely L.R. NO. MN/III/5612 to the Plaintiffs.
 - c. Unless a stay of execution is granted the suit premises will be registered in the name of the Plaintiffs who may proceed to deal with it as they please thus rendering the intended appeal nugatory. It was therefore imperative that a stay of execution of the decree of the court is granted to preserve the suit premises until the intended appeal is heard and determined.
 - d. Upon the Court delivering its Judgement herein the Court granted a stay of execution for 14 days to enable the defendant to make this formal application. This application has been made within 14 days. It has therefore been filed without unreasonable delay.
 - e. The Defendant was willing to provide any security that the Court may reasonably require the Defendant to provide. However, as the matter in dispute is the suit property namely LR NO. MN/III/5612 the best security would be an order of inhibition to stop any dealing with the property pending the hearing and determination of the intended appeal.
 - f. The Defendant had an arguable appeal from the decision of the court for the following reasons;
 - a. The court in its judgement allowed the Plaintiffs suit for adverse possession even though the suit for adverse possession was filed only 5 years after the Defendant obtained title to the suit property before the expiry of 12 years limitation period prescribed In the *Limitation of Actions Act*.
 - b. The Court in its judgement failed to give any consideration to the evidence tendered on behalf of the Defendant.



- c. The Court proceeded to make orders that were not sought by any parties before it.

II. Submissions

4. On 5th November, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 1st October, 2024 be disposed of by way of written submissions. Subsequently, on 10th December, 2024 the ruling was deferred 18th December, 2024 accordingly.

II. Analysis & Determination.

5. I have carefully read and considered the pleadings herein by the 1st Defendant/Applicant, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
6. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has framed the following three (3) issues for its determination. These are:-
 - a. What are the legal parameters that govern the warrant of stay of execution.
 - b. Whether the Notice of Motion application dated 1st October, 2024 seeking to stay execution of the of the decree of this Honourable Court issued on the 18th September, 2024 by this Honourable Court pending the hearing and determination of the Appealthe Defendant intends to file in the Court of Appeal is merited?
 - c. Who will bear the Costs of Notice of Motion application dated 1st October, 2024.

ISSUE No. a). What are the legal parameters that govern the warrant of stay of execution.

7. Under this Sub – title, the main gist of the matter is on whether or not to grant Stay of Execution from a delivered Judgement or Decree of the Court. The law concerning stay of execution pending Appeal is found in the provision of Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, 2010 which stipulates as follows:

“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 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.



8. It is trite law that stay of execution pending appeal is a discretionary power bestowed upon this court by the law. In the initial stages of building Jurisprudence around this legal aspect, the Court of Appeal in the case of “Butt –Versus- Rent Restriction Tribunal {1982} KLR 417” gave guidance on how a court should exercise the said discretion and held that:
- “ 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.”
9. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in the provision of Sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act*, cap. 21 or in the interpretation of any of its provisions.
10. The provision of Section 1A (2) of the *Civil Procedure Act* provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under the provision of Section 1B some of the aims of the said objectives are:- “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
11. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to which:
- a. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
 - b. The application is brought without undue delay 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.
12. I find issues for determination arising therein namely:



- a. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of judgment pending Appeal.
 - b. What orders this Court should make
13. The purpose of stay of execution is to preserve the substratum of the case. In the case of “Consolidated Marine – Versus - Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)”, the Court held that:-

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
 14. As such, for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.
 15. As for the applicant having to suffer substantial loss, in the case of “Kenya Shell Limited – Versus - Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018” the Court of Appeal pronounced itself to the effect that:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”
 16. The Court of Appeal in the case of “Mukuma – Versus - Abuoga (1988) KLR 645” where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
 17. The Applicant has a burden to show the substantial loss they are likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Applicant to the Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. {See the case of “Absalom Dora –Versus -Turbo Transporters (2013) (eKLR)”}.
 18. As F. Gikonyo J stated in the case of:- “Geoffery Muriungi & another – Versus - John Rukunga M’imonyo suing as Legal representative of the estate of Kinoti Simon Rukunga (Deceased) [2016] eKLR” and which wisdom I am persuaded with: -

“.....the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or “rendering the appeal nugatory” within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal...”.



ISSUE No. b). Whether the Notice of Motion application dated 1st October, 2024 seeking to stay execution of the of the decree of this Honourable Court issued on the 18th September, 2024 by this Honourable Court pending the hearing and determination of the Appeal the Defendant intends to file in the Court of Appeal is merited

19. Now its apply the above legal principles to the instant case. From the proceedings, the Applicant herein filed an application dated 1st October, 2024 seeking orders to stay the Judgement in this matter delivered by this Honourable Court on 18th September, 2024. According to the applicant, the Honourable Court delivered a judgment where it awarded the suit premises namely L.R. NO. MN/III/5612 to the Plaintiffs. The Defendant is aggrieved by the whole judgment and has filed a Notice of Appeal marked as “FMAS – 1” in the affidavit.
20. In determining whether sufficient cause has been shown, the court should be guided by the three pre - requisites provided under the provision of Order 42 Rule 6. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicant unless stay of execution is granted; and thirdly such security as the court orders for the due performance of such decree or order as may ultimately be binding on them has been given by the Applicant.
21. Regarding the pre - requisite conditions evolving from the law is on substantial loss occurring to the Appellants. The court has already deliberated on this aspect and taken into consideration of it from the case of:- “Kenya Shell Limited (Supra)”. From the surrounding facts and inferences of the instant case, I am strongly persuaded that indeed, the Applicant has proved that it will suffer substantially if the orders for stay of the execution are not granted as prayed. For that reason, the application should succeed.
22. On the second issue to determine is whether the application for stay of execution was made without inordinate delay. From the record, the judgment being appealed against was delivered on 18th September, 2024 and the application herein was filed on 1st October, 2024, the Notice of appeal. This application was filed after about 12 days after the delivery of Judgment. Clearly, in this Honourable Court’s assessment, the application was expeditiously without any undue delay.
23. On the last condition as to provision of security, I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. The Applicant has deposed that it is willing to provide any security that the Court may reasonably require the Defendant to provide. However, as the matter in dispute is the suit property namely LR NO. MN/III/5612 the best security would be an order of inhibition to stop any dealing with the property pending the hearing and determination of the intended appeal.
24. This provision of the law notwithstanding from the face value, this court is not bound by the type of security offered by an applicant. It can make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal.
25. In saying so I seek refuge from the case of “Aron C. Sharma – Versus - Ashana Raikundalia T/A Rairundalia & Co. Advocates” the court held that:

“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.”

26. Therefore, in the interest of justice and fairness, it behooved the Applicant herein to furnish security as stipulated by the law. Stay of execution is exactly what it states. It is an order of the court barring a Decree Holder from enjoying the fruits of his Judgment pending the determination of some issue in contention. It matters not whether the issue in contention is the amount awarded in the Judgment Debt, or liability or legality of the extracted warrants as in this case. Where a party seeks to stay execution, the Court must be guided by the parameters set out in the provision of Order 42 Rule 6 of the Rules.

27. The Court observed in the case of:- “Gianfranco Manenthi & Another – Versus - Africa Merchant Assurance Company Limited [2019] eKLR”, thus:-

“..... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the Plaintiff to initiate execution proceedings where the Judgement involves a money decree. The court would order for the release of the deposited decretal amount to the Respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree. (Underlining mine for emphasis)

28. As already demonstrated in the case of “James Wangalwa & Another – Versus - Agnes Naliaka Cheseto (Supra)” the three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive and not disjunctive. It is my finding that the Applicant herein, though they brought this Application without undue delay and adequately demonstrated the substantial loss that they would suffer as stipulated by sub-rule 2b.

29. This being a land matter, it would be appropriate to proceed on the premise that the subject matter ought to be preserved to enable the Defendant pursue his appeal to its finality. I believe substantial loss lies in the failure to preserve the property. The balance of convenience therefore tilts in preserving the subject matter to enable the Defendant exercise his right of appeal.



30. In the result, I am persuaded to grant the order for stay of execution but strictly on condition that the parties shall abide by the orders granted by this Honourable Court.

ISSUE No. c). Who will bear the Costs of Notice of Motion application dated 1st October, 2024.

31. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh (2014) eKLR” and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, (2014) eKLR”.
32. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR”, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In this case, this Honourable Court has reserved its discretion in not awarding costs.

II. Conclusion & Disposition

33. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to the Preponderance of Probabilities and balance of convenience.
34. Ultimately in view of the foregoing detailed and expansive analysis to the application, this court arrives at the following decision and makes the following orders:-
- a. That the Notice of Motion application dated 1st October, 2024 be and is hereby found to have merit and hence allowed subject to the fulfilment of the Pre – Conditions stated herein.
 - b. That this Honourable Court do hereby issue an order of stay of execution of its decree arising from the Judgment of this Honorable delivered on 18th September, 2024 pending the hearing and determination of the Intended appeal in the Court of Appeal.
 - c. That taking that this is a suit where there was no decretal sum, an order of:-
 - i. inhibition to be registered on the title in respect to suit premises namely L.R. NO. MN/III/5612 pursuant to the provision of Sections 68 (1) , (2) & (3) of the *land Registration Act*, No. 3 of 2012 and Regulation 69 (1), (2) & (3) of The Land Registration (General) Regulations, 2017 to prohibit any dealings on the land & guided by “the Doctrine of Lin Pendant”;
 - ii. the original Certificate of Title Deed in respect to suit premises namely L.R. NO. MN/ III/5612 be deposited with the Deputy Registrar of Environment and Land Court pending the hearing and determination of the appeal WITHIN THE NEXT 45 DAYS from the date of this Ruling.
 - d. That failure to adhere with the condition under Clause (c) herein above of this Ruling the Notice of Motion application dated 1st October, 2024 shall automatically stand dismissed thereof with no reference to the Court and execution of the Decree shall ensue procedurally as provided for by law.
 - e. That there shall be no orders as to costs.

It is so ordered accordingly.



RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS.....18THDAY OFDECEMBER.....2024.

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**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. M/s. Osewe Advocate holding brief for Mr. Siminyu Advocate for the Plaintiffs/Respondents.
- c. Mr. Omollo Advocate for the Defendant/Applicant.

