



**Wamalwa v Ekirapa (Environment and Land Miscellaneous Application
2 of 2022) [2023] KEELC 490 (KLR) (31 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 490 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 2 OF 2022
FO NYAGAKA, J
JANUARY 31, 2023**

BETWEEN

BEATRICE WAMALWA PLAINTIFF

AND

ALBERT ALEXANDER AGGREY EKIRAPA DEFENDANT

RULING

1. This Court was called upon to determine an Application dated 13/10/2022. It was a Notice of Motion brought under certificate of urgency. It was brought under Section 17(3) of the *Environment and Land Court Act* (ELC Act), Act No. 19 of 2011, Section 3A of the *Civil Procedure Act* and Article 162(2)(b) of *the Constitution*. In it, the Defendant/ Applicant sought the following orders:-
 1. ...spent
 2. That this Honourable Court do (sic) order a stay of execution of the Ruling of this Court (Hon. Dr. iur Fred Nyagaka, J.) dated 05/10/2022 and all consequential proceedings and orders issued and or emanating from the said Ruling and further order a stay of all further proceedings in this case pending the hearing and final determination of the intended appeal thereon.
 3. That the costs of this Application do abide the intended Appeal.
2. The Application was brought was based on six (6) grounds which are summarized hereinafter. One, that this Court delivered a Ruling herein on 5/10/2022 by which it allowed the Plaintiff's Notice of Motion dated 13/04/2022. After that it directed the Applicant to appear personally for mitigation and sentencing. The Defendant being dissatisfied with the Ruling filed a Notice of Appeal on 06/10/2022. He was apprehensive that if the Court proceeded to sentence him, his right of liberty would be taken away and that would have immense and irreparable loss and prejudice occasioned to him.



3. The Applicant then gave four decisions of courts of same status where they pronounced themselves favourably on the issue such as presented before this Court. To him, all the decisions were that a stay of execution ought to be granted in such circumstances. He then relied further on the decision of the Supreme Court of Kenya in Justus *Kariuki Mate & Another v. Martin Nyaga Wambora and another* (2014) eKLR. In it the Court stated that if the court declined to grant the status quo of an applicant contemnor and he was sentenced and incarcerated, it would render the substratum of the Appeal spent, and it would be impossible to compensate him if the appeal succeeded while on the other hand it would do no harm if application was granted.
4. The other ground was that no prejudice would be occasioned the Plaintiff if the stay of execution and stay of proceedings was granted but the Applicant would instead incur substantial loss unless the order was made. The last ground was that the Application was brought without undue delay.
5. The Application was supported by the Affidavit sworn by one Albert Alexander Aggrey Ekirapa, the Defendant/Applicant. It was sworn on 13/10/2022. In his Affidavit, he reiterated the contents of the grounds of the Application but in a deposition form. He then annexed to the Affidavit and marked as AAAE 2 a copy of the Notice of Appeal filed and AAAE 3 a copy of a letter for proceedings. He also annexed and marked AAAE 1 a copy of the Ruling and AAAE 4 a draft Memorandum of Appeal. He then swore that the Appeal would be rendered nugatory in case the order sought was not granted since by not granting it, his right to liberty would be deprived and his constitutional right to appeal indirectly denied. Further, he deponed that the appeal raised substantive issues of both law and fact which would had reasonable chances of success. He deponed further that no prejudice would be occasioned to the Plaintiff if the orders sought were granted while on the contrary it was him who would suffer substantial loss. He swore that the Application was brought without undue delay.
6. He deponed that the orders he appealed against were grievous. He relied on the Supreme Court of Kenya decision of *Julius Kariuki Mate v. Martin Nyaga Wambora and another* (2014) eKLR. He quoted an excerpt from it which was along the above lines. He then deponed that he had demonstrated sufficient cause to this Court to warrant the grant of the orders sought.
7. The Respondent's learned counsel filed a Replying Affidavit sworn on 25/10/2022. He did so on 28/10/2022. He deponed that the Application was bad in law and an abuse of the process of this Court. He repeated that the Applicant was, on 05/10/2022, found guilty of disobedience of the orders of this Court. His deposition was that the Ruling fell within the provisions of Order 43 Rule 1(2), (3) and (4) of the Civil Procedure Rules, and the Applicant had not sought for and obtained leave of Court, even within 14 days, to file an appeal against it. He deponed further that without the leave of Court to appeal, the application was incurably defective and abuse of the process of the Court. He stated further that there was therefore no appeal filed to justify the grant of the orders sought.
8. The Respondent swore further that the Applicant could not halt the due process of the Court of dispensing justice because of an intended appeal. Further, that she was on the land pursuant to the orders of this Court and by the said orders she was required to remove whatever was unlawfully planted on the land. He stated that the Applicant admitted to having destroyed the Respondent's maize crop and her structure, thereby disobeying the orders of this Court issued on 28/02/2022. He therefore ought to face the consequences of his actions. He deponed further that to allow the instant application would be tantamount to permitting the Applicant to get away with his actions yet the Respondent was counting losses over the Applicant's actions.



Submissions

9. The Application was disposed of by way of written submissions. The Applicant filed his submissions on 17/11/2022. He organized them in four segments. The first one, A, was about the Application itself. The second, B, was the Applicable law, which he submitted was on the jurisdiction of this Court to handle the Application. He stated that Section 13(7) of the ELC Act granted the Court power to make any order or grant any relief as the Court deemed fit and just to grant hence it was clothed with jurisdiction to handle the Application. He relied on the High Court case of *Visram Ravji Halai v. Thornton & Turpin* (1990) KLR 365 in which his Lordship stated that Order 41 Rule 6 (then, but now equivalent to Order 42 Rule 6) of the Civil Procedure Rules fettered this Court's discretion in granting such an order to the fulfilment of three requirements, being, sufficient cause, substantial loss and furnishing of security besides the application being made without undue delay.
10. The third segment, C, was the analysis. In it he submitted that he had filed a Notice of Appeal in accordance with Rule 75 of the Court of Appeal Rules. He submitted further that contrary to the contention by the Respondent that he had not secured leave of this Court to Appeal against the Ruling delivered on 05/11/2022, Section 16 of the ELC Act as read with Article 164(3) of *the Constitution* provides that appeals from the decisions of this Court be made to the Court of Appeal. He gave the provisions of Section 16 of the Act, which deals with appeals. He also relied on Section 5(2) of the *Judicature Act* which provides that order of the High Court to punish for contempt of Court shall be appealable as of it were a conviction and sentence made in exercise of the original criminal jurisdiction of the Court. He then argued that an appeal against such order lay to the Court of Appeal as of right under Section 75(1)(g) of the *Civil Procedure Act*. He also stated that when Order 40 Rules 2 and 3 are read with Order 43 Rule 1(1)(1)(u) of the Civil Procedure Rules, that right is automatic.
11. The Applicant then summarized the manner in which the intended appeal was arguable by stating that the court erred in law in rationalizing what the status quo was, in the Court relying on a report by the Agricultural Officer and failure to take recourse to the Plaintiff's actions. He submitted further that there was sufficient cause to warrant the orders being granted. He relied on the decision of the Court of Appeal in CA Civil Application No. NAI 283 of 2015 *National Bank of Kenya Limited and Another vs Geoffrey Wahome Muotia* (2016) eKLR. In the matter the Court held that in a matter of an appeal against an order of conviction for contempt, the proper cause is for the Court to stay the order of contempt and any proceedings that may effectuate the order, pending a full determination of the intended appeal. He argued that in case this Court proceeded to carry out the sentence then the applicant would be deprived of his right of appeal. He also relied on Nairobi CA Civil Application No. 95 of 2018 *Centre Star Limited & another v. Halima Mahmood Ali & 2 others* (2018) eKLR. In it the Court of Appeal held that by the time the intended appeal would be heard there could be a possibility of the appellant having served the sentence yet there were lingering questions about the legality of the orders made. Further, he relied on the Supreme Court of Kenya decision of *Justus Kariuki Mate & Another vs. Martin Nyaga Wambora & Another* (2014) eKLR and the persuasive decisions of Oundo J in *Julius Mugo Gachagua vs. Peter Mahinda Kanyora & 2 Others* (2020) eKLR and Ombwayo J in *Siokwet Tarita Limited vs Commission for University Education & Another* (2017) eKLR and of Chitembwe J in *Nation Media Group v. Child Welfare Society of Kenya* (2021) eKLR.
12. Regarding furnishing of security, the applicant stated that having executed a bond of Kshs. 750,000/= with a surety of similar amount on 03/11/2022, he had already satisfied it.
13. The fourth one, D, was the conclusion he gave regarding the application. He stated that it was merited and ought to be granted; it did not offend Section 6 and 7 of the *Civil Procedure Act* since even though there was a pending Application of a similar nature in the Court of Appeal, the two jurisdictions did



not overlap hence that should not affect the determination of the instant application. He stated the jurisdiction of this Court as being given under Section 16 of the ELC Act while that of the Court of Appeal was under Rule 5(2)(b) of the Court of Appeal Rules. Lastly, he submitted that Order 42 Rule 6(1) of the Civil Procedure Rules allowed the appellate court to consider an application for stay of execution regardless of whether the trial Court had granted it or not and that there was no requirement that the trial Court should have determined the application before it or not. On filing the Application without undue delay, he submitted that having brought it on 13/10/2022 after delivery of the Ruling impugned on 05/10/2022 it was timeously done.

14. The Respondent summarized the Application and then stated that it was malicious, frivolous and intended to abuse the process of the Court. He summed it that the Applicant by his own admission in the oral testimony before Court admitted that he, through Engineer Wamalwa, destroyed the Respondent's crop on the ground, contrary to status quo order. He therefore could not appeal against his own testimony and therefore the Application was frivolous.
15. He also summed that the Applicant had not sought leave of the court to appeal the Ruling, even within 14 days after delivery. Thus, since the Application was brought under Order 43 Rule 1(2), (3) and (4) of the Civil Procedure Rules, the application was not merited. He then argued that there was no appeal filed or one that was pending in the superior Court against the impugned Ruling of this Court hence it was impossible to assess the success or otherwise of the same.
16. He then stated that the Application offended Section 6 of the Civil Procedure Rules since there was already a similar one filed on 18/10/2022 and pending in the Court of Appeal in Kisumu No. E121 of 2022 for determination. He stated that the instant one was an abuse of the process of this Court. He then cited the said provision of Section 6 of the Civil Procedure Act.
17. His view was that the Applicant was gambling with the process of the Court. He cited Order 42 Rule 6(1) of the Civil Procedure Rules stating that the Applicant ought to have filed the instant application and waited for the outcome thereof before moving for a similar order in the Court of Appeal. He then prayed for the dismissal of the instant application. That concluded submissions of the parties.

ISSUES, ANALYSIS AND DETERMINATION

18. I have given due consideration of the Application, the law, the facts in support and opposition to the application, both statutory and case law cited by both parties, the extensive submissions and I am of the view that the following are the issues to be determined:-
 - a. Whether to consider prayer 2 as a unitary one or break it into two limbs;
 - b. Whether the Application is merited;
 - c. What orders to issue and who to bear costs.
19. It would be apt to determine the issues identified above sequentially because, a finding on each of the one preceding the other leads to the basis for considering the subsequent one differently, if any. Thus, I begin with the first one.

Whether to consider Prayer 2 as a unitary one or break it into two limbs

20. The substantive prayer the Applicant sought was that this Honourable Court does order a stay of execution of its Ruling dated 05/10/2022 and all consequential proceedings and orders issued and or emanating from it and also to stay all further proceedings in this case pending the hearing and final determination of the intended appeal thereon. In my understanding of the prayer, the order of stay if



granted would be directed to two events, namely, the execution of the Ruling and its attendant orders, and the continuance of proceedings herein for reason of the fact that an intended appeal was to be pursued in the Court of Appeal.

21. The above deduction being the case, it is my view that this Court had to ask itself whether it would be in the interest of justice of both parties herein to grant or refuse the prayer in a unitary manner. I understand well that the Applicant crafted the prayer in such a subtle manner as to call for a singular and synchronised consideration of the same yet the reading of the provisions under which the prayer is sought, which I will consider below as I deal with the next issue, renders the view that the two be considered in disaggregated manner. The relevant phrase is at Order 42 Rule 6(1) of the Civil Procedure Rules which reads as follows, “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except...” (emphasis is added in bold and underline).
22. The connecting word used in the phrase is “OR”. The term is disjunctive. There was a good reason why the Rules Committee used the term “or” and not “AND”. By using the word “and”, it would have meant combining the two issues. But by using “or” it means that whereas the prayers of staying of execution or proceedings may be made in one application or simultaneously, they ought to be crafted separately presented. This is because grant or refusal of one or the other does not, in my view, obviate the other. Each prayer contains its own merits to be considered. In any event the principles for grant of either prayer are different. Thus, to subsume the prayers into one omnibus prayer is, to say the least, to cause confusion and call for dismissal of the prayer.
23. Having said as I have above, I am of the considered view that in the interest of justice, and basing my decision on Sections 3A and 63(e) of the *Civil Procedure Act* and Article 159(2)(d) of *the Constitution*, I hereby exercise my discretion to determine the substantive prayer in the instant application as though the prayer for execution were made separately from that of stay of proceedings. I overlook that drafting technicality error. In so doing I will apply the principles for grant of either in a directed manner as I consider the merits of either.

(b) Whether the Application is merited

24. The Application before me was brought under Section 13(7) and 16 of the ELC Act, Act No. 19 of 2011, Section 3A of the *Civil Procedure Act* and Article 162(2)(b) of *the Constitution* of Kenya. The substantive prayer in it, which was (2), was for stay of execution of the ruling delivered on 5/10/2022 together with any consequential orders and proceedings emanating from it, and stay of proceedings in this case. Both were sought to be granted pending the hearing of an Appeal preferred from the Ruling impugned. I first laid out the content of the prayers sought herein so that I would start by stating the issue. Then I would move to the law or rule applicable before I apply the facts thereto and then conclude the matter. Thus, the issue herein was in two simple limbs, namely, one, a prayer for stay of execution, and, two, a prayer for stay of proceedings.
25. The law procedural applicable in the two cases, in courts of this level and those below, is the *Civil Procedure Act* and Rules. The question this court asks itself is: are the provisions cited by the applicant relevant to the Application of this nature? I start with analysing the content of each. The Applicant cited Sections 13(7) and 16 of the ELC Act. Section 3A of the *Civil Procedure Act* is on the inherent power of this Court to make any order as it may deem just for the ends of justice and avoid abuse of its process. Sections 13(7) and 16 of the ELC Act are on the reliefs this Court can grant and the Court (of Appeal) to which appeals from the judgments and orders of this Court lie, respectively. Article 162(2) (b) of *the Constitution* is on the establishment of this Court separate from the High Court but equal in status with it. These are not procedural provisions.



26. Therefore, the relevant law governing which governs applications for stay of execution, or even those on stay of proceedings, pending appeal is Order 42 Rule 6 1(2) of the Civil Procedure Rules, 2010. The Rule states 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.”

27. Since arguments on such issues arise whenever a party is dissatisfied with decisions of the court and desire to be granted orders of stay of either execution or proceedings, numerous decisions have been rendered on them. It goes without saying that there is a plethora of decisions to guide this Court. Thus, in *Halal & Another -vs- Thornton & Turpin [1963] Ltd [1990] eKLR* the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag. JA) the Court of Appeal held that:

“...thus the superior court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must of course, be made without unreasonable delay.”

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in the case of *Hassan Guyo Wakalo -vs- Straman EA Ltd (2013)* as follows:

“In addition the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory.”

These two principles go hand in hand and failure to prove one dislodges the other.”

28. Again, in *In Civil Appeal No.107 of 2015, Masisi Mwita -vs- Damaris Wanjiku Njeri (2016) eKLR*, the Court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & Another..Vs...Thornton & Turpin Ltd*, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-

“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.

“In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo...Vs... Straman EA Ltd (2013)* as follows:-



“In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory.”

These twin principles go hand in hand and failure to prove one dislodges the other.”

29. The grant of an order of stay of execution is a discretionary one. It ought to be exercised judiciously and not capriciously. In Brian A. Garner (2019). Black’s Law Dictionary, 11th Edition, Thompson Reuters, MN, the term “judiciously” is defined to mean “to use sound judgment.” In that regard, the Court of Appeal decision in COI & another v Chief Magistrate Ukunda Law Courts & 4 others [2018] eKLR has put it clearly that there is need for a court to act judiciously. This means that the Court ought to weigh all the facts pertaining the issue and the law and give a reasoned judgment. What it means is that the Court has to apply its mind to the circumstances of the case and the law as any reasonable (learned) person would and demonstrate or show it in its determination that it did so.
30. Ordinarily an order for stay of execution pending appeal is made to preserve the subject matter of the appeal. It presupposes that there ought to be an appeal pending. It would not normally be granted in speculative circumstances, that is to say, where a party has not filed an appeal but moves the Court as much. However, in ordinary parlance, the usual prudence and practice is that courts grant temporary orders of stay immediately after a decision is made if it is just and expedient to do so or where circumstances of the case dictate so, pending a formal application for such orders. In such instances one might not expect to, and there does not, exist an appeal. But at the formal application stage the applicant must demonstrate to the Court that there exists an appeal (as required by law) and show how arguable the appeal is.
31. It is worth noting that if the subject or substratum of the appeal is not maintained before the determination of the appeal then it would render the appeal nugatory or an academic exercise. That is why it is necessary that that orders of stay of execution are granted. Even then, where a party prays for an order of stay of execution, the court should balance the interests of both the successful party and the Appellant’s. Therefore, in RWW vs EKW (2019) eKLR where it was held:

“.....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.”
32. As noted above, on the one hand, the Respondent argued that this Court should not grant the orders sought because there was no appeal that was pending, as at the time of the application. The Applicant, on the other hand, argued that there was a pending appeal. To support his contention the Applicant annexed to the Application and marked as AAAE 2 a copy of the Notice of Appeal filed, and AAAE 4 a draft memorandum of appeal. These the Respondent discounted as meaningless. But the Applicant went into great lengths through explaining the import of provisions such as Rule 75 of the Court of Appeal Rules, Section 16(3) of the ELC Act and Article 164(3) of *the Constitution* that he had appealed against the Ruling of this Court as of right.
33. In the instant case, in my humble view, the answer to the above rival arguments lay in the meaning of Order 42 Rule 6(4) of the Civil Procedure Rules which provides for appeals preferred from this Court to the Court of Appeal, and Rule 2(2) of the *Appellate Jurisdiction Act*/Court of Appeal Rules



for appeals to that Court. Under Order 42 Rule 6(4) it is provided that once a Notice of Appeal is given it is deemed that an appeal has been filed under the Rules of the Court (of Appeal). This borne in mind, then it is apt to consider what the Rules of that Court refer to as an appeal. Rule 2(2) of the Rules of the *Appellate Jurisdiction Act* provides that an ““appeal”, in relation to appeals to the Court, includes an intended appeal;...”. This has been reiterated in *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR, by the Court of Appeal. It was held that an appeal is deemed to have been filed once a Notice thereof has been filed in the appropriate registry. The Court used these specific words:

“Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time when the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of review while keeping open its option to appeal against the same ruling.”

34. In the instant case, a Notice of Appeal was filed and served on the Respondent. As to its competency or otherwise, this Court has no jurisdiction to determine. Therefore, whether the Applicant filed a proper appeal or not is not for this Court to decide. It goes without saying then that whether ought to have obtained leave of this Court to appeal against the Ruling herein or not and whether he actually followed the provisions of Order 43 of the Civil Procedure Rules as was argued by the Respondent, that is not within the purview of this Court to consider: it lies in the power of the Court to which the appeal has been preferred.
35. What remains of me them to determine is whether or not the applicant has fulfilled the conditions for the grant of the orders sought. In regard to sufficient cause being shown, the applicant contended that having filed the appeal and this case being unique in that the orders appealed against related to an intention to punish him for contempt of court, and the orders being grievous, he had shown sufficient cause. Furthermore, he argued that if the mitigation and sentence were to be carried out before his appeal is heard and determined, it would deprive him of his constitutional right of appeal. He relied on a number of authorities which I need not to reproduce herein. The Respondent argued otherwise.
36. I have considered the uniqueness of this case, the peculiarity of the orders appealed against, being that it is, if executed, capable of depriving the Applicant his freedom of movement or liberty (although it is not automatic that a Court must always impose a sentence leading to loss of liberty: it can even just admonish) and that once executed there may be a possibility that he may have served the sentence before the appeal is heard and determined. I hold that he has shown sufficient cause to warrant the grant of the orders sought. This is because the order herein is of a penal nature and it ought to be treated differently from that of a civil nature.
37. As was held by the Court of Appeal in *Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & another* [2006] eKLR, so I hold. The Court stated as follows:

“But matters involving penal consequences must, of necessity, be treated differently. It can be of no consolation to tell a man that his appeal will not be rendered nugatory even if he went to prison for only one week. The appeal would have been rendered nugatory.”
38. I am further bound by the Supreme Court of Kenya decision of *Justus Kariuki Mate & Another vs. Martin Nyaga Wambora & Another* (2014) eKLR and the Court of Appeal decisions of *CA Civil Application No. NAI 283 of 2015 National Bank of Kenya Limited; Another vs Geoffrey Wahome Muotia* (2016) eKLR; and *Nairobi CA Civil Application No. 95 of 2018 Centre Star Limited & another v. Halima Mahmood Ali & 2 Others* (2018) eKLR. I will agree also on this point with the persuasive decisions of *Julius Mugo Gachagua vs. Peter Mahinda Kanyora & 2 Others* (2020) eKLR



and Siokwet Tarita Limited vs Commission for University Education & Another (2017) eKLR. All these the Applicant cited.

39. This Court would hasten to add that in United Insurance Co. Ltd. vs. Stephen Ngare Nyamboki Civil Application No. Nai. 295 of 2001, the Court of Appeal took the view that imprisonment of the contemnor therein even for a few days, if enforced, would obviously render the appeal nugatory if it eventually succeeded.
40. But the Court is bound to consider the satisfaction of the other requirements. Regarding the application being brought without undue delay, I consider that since the Ruling was delivered on 05/10/2022 and the Application brought on 13/10/2022, a span of only eight days, that was such a short period as not to constitute delay.
41. About providing security, the Applicant argued that having executed a bond of Kshs 750,000/= with a surety of a similar sum, he had met the requirement. On this, the Court finds that the bond and surety were given to ensure the Applicant attended this Court for mitigation and sentencing. They would end there and not to the Appellate Court. My understanding of the Applicant's plea is that he has offered to utilize the same bond and terms in order to be free while he awaits the determination of the appeal. This Court shall consider shortly hereafter whether that in itself is sufficient to ensure due performance of the orders of this Court, after it considers the next issue - substantial loss.
42. The Applicant contended that he would suffer substantial loss if the orders were not granted. On this, this Court considers what in law is understood to be substantial loss. The High Court sitting in Bungoma Misc. Application No. 42 of 2011, that is to say, JAMES WANGALWA & ANOTHER V AGNES NALIKA CHESETO [2012] eKLR, the Court held that:

“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. This is what substantial loss would entail.”
43. The Applicant argues that being deprived of liberty is substantial loss. While this Court agrees with him on that account, it is of the view that the Applicant has taken the narrow view that only a custodial sentence will be meted against him after mitigation. There are various sentences this Court is empowered to mete, including payment of fines or even non-custodial ones. These do not lead to loss of liberty. However, for the reasons noted above from the binding authorities that I have alluded to, I am of the view that in case this court were to mete out the sentence substantial loss may result in case, for instance, the Court imposed a fine and the Applicant was unable to pay it.
44. I have said much on the merits of the limb on stay of execution and I ought to end it here. But one fact which came to light and which I consider to be the elephant in the room is: that the Applicant was urging an exactly similar application in the Court of Appeal in Kisumu Civil Appeal No. E121 of 2022. Thus, the Respondent opposed the grant of the orders sought herein on the ground that Order 42 Rule 6(1) of the Civil Procedure Rules does not permit the Applicant to file a similar application in the Court of Appeal, at the same time as the instant one (emphasis mine). He argued that the instant one was an abuse of the process of the Court. Argued that one of the two applications ought to be stayed pending the determination of the other. It turned out that indeed the Applicant had, on 18/10/2022, just after five days of filing the instant Application also filed the other one.
45. To this contention the Applicant stated that the application did not offend Sections 6 and 7 of the *Civil Procedure Act* since the jurisdictions of the two courts - the Court of Appeal and this one - do not overlap. He argued that the res judicata doctrine did not apply. I agree with him on that. He then stated that Order 42 Rule 6(1) empowered the appellate court to consider an application for stay of



execution regardless of whether the trial Court had granted or refused a similar application. But this Court finds that that is true to the extent that it is this Court or the High Court of Employment and *Labour Relations Act* that is exercising appellate jurisdiction. He further argued that he was in the Court of Appeal vide the provisions of the *Appellate Jurisdiction Act* and Rule 5(2)(b) of the Court of Appeal Rules.

46. In regard to whether or not the similar Applications should be urged simultaneously, the issue presents a unique contention which this Court has to make the parties all and sundry to understand. Under Article 10(1) and (2) of *the Constitution*, one of the national values and principles of governance that all state officers, all public servants and all persons is the Rule of Law. The rule of law is a value that encompasses many facets. One these is that there is in society, in terms of law, law and order. With regard to order, it is further required of men and women to follow the laid down principles of law, life, reason and morality. Under the rule of law, it is not open for anyone to do things with uncertainty: arbitrariness is abhorred. Similarly, conjecture, guesswork and confusion are not among them.
47. Before me an argument was made that two applications of the same nature can be argued at the same time before courts of competent jurisdiction and different results thereof be expected. While Rule 5(2) (b) of the Court of Appeal rules does not provide for whether the Application for stay of execution should have been determined by the superior or trial court first before another one is presented before that Court, the question that is pertinent is, should a similar application be prosecuted in both the Court of Appeal and the Superior Court at the same time? The Rule provides that, “Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may- (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”
48. Clearly, there is no reference in that Rule to any other decision on stay of execution by the court of the lower hierarchy. In terms of Order 42 Rule 6(1) of the Civil Procedure Rules, the provision is specific that the appellate Court, in which case it is this Court or the High Court or the Employment and Labour Relations Court acting in that jurisdiction, has to consider the granting or refusing the application for stay of execution or proceedings after the trial Court has considered it. This is because the guiding phrase therein is, “...whether the application for such stay shall have been granted or refused by the court appealed from...” There is no way the Court and even parties shall form an opinion as to the above statement unless the trial Court has rendered itself on a similar application.
49. Public policy, order and the rule of law, together with the principles and practices of the Common Law system and reason, besides common sense, require that in legal practice no similar issues should be urged or litigated in two different forums of competent jurisdiction at the same time. That would breed confusion, gambling, uncertainty and disorder. That is why duplicity of suits is abhorred and, for this Court, prohibited by virtue of Section 6 of the *Civil Procedure Act*. The Applicant ought to have elected either to prosecute the application for stay of execution in this Court or the Court of Appeal and not both at the same time. It is for those reasons that this Court holds that while the instant application is not an abuse of the process of this Court, it cannot be properly granted during the pendency of the Application in the Court of Appeal. That would be akin to the Applicant swaying the sword of Damocles on both this Court and the Respondent. On that account I would dismiss this Application.
50. Regarding the limb on stay of proceedings pending the appeal, the questions this Court asks itself are these: first, will the failure to grant the application prejudice the parties in this case? Two, will the outcome of the Court of Appeal decision arising from the intended appeal, if the appeal is successful, impact the proceedings of this court?



51. The grounds for the grant of an order for stay of proceedings pending appeal are to be found in Order 42 Rule 6(1). It states, at the relevant part, as follows:-

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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, ...”

52. It is thus required of a party seeking orders as herein sought to satisfy only one requirement in order to be granted the order. That requirement presupposes that a party shall have filed an Appeal against a judgment or decree or ruling or order of a court before moving it. However, as the provision reads, that does not entitle him to automatic stay of proceedings in the matter: a stay is not a matter of right in those circumstances. Granted that he has shown the Court that he has filed an appeal, the Applicant ought to show sufficient cause in order for the court to grant the orders sought.

53. What amounts to sufficient cause is a matter of both law and fact. Sufficient cause has been explained to mean bona fide and more than inaction on the part of a party. In *Parimal v. Veena*, (2011) 3 SCC 545, the Supreme Court of India tried to define the terms by stating that:-

“sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore, the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously”.

54. It implies that there ought to be enough or adequate reason given by a party in order to avail himself, through Court, of the grant of the orders sought. In *Martin Lokite Korwa on behalf of Kaboyi Merikor (Deceased) v Lomute Pusikwang & 4 Others* [2021] eKLR this Court held that sufficient cause:

“...should be borne out of good faith, honesty, blamelessness and diligence in action. None has been demonstrated in the present Application. All that was made was an attack on the private surveyor’s report from the Bar before the maker thereof takes to the witness stand.”

55. In the case of *Halal & Another -vs- Thornton & Turpin* [1963] Ltd [1990] eKLR the Court of Appeal held that:

“The application must of course, be made without unreasonable delay.

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in the case of *Hassan Guyo Wakalo -vs- Straman EA Ltd* (2013) as follows:

“In addition, the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory.”



These two principles go hand in hand and failure to prove one dislodges the other.”

56. This court is alive to fact that the intention and purpose of stay of proceedings pending appeal is to ensure that the subject matter of the Appeal is not rendered nugatory in the long-run. That being the case, it is not for this court to evaluate the merits of the Appeal. All the Applicants needs to demonstrate to the Court is that he has filed an appeal and it is arguable. He does that by exhibiting a Notice of Appeal or a Memorandum of Appeal to that effect. He has done so here.
57. This Court has considered whether when the Court of Appeal renders itself on the intended appeal and finds that the Appeal is merited that would affect the proceedings herein. It thinks not. This is because, the Ruling impugned was only as a result of the contention be parties that the interlocutory orders of the Court were not obeyed. If the Court of Appeal finds that indeed the Applicant obeyed the orders, it will declare only the decision of this Court challenged invalid. That would leave the matter there since whether he obeyed the orders of this Court or not the suit would proceed, aside from the interlocutory orders. Conversely, in case the Appellate Court finds that he did not obey them then it will only send him back to this Court for mitigation and sentencing. That has no effect on the process of tendering evidence or taking other steps in this matter. For those reasons I would reject the prayer and direct that the proceedings are not stayed. The proceedings after this order will not at all or in any way effectuate the Ruling and order issued on 05/10/2022 and the proceedings emanating from that.
58. On the above finding, this Court is guided by the Court of Appeal decision of CA Civil Application No. NAI 283 of 2015 National Bank of Kenya Limited & Anor vs Geoffrey Wahome Muotia (2016) eKLR. In it the Court held that where the alleged contemnor intends to appeal against an order of conviction and has raised issues that could deserve the input of that Court, “... then it would be just to grant a stay of the order of contempt, as well as proceedings that may be taken to effectuate that order pending a full determination of the intended appeal.”
59. From the decision of the Court of Appeal cited, it is clear that it is only in an instance where the proceedings subsequent to the finding of the Court on the conviction of the contemnor, which are “effectuate the order” that would lead to granting an order of their stay. If the proceedings are independent of and do not have any effect on perfecting the order, they ought not to be stayed because that would prejudice the adverse party, by a delay in the matter, for no apparent reason.
60. Finally, I dismiss the entire application with costs. However, since the dismissal of the Application is solely on the ground that there is a similar application in the Court of Appeal in Kisumu, I exercise my discretion to suspend the mitigation and sentencing of the contemnor for one month pending a confirmation to this Court is a date has been taken on the Application pending in the Court of Appeal. The Applicant shall be free on the same bond terms as have been given in these proceedings before. Failure to fix a date within a month of this decision will lead to the orders of suspension lapsing automatically unless it is shown to the satisfaction of this Court that the failure shall be due to circumstances beyond the control of the Applicant. This matter shall be mentioned virtually on 02/03/2022 for a report on the issue of a date before the Court of Appeal and for further orders.
61. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE THIS 31ST DAY OF JANUARY, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

