



REPUBLIC OF KENYA



**KENYA LAW**  
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**Josvir Traders & Agencies Limited v Kirundi & 2 others (Environment & Land Case 174 of 2018) [2023] KEELC 155 (KLR) (20 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 155 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT THIKA**  
**ENVIRONMENT & LAND CASE 174 OF 2018**  
**BM EBOSO, J**  
**JANUARY 20, 2023**

**BETWEEN**

**JOSVIR TRADERS & AGENCIES LIMITED ..... PLAINTIFF**

**AND**

**GEOFFREY CHEGE KIRUNDI ..... 1<sup>ST</sup> DEFENDANT**

**LUCY WAMAITHA CHEGE ..... 2<sup>ND</sup> DEFENDANT**

**EVERTON COAL ENTERPRISES LIMITED ..... 3<sup>RD</sup> DEFENDANT**

*(Angote J on 18/2/2022)*

**RULING**

1. The subject of this ruling is the 1st and 2nd defendants' notice of motion dated May 13, 2022, through which they seek an order of stay of execution of the judgment rendered in this suit by Angote J on February 18, 2022. The judgment was a culmination of a dispute that arose from a land sale agreement dated December 20, 2008, between the plaintiff [purchaser] and the 1st and 2nd defendants [vendors], in relation to Land Reference Number 10090/23, situated in South West of Thika Municipality. The agreed purchase price for the land was Kshs 50,000,000, out of which the plaintiff paid to the 1st and 2nd defendants Kshs 22,550,000. Subsequent to the signing of the sale agreement, the two defendants conveyed the land to a third party [the 3rd defendant].
2. The plaintiff sued the defendants seeking, among other reliefs, an order cancelling the title that had been issued to the 3rd defendant in relation to the suit property, and an order of specific performance against the 1st and 2nd defendants. As an alternative relief, the plaintiff sought damages.
3. Upon conclusion of trial, and upon receiving submissions from the parties, Angote J rendered the said judgment, dated February 18, 2022, in which he ordered the 1st and 2nd defendants to pay the plaintiff Kshs 22,550,000, together with interest at 18% per annum, compounded on a monthly basis, from the



date when this suit was filed [2009]. The court further condemned the two defendants to bear costs of the suit.

4. The two defendants subsequently lodged a notice of appeal on February 25, 2022. Four months later, the two defendants brought the application under consideration, seeking an order of stay of execution pending appeal.
5. The application was supported by an affidavit sworn on May 13, 2022 by the 1st defendant and written submissions dated September 17, 2022, filed by M/s Gatheru Gathemia & Co Advocates. The applicants contend that the plaintiff's advocates wrote to them demanding a total of Kshs 277,054,129, which comprises of the principal award of Kshs 22,550,00 and compounded interest. It is the applicants' case that the above sum is a substantial amount by any standard, and that if the decree is executed while the appeal is pending, they would stand to be rendered bankrupt and they would suffer irreparable loss, damage and substantial loss. The applicants add that the application has been made without undue delay, and that they are ready and willing to provide appropriate security, as may be directed by the court.
6. The application is opposed by the plaintiff through an affidavit sworn on July 19, 2022 by Virginia Wangui Ng'ang'a, a director of the plaintiff company, and through written submissions dated October 21, 2022, filed through M/s Mbigi Njuguna & Co Advocates. The plaintiff's case is that the application lacks merit because the applicants have not satisfied the criteria set out in Order 42 rule 6 (2) of the *Civil Procedure Rules*. They contend that the principal award is entirely an order for refund of the purchase price which they paid to the applicants while the awarded interest is what was provided for in the agreement for sale.
7. The plaintiff further contends that the applicants do not deserve the order of stay of execution because the application was brought after undue delay. The plaintiff adds that the applicants have kept their funds since April 2009, and that there is no proper basis why they should hold onto the money, given that they transferred the suit property to a third party [the 3rd defendant]. They further contend that this being a money decree, any money paid, if subsequently adjudged as not payable, will be refunded. They urge the court to dismiss the application.
8. I have considered the application, the response to the application, the parties' respective submissions, the relevant legal framework and the relevant jurisprudential principles. The single question to be determined in the application is whether the applicants have satisfied the criteria upon which a trial court exercises jurisdiction to grant an order of stay of execution pending appeal.
9. The jurisdiction of a trial court on a plea for an order of stay of execution pending appeal is guided by the principle laid down in Order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows:
  - “2. 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.”



10. The jurisprudential principle which guides our courts when exercising this jurisdiction was well outlined by the Court of Appeal in *Butt v Rent Restriction Tribunal* [1979] in the following words:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory.”
11. In *M/s Port Reitz Maternity v James Karanja Kabia* CA No 63 of 1997, the court outlined the following principle which guides our courts when exercising jurisdiction to grant orders of stay of execution pending appeal:

“The right of appeal must be balanced against an equally weighty right of the plaintiff to enjoy the fruits of judgment delivered in his favour. There must be a just cause for depriving the plaintiff that right.”
12. The applicants were required to satisfy the three requirements of Order 42 rule 6(2) of the *Civil Procedure Rules*, namely: (i) that unless an order of stay of execution is granted, they would stand to suffer substantial loss; (ii) that the application has been brought without undue delay; and (iii) that they have tendered appropriate security or they are ready to tender appropriate security for the due performance of the decree.
13. On the first requirement, the applicants contend that the award is substantial and that if it is executed, they would be rendered bankrupt. While this court agrees that the award is substantial, it is not lost to the court that the principal award relates to purchase price which the plaintiff paid to the applicants about 13 years ago. The applicants subsequently conveyed the land subject matter of the sale agreement to a third party [the 3rd defendant] and elected to retain all the purchase price which the plaintiff had paid to them. The plaintiff has been deprived of both the money and the land for the period of 13 years. Weighing the need to ensure that the applicants are not exposed to substantial loss during the pendency of the appeal vis-à-vis the plaintiff’s right to access the money that they paid to the applicants thirteen years ago, this court has no doubt that an order of stay in relation to the principal award would cause the plaintiff more prejudice compared to the loss that the two applicants may be exposed to if they were made to satisfy the decree in relation to the principal award of Kshs 22,550,000.
14. Faced with a case not too different from the present scenario, Warsame J [as he then was] in *Samvir Trustee Limited v Guardian Bank Limited* held thus:

“But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment.
15. Considering the circumstances of this case, I do not think satisfaction of the principal award which entirely constitutes the purchase price which the applicants received 13 years ago and have held since then would constitute substantial loss to them. In my view, it would not be just to grant a blanket order of stay allowing the applicants to continue holding onto the purchase price thirteen years after they transferred the land to a third party.
16. On undue delay, the applicants contend that they brought the application timeously, while the plaintiff contends that the four months period that lapsed before the application was brought is inordinate. In my view, the question as to whether or not a certain period of time amounts to inordinate delay is to



be considered within the context of the circumstances of each case. In the present case, the impugned Judgment was rendered on February 18, 2022 at Machakos Environment & Land Court. The notice of appeal was promptly lodged at Thika Environment & Land Court on February 25, 2022. It is not clear how long it took for the file to be returned to Thika Environment & Land Court. Secondly, at the time of bringing the application, the bill of costs had not been lodged and/or taxed. The formal execution process had not been initiated. That remains the position to date. Given the above circumstances, I do not think the four months period would be considered as inordinate and a sufficient ground for declining the plea for stay wholly.

17. On security, the applicants have stated in the application that they are “ready and willing to abide by reasonable conditions in terms of security as the honourable court may order in granting stay of execution.” Put differently, they are ready to provide such security for the due satisfaction of the judgement as the court may order.
18. Taking the foregoing into account, I would reluctantly grant a stay of execution in relation to interest and costs of the suit and on condition that the principal award of Kshs 22,550,000 is paid to the plaintiff. Consequently, the notice of motion dated May 13, 2022 is disposed in the following terms:
  - a. There shall be stay of execution of the judgment rendered by Angote J in this suit [previously designated as Nairobi ELC Case no 236 of 2009 and also designated in the signed Judgment as Machakos ELC Case No 174 of 2018] on condition that:
    - i. The 1st and 2nd defendants shall pay to the plaintiff the principal award of Kshs 22,550,000 within 30 days from today.
    - ii. The 1st and 2nd defendants shall, within 45 days from today, provide to the plaintiff’s advocates and also file in court an irrevocable undertaking by a reputable financial institution, binding the financial institution, to satisfy any part of the decree that may ultimately fall payable by the 1st and 2nd defendants in this suit.
  - b. No order as to costs

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 20TH DAY OF JANUARY, 2023.**

**B M EBOSO**

**JUDGE**

Mr Mwangi Ndambiri for the 1st and 2nd defendant

Ms Kahangara holding brief for Mr Mbigi for the Plaintiff

**Court Assistant: Ms Osodo**

