



**Nganga & 4 others v Mande & 3 others (Environment & Land Case
323 of 2018) [2024] KEELC 14130 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 14130 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 323 OF 2018
A OMBWAYO, J
DECEMBER 18, 2024**

BETWEEN

**PETER MUIRURI NGANGA 1ST APPLICANT
MISHECK NGANGA KARANJA 2ND APPLICANT
JOSPHAT KARUNJII NGUGI 3RD APPLICANT
JOSEPH NDICHU MBURU 4TH APPLICANT
JOAB MARAGIA KARANJA 5TH APPLICANT**

AND

**JOSEPH KAMAU MANDE 1ST RESPONDENT
JOHN MWANGI KABICHO 2ND RESPONDENT
GILBERT NDUNGU NDIRANGU 3RD RESPONDENT
THE REGISTRAR OF SOCIETIES 4TH RESPONDENT**

RULING

1. This ruling is in respect of the Applicant's Notice of Motion application dated 30th September, 2024 which sought the following orders; a. Spent.
 - b. Spent.
 - c. Spent.
 - d. This Honourable court be pleased to stay the execution of the decree obtained in Nakuru ELC Case No. 323 of 2018 pending the hearing and determination of the Applicants' intended appeal at the Court of Appeal in Nakuru.



- e. The costs of this application abide by the outcome of the Appeal.
2. The grounds on the face of the application are that judgement was delivered on 30th April, 2024 dismissing the Applicants case. The Applicants being aggrieved by the said judgement, filed an appeal.
3. The application was supported by the affidavit of PETER MUIRURI NGANGA sworn on 30th September, 2024. He reiterated the grounds on the face of the application and stated that this court vide its judgment of 30th April, 2024 dismissed the Applicants suit with costs. He stated that having been dissatisfied by the said decision, they preferred an appeal against the said decision. That on 13th May, 2024 through their advocates, they applied for certified typed copies of the proceedings, judgment and decree but the same has never been supplied despite having paid the requisite fee. He stated that it took time for them to obtain the certified types copies of proceedings, judgment and decree on 22nd August, 2024, where they applied for a certificate of delay which has never been availed to them. He further stated that they have an arguable appeal and that they had also filed the notice of appeal within the statutory timelines. He also stated that the delay in filing the instant application was not intentional since the advocate that was handling the matter was away on maternity leave. He added that they believed that the court would grant them stay of execution upon filing of notice of appeal.
4. He went on to state that unless stay is granted, the intended appeal will be rendered nugatory. He also stated that they also stand to suffer irreparable loss as the 1st Respondent have started eviction of the Applicants.

Response

5. In response, the 1st Respondent filed his Replying Affidavit sworn on 28th October, 2024 where he averred that that despite the order of permanent injunction restraining the Applicants from trespassing the suit land, they have disregarded the said order and continued to trespass. He further averred that from the time the Applicants filed and served the notice of appeal, no action had been taken. He averred that the he instructed his advocates to file an application at the Court of Appeal to have the notice deemed as withdrawn. He further averred that as advised by his advocates, there exists no appeal to warrant grant of the orders sought.
6. The 1st Respondent averred that the present application has been brought 5 months after judgment with no reason given for the delay. He also averred that the Applicants failed to show the loss they would be occasioned or any willingness to place security for grant of the prayers sought. He urged the court to dismiss the application.
7. The Applicants also filed a Further Affidavit sworn on 11th November, 2024 where they reiterated the contents of the supporting affidavit. He added that the notice of appeal is still in force since no contrary orders have been granted. He also added that the decree is not a money decree thus the requirement to provide security for costs does not apply.

Submissions

8. Counsel for the Applicant filed his submissions dated 11th November, 2024 where they identified one issue for determination, whether the court should exercise its discretion and grant stay of execution. They relied on Order 42 Rule 6 of the Civil Procedure Rules and the case of Waithira & 13 others V Wambui (Environment and Land Appeal E027 of 2023) [2024] KEELC 960 (KLR) (22 February 2024) (Ruling) which cited with approval the case of Butt V Rent Restriction Tribunal [1979]. They urge the court to exercise its discretionary powers and grant stay of execution for the reason that they had lodged a notice of appeal but there was delay in availing of the certified proceedings and the



certificate of delay. They relied on Rule 84 (1) of the Court of Appeal Rules, 2022 and submit that Applicants' appeal would be incomplete without the record of appeal which is comprised of the trial court's certified copies of typed proceedings and judgment.

9. They submit that the Applicants have an arguable appeal and that the only reason why the same has not been instituted is because they are yet to be supplied with copies of judgment and proceedings. They add that the 1st Respondent despite being aware that the Applicants had lodged a notice of appeal, embarked on chasing the Applicants and their congregants from their churches which actions have caused and continue to occasion immense loss to the Applicants. They submit that unless stay is granted, the Applicants will suffer irreversible harm and loss. Counsel cited the case of *RWW V EKW* [2019] eKLR and *Matata & another v Rono & another (Civil Appeal E034 of 2024)* [2024] KEHC 2799 (KLR) (19 March 2024) (Ruling).
10. On security for costs, they submit that the decree is not a money decree and therefore the requirement for payment of security for due performance of the decree is inapplicable in the instant application. They relied on the case of *Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd* [2019] eKLR.
11. Counsel for the 1st Respondent filed 19th November, 2024 where he identified three issues for determination. The first issue being whether the court has been approached without unreasonable delay. He submits that judgment was delivered on 30th April, 2024 and the application on 1st October, 2024. He submits that no explanation was given as to why it took 5 months to bring the instant application and added that the Applicants are guilty of laches. He relied on the case of *Mohen Ali & Another V Priscillah Boit & Another E&L No. 200 of 2012* [2014] eKLR
12. The second issue is whether the Applicants shall suffer substantial loss if the order sought is not granted. He submits that it is trite law that declaratory orders cannot be stayed upon delivery of judgment. He added that unless there was admission that the Applicants defied the injunction orders, they submit that there is nothing to stay. He cited the case of *Mukuma V Abuoga* (1988) KLR 645 and *Pan African Insurance Co. Ltd V International Air Transport Association High Court No. 86 of 2006*. He submits that they are unable to tell the substantial loss the Applicants stand to suffer should the court not grant the stay orders. He added that there was no proof that they were evicted from the suit properties. Counsel relied on the case of *Mohammed Salim t/a Choice Butchery V Nasserpuria Memon Jamat* (2013) eKLR
13. The third issue is on security where he submits that the Applicants have not offered any security for appeal despite the mandatory provisions of Order 42 Rule 6(2) of the Civil Procedure Rules. He submits that failure to offer security is fatal to the application. He cited the case of *Patel V Kenya Railway Corporation & 2 Others* [2022] KEELC 14995 (KLR)

Analysis and determination

14. The Court has considered the application and the main issue for determination is whether orders of stay of execution pending appeal should issue.
15. Order 42 Rule 6 (1)(2) of the Civil Procedure Rules provides as follows;
 - “(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.

16. In *RWW V EKW* [2019] eKLR the court held as follows:

“...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.”

17. For this court to grant an order of stay of execution, the Applicants must demonstrate that they filed the application under consideration without unreasonable delay, that they will suffer substantial loss if the orders sought are not granted and that they are willing to deposit security for costs. It is also noteworthy that the court should endeavor to balance the interests of both the successful party in litigation so as not to unnecessarily bar them from enjoying the fruits of judgment and that of the Appellant whose appeal may succeed and be rendered nugatory if stay of execution is not granted. On the issue of delay, a perusal of the court record shows that judgment in the matter was delivered on 30th April, 2024 and the Applicants filed a Notice of Appeal filed on 13th May, 2024. It is this court's view that the same was within the statutory time provided to file an appeal. However, the Applicants failed to file the present application for the reason that the advocate handling the matter was on maternity leave and that the fact that they filed the notice of appeal, it guaranteed stay. It is trite law that Order 42 Rule 6(1) of the Civil Procedure Rules, provides that an appeal is not an automatic stay of execution of the decree of a court and therefore the reason advanced by the Applicant is not warranted. In addition, the Applicants' law firm could have easily assigned the matter to another advocate to proceed.
18. This court notes that judgment was delivered on 30th April, 2024 and the Application filed on 14th October, 2024 translating to a period of about six months. It is also instructive to note that within that period, execution had not been commenced. This court is of the view that that the period does not amount to inordinate delay.
19. The Applicants have to also demonstrate that unless the court grants stay of execution orders pending appeal, they stand to suffer substantial loss. The Applicants argued that the Respondents would proceed to evict their congregants from the church suit land unless orders of stay of execution are granted. It is this court's view that since the Applicants have been in occupation of the land and could be removed if eviction proceeded, they demonstrated the substantial loss they would suffer if stay is not granted.
20. On the issue of security of costs, although the Applicants have not expressed whether they are ready to offer security of costs, this court is of the opinion that they can be directed by the court to do so. In view of the same, this court shall exercise its discretion regarding the security of costs to be offered by the Applicants and direct that they do so within the time to be stipulated in this ruling if they intend to pursue the Appeal.
21. In the case of *Kenya Commercial Bank Limited V Sun City Properties Limited & 5 Others* [2012] eKLR the court held as follows:

“...in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should



be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced in a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal. I do not see, why the same should not be applicable in this case."

22. This court is of the view that grant of stay remains a discretionary order that must consider the fact that the court ought not to make a practice of denying a successful litigant the fruits of their judgment.
23. In the upshot, this court shall exercise its discretion and order of stay of execution of this court's judgement delivered on 30th April, 2024 on the following conditions;
 - a. The Applicants to deposit a sum of Kshs. 300,000/= as security for costs in a fixed joint interest earning account in the names of both counsel for the parties within 14 days from the date of this ruling.
 - b. The Applicants shall compile, file and serve a record of appeal within 60 days and move the Court appropriately towards the finalization of this Appeal within 180 days from the date of this ruling. In the event the Applicants fail to abide by any of the above stated two conditions within the fixed time lines there will be an automatic lapse of the stay of execution herein irrespective of whether or not one condition shall have been met earlier than the failure of the latter. It is so ordered.

SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO

THE JUDICIARY OF KENYA.

NAKURU ENVIRONMENT AND LAND COURT

ENVIRONMENT AND LAND COURT DATE: 2024-12-18 10:21:20

