



**Awadh v Kalume & another (Environment & Land Case
5 of 2019) [2023] KEELC 249 (KLR) (24 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 249 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 5 OF 2019
NA MATHEKA, J
JANUARY 24, 2023**

BETWEEN

FARID FARAJ AWADH PLAINTIFF

AND

BILLY THUVA KALUME 1ST DEFENDANT

BERNARD OCHIENG OLOUCH 2ND DEFENDANT

RULING

1. The application is dated April 5, 2022 and is brought under 51 rules 1 and 3, order 42 rule 6 of the [Civil Procedure Rules, 2010](#) section 1, 1A, 3 and 3A of the [Civil Procedure Act](#) seeking the following orders;
 1. That this application be certified as urgent and be heard *ex-parte* and service be dispensed within the first instance.
 2. This honourable court be pleased to order the stay of execution of this honourable court judgement delivered by the Hon Justice NA Matheka on the March 22, 2022 pending the hearing and determination of the application.
 3. That there be stay of execution of this honourable court judgement delivered on March 22, 2022 pending the hearing and determination of the plaintiff's intended appeal.
 4. The costs of this application be provided for.
 5. Such other and/or further orders as the honourable court may deem expedient and fit to grant.
2. It is based on the grounds that this honourable court delivered judgement as against the plaintiff/applicant on March 22, 2022 and the court directed that the plaintiff/applicant suit was dismissed with costs to the 1st defendants a consequence of which the 1st defendant can take possession of the suit land to the detriment of the plaintiff and hence is exposed to loss of the investment by continued



construction and demolish. The plaintiff intends to appeal the judgement of this honourable court and whose grounds have high chances of success and has already filed a notice of appeal on within the requisite period. It is in the interest of justice to preserve the plaintiff/applicant's right to appeal by granting a stay of execution of the decree so that the appeal is not rendered nugatory.

3. The 1st defendant/respondent stated that the judgement entered in court on March 22, 2022 is well reasoned which took into consideration the all the facts and evidence presented in court and the relevant laws and as such there is no plausible ground to disturb the same. That the court correctly made a finding dismissing the suit on the strength of the documents of ownership on the part of the plaintiff which was a core issue in the primary suit. The plaintiff has not ably demonstrated how he stands to suffer loss at this stage in time. That the plaintiff/applicant has introduced/ pleaded new facts in his memorandum of appeal which were not subject to litigation the primary suit. The same is unprocedural and an outright illegality. That as it stands now, the intended appeal completely lacks substance, is an abuse of the court process which ought not to be entertained at all. That in the unlikely event that the application is allowed, they pray that the court orders the applicant to comply with the mandatory requirement of order 42 rule 6 (2) of the [Civil Procedure Rules](#) to deposit security of costs. The applicant be compelled to deposit at least a sum of Kshs 1,500,000 in a joint interest earning account of both advocates on record as a precondition.
4. This court has considered the application and submissions therein. The issues for determination in an application for stay of execution pending appeal are as provided for under order 42 Rule 6 of the [Civil Procedure Rules, 2010](#) which provide 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 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 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 of stay 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 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."
5. The purpose of stay pending appeal is to preserve the substratum of the case especially in land matters where the character of the suit property may be changed while the appeal is pending. The applicant must establish the he will suffer substantial loss if the order of stay is not granted.
6. There are many decided cases on the issue of grant of stay of execution pending appeal. 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”

7. This court will now proceed to determine whether the appellant/applicant herein satisfied the required standard for grant of stay orders pending appeal.

8. It is evident from the above provisions of law that the court has discretion to issue an order of stay of execution. However, the said discretion must be exercised judiciously. In the case of *Canvass Manufacturers Ltd vs Stephen Reuben Karunditu*, Civil Application No 158 of 1994, (1994) LLR 4853, the court held that;

“Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised”.

9. Further in the case of *Stephen Wanjohi vs Central Glass Industries Ltd*, Nairobi HCC No 6726 of 1991, the court held that;

“For the court to order a stay of execution there must be:-

- i. Sufficient cause
- ii. Substantial loss
- iii. No unreasonable delay
- iv. Security and the grant of stay is discretionary”.

10. The court will also take into account that it is not the practice of the courts to deprive a successful litigant of the fruits of his/her litigation. Further the court will take into account that the purpose of stay of execution pending appeal is to preserve the subject matter. 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”.

11. The conditions that the applicant herein should satisfy in order 42 rule 6(2) of the *Civil Procedure Rules* as stated above are firstly, the applicant must satisfy that he will suffer substantial loss, unless the orders sought are issued. The applicant seeks a permanent injunction against the respondent from constructing and evicting him or alternatively an eviction of the respondent. He seeks compensation of his demolished structure from the 2nd defendant and not the 1st defendant. I find that the structure is already demolished according to the plaintiff and hence there is no further loss that can be occasioned. There is no subject matter to be preserved and/or an arguable appeal. Having carefully considered the



instant application, the written submissions, the cited authorities and the relevant provisions of law, the court finds that the said application is not merited and is dismissed with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF JANUARY, 2023.

N.A. MATHEKA

JUDGE

