



**Chombo & 4 others v Estate of Kassim Hamisi Nyuni (Deceased)
Formerly [Kassim Hamisi Nyuni] (Environment & Land Case
162 of 2021) [2024] KEELC 13740 (KLR) (10 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13740 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 162 OF 2021
AE DENA, J
DECEMBER 10, 2024**

BETWEEN

**BAKARI NASORO CHOMBO 1ST PLAINTIFF
MOHAMED JUMA ALI 2ND PLAINTIFF
MOHAMED BAKARI NYUNI 3RD PLAINTIFF
IDRIS JUMA KHALE 4TH PLAINTIFF
BAINA AMADI SEIF 5TH PLAINTIFF**

AND

**ESTATE OF KASSIM HAMISI NYUNI (DECEASED) FORMERLY [KASSIM
HAMISI NYUNI] DEFENDANT**

RULING

Application for Stay of Execution

1. The Plaintiffs/Applicants seek for the following orders before court; -
 1. Spent
 2. An interim order be and is hereby issued staying the execution of the judgement of the superior court delivered on 7th March 2024 in Kwale ELC No. 162 of 2021 pending the hearing of this application
 3. This honourable court be pleased to order for stay of execution of the judgement and decree made on 7th March 2024 where the honourable court determined that the suit land be shared amongst the Plaintiffs and the Defendant [who is now deceased]



4. Costs of this application be provided for.
2. The application is supported by the affidavit of Bakari Nasoro Chombo the 1st Applicant herein. It is averred that the Plaintiffs/Applicants moved the ELC court to address their rights over Kwale/Msambweni/2164 the suit property. That judgement over the same was rendered on 7/3/2024 and being dissatisfied with the judgement have preferred an appeal before the Court of Appeal designated as Civil Application No E049 OF 2024. Further that the Defendant is deceased and cannot sanction the subdivision of the suit property.
3. That despite the pending appeal and the death of the Defendant, the department of survey had issued a notice of the intended sub division set to be conducted on 6/8/2024. That it is unclear who the owners of the land are save for the Defendant and the Plaintiffs who have an interest in the suit property. The Plaintiffs are apprehensive that third parties might be having an interest in taking advantage of the judgement to the Plaintiffs detriment. The Plaintiffs now seek for orders of stay of execution of the judgement of 7/3/2024 pending the hearing and determination of the appeal.

Response

4. In opposing the application, the administrator of the estate of the late Kassim Hamisi Nyuni one Rukia Hamisi Nyuni filed a replying affidavit sworn on 10/9/2024. It is averred that the Plaintiffs have never served the alleged application in the Court of Appeal upon the Defendant. The deponent admits that indeed the Defendant passed away but she is the administrator to his estate. That the purported sub division and survey is being carried out according to the judgement of the court. At paragraph 7 it is averred that there is no prejudice to be suffered even if the appeal succeeds as the suit property will revert back to its owner. The respondent seeks that the application is dismissed as the same is not merited.

Further Affidavit

5. In response to the replying affidavit, the Plaintiffs filed a further affidavit sworn by Bakari Nasoro Chombo. It is stated that the Respondents were served with the Court of Appeal application and directions given by the court. An affidavit of service is attached to the same. That after being served with the appeal papers the survey which had been scheduled for May 2024 was rescheduled to August 2024. That it is only fair that the court stays execution of judgment of 7/3/2024. That in the event the stay of execution is not granted the proceedings of the appeal will be rendered nugatory.

Submissions

6. By consent of parties, the application was dispensed by way of written submissions. The Applicant's submissions are dated 4/10/2024 and the Defendant's 14/10/2024.

Dictum

7. I have considered the application, the response and the submissions filed by the parties to buttress their assertions. The main issue that emerges for determination is whether the Applicants have met the threshold for grant of orders of stay pending appeal. The purpose and objective of the order for stay of execution is to preserve the substratum of the appeal in order to ensure that the appeal is not defeated. In the case of Consolidated Marine. vs. 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”.



8. The Court of Appeal in *RWW vs. EKW* (2019) eKLR addressed itself on this as hereunder: -

"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."

9. The Court of Appeal in *Butt vs Rent Restriction Tribunal* [1982] KLR 417 guided on how this discretion should be exercised 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, 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."

10. 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.

11. From the above provisions of statute, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely

- (a) that substantial loss may result to the applicant unless the order is made,
- (b) that the application has been made without unreasonable delay, and



- (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
12. I will proceed first to interrogate if the applicant really will suffer substantial loss if stay is not granted. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma vs 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."
13. Substantial loss was further explained in the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, thus: -
- "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. Applying the foregoing guidance to the facts of this case, the Plaintiffs in the suit refer to themselves as the heirs of the late Nyuni Kunyapa vide a Succession Cause at the Kadhis Court in Kwale. They dispute the Defendant's beneficiary interest and stated that the Defendant was not entitled to inherit anything from the estate of the deceased. The Defendant's occupation of the suit property was thus termed wrongful and unlawful. The court however found that the Plaintiffs failed to prove their case on a balance of probability and consequently the orders issued in ELC Misc 5 of 2021 were to be perfected and to wit the sub division of the suit property was to be among both the Plaintiffs and the Defendant herein who are beneficiaries to the estate of the deceased Nyuni Kunyapa. The Plaintiff obviously not satisfied with these orders has preferred an appeal against the same. I however note that what was filed at the Court of Appeal was an application whose contents have not been made known to court. As it stands, there is no appeal as alluded to by the Plaintiffs.
15. I will not dwell much on my judgement. However in the event that the Court of Appeal overturns the findings of this court then clearly the suit property will revert to the late Nyuni Kunyapa. In the impugned judgement, I made a finding that the parties herein were both in occupation of the suit property though the Plaintiffs were keen on the Defendant being evicted from the said parcel. Does the Plaintiff stand to suffer any loss in the event that the orders sought are not granted? Am not in doubt that they will not.
16. Moreover the Plaintiff's states that the Defendant is deceased which is not a disputed fact and the expected sub division cannot take place with third parties. However, the Respondent Rukia Hamisi Nyuni has produced before court Letters of Administration ad litem to the estate of the deceased Kassim Hamisi Nyuni. In the event the subdivision proceeds then the same will definitely not be with third parties and strangers but the beneficiaries of the estate of the deceased Kassim Hamisi Nyuni together with the Plaintiffs. In my view the aspect of substantial loss has not been successfully demonstrated by the Plaintiffs. I draw further guidance from the Court of Appeal in *Kenya Shell*



Limited –vs- Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018 which pronounced itself thus:

“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.”

17. On security for costs, the applicant has not made any proposal as to what he intends to deposit as security for costs. However having found that the requirement to demonstrate substantial loss will be suffered should the order not be granted has not been met, I see no need to dwell into this issue. I’m persuaded by the dictum in the case of Sammy Some Kosgei V Grace Jelel Boit [2013] eKLR where the court emphasised that if an applicant cannot demonstrate substantial loss, then the application ought to automatically fail and there would be no point in considering the question of security since the question of substantial is the epicenter in an application for stay of execution pending appeal.
18. The above argument will also apply to whether the application has been made without delay.
19. Having made a finding that substantial loss has not been proved and considering the circumstances of this case, I find the application lacking in merit. The Plaintiff’s application dated 3/8/2024 is hereby dismissed. The Respondent will have the costs of the application.
20. Orders accordingly.

RULING DATED SIGNED AND DELIVERED THIS 10TH DAY OF DECEMBER, 2024

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AE DENA

JUDGE

Ms. Juma Holding Brief for Khatib for the Defendant

Mr. Yose for Plaintiff/applicant

Daniel Disii - Court Assistant.

