



Raghvani v Kirigia; Momanyi t/a OH Momanyi & Co (Interested Party) (Environment & Land Case 115 of 2016) [2023] KEELC 904 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 904 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 115 OF 2016
J OMANGE, J
JANUARY 26, 2023**

BETWEEN

MAVJI HARJI RAGHVANI APPLICANT

AND

FRANKLINE KARIUKI KIRIGIA RESPONDENT

AND

HESBON MOMANYI T/A OH MOMANYI & CO INTERESTED PARTY

RULING

1. The defendant vide a notice of motion application dated May 3, 2022 brought under order 5(2) b of the *Civil Procedure Rules* and section 3 A of the *Civil Procedure Act* sought for the following orders;
 - a. Spent.
 - b. Spent.
 - c. That this honourable court be pleased to grant the defendant/ applicant a stay of execution of the judgement/ decree dated July 14, 2022 and all consequential orders arising therefrom pending the hearing and determination of the appeal.
2. The application is premised on the grounds that the applicant had filed a suit seeking specific performance of the contract of sale for the suit property. The applicant contends that notwithstanding that he has lodged a notice of appeal against the courts judgement, the respondent has commenced execution.
3. The respondent has filed grounds of opposition in which he submits that the applicant has not met the requirements of order 42 of proving substantial loss or that the appeal would be rendered nugatory.



4. Counsel for the applicant submitted that the applicant has met the requirements for grant of stay under order rule 5 (2) b of the *Civil Procedure Rules*.
5. I have considered the application with the accompanying documents, the grounds of opposition and submissions by the applicant's counsel. As at the date of writing this ruling on January 17, 2023, the applicants submissions are not on record.
6. The applicant has indicated that the application is brought under order 5 rule 2 b. this is evidently an error as the relevant section is order 42 rule 6 (2) b. in the interest of delivering substantive justice I will proceed to consider the application in spite of this error. As I do this, I note that principles for grant stay in the Court of Appeal are different from the principles for stay in the High Court as was clearly stated in the case of *Visbram Ravji Halai v Thornton & Turpin* civil application No Nai 15 of 1990 [1990] KLR 365, in which the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under order 41 rule 6 of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
7. The issues that then arise for the courts determination are;
 - a. Has the applicant proven substantial loss?
 - b. Does the applicant have an arguable appeal?
 - c. Lastly what if any security should the applicant give?
8. The courts have had occasion to define what amounts to substantial loss. In *Silverstein v Chesoni* [2002]1 KLR 867 the court held that: -

“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 a loss would render the appeal nugatory.”
9. In this case the status quo the applicant wishes to maintain is that the caveat should remain in place. He avers that if the caveat were to be lifted his appeal would be rendered nugatory and he would suffer substantial loss. No doubt once the caveat is lifted the respondent could decide to sell the suit property in which event the applicants appeal would be rendered nugatory. Given that the relief sought by the applicant in the appeal is for specific performance and not an amount, the respondent would not be able to compensate the applicant if the status quo were not maintained by a stay order.
10. The courts have on numerous occasions pronounced themselves on the principle of an appeal being rendered nugatory. In the case of *Kenya Airports Authority v Mitu-Bell Welfare Society & another* (2014) eKLR, the court held that:

“The nugatory limb is meant to obviate the spectre of a meritorious appeal, when successful, being rendered academic the apprehended harm, loss or prejudice having come to pass in the intervening period. Our stay of execution jurisdiction is meant to avoid such defeatist eventualities in deserving cases.” Tabro
11. Under the provisions of order 42 rule 6 (1) (2) of the *Civil Procedure Rules*, a party seeking a stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. In the instant matter, the applicant was required to provide the actual security for consideration by the



court as to its sufficiency. In the case of *Equity Bank Ltd v Taiga Adams Company Ltd* [2006] eKLR it was held that:-

“of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought ...let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...” which principle was also emphasized in *Carter & Sons Ltd v Deposit Protection Fund Board & 3 others*.”

The applicant has averred that he is willing to abide with any directions the court may give on security.

12. Having reviewed the facts of this case, submission by counsel, the relevant law and principles that have been clearly set out by the courts, I am in the end guided by the principles set out in the case of *Transporters Ltd v Absalom Dova Lumbasi* [2012] eKLR, thus:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the appellant to his 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.”

13. In balancing the right of the applicant’s right to appeal against the respondents right to enjoy the fruits of his judgement, I am inclined to allow the application in the following terms:-
- a. Stay of execution of the judgment and decree dated July 14, 2022 is granted for a period of 120 days.
 - b. The applicant to furnish a bank guarantee of Kshs 1,000,000 as security for costs from an institution of repute within 30 days of this ruling.
 - c. That the record of appeal to be filed within 120 days
 - d. That in default of (b) and (c) the prayer for stay shall be deemed to have been dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 26TH DAY OF JANUARY 2023.

JUDY OMANGE

JUDGE

In the presence of: -

Ms Ndinda for Mr. Mbaabu for the Respondent

Steve - Court Assistant

