



REPUBLIC OF KENYA



KENYA LAW
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**Chelimo v Aldridge (Civil Appeal E169 of 2023)
[2025] KEHC 2911 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 2911 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E169 OF 2023
DO CHEPKWONY, J
JANUARY 30, 2025**

BETWEEN

LINDA CHELIMO APPELLANT

AND

STEPHEN ANTHONY ALDRIDGE RESPONDENT

RULING

1. Before this court for determination is the Notice of Motion application dated 1st November, 2023, filed by the Applicant seeking the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That there be a stay of execution of the Decree and/or judgment in Thika CMCC No. 204 of 2020 by Honourable S. Atambo on 9th May, 2023 pending the hearing and determination of the Appeal filed therein.
 - d. That the costs of this application be provided for.
2. The Application is based on the grounds as set out on its face and the Supporting Affidavit sworn by the Appellant/Applicant, Linda Chelimo, on the even date. The Applicant's case is That she sought and was granted a 45 day stay of execution before the trial court to allow her launch the instant Appeal against the trial Court's Judgment. It is averred That on the lapse of the said 45 days, the Respondent is likely to execute the decree and render the appeal nugatory although the Appeal has a high chance of success. Thus, the Applicant argues That would be in the interest of justice That the stay of execution be granted.
3. The Respondent opposed the Application through a Replying Affidavit sworn by Stephen Anthony Aldridge on the 19th July, 2023. He avers That the application is misconceived and discloses no grounds



for the court to grant the orders of stay sought. He asserts That it is an uncontested fact That he paid the purchase price of Kshs. 4,250,000/= and all costs towards the acquisition of the suit land which the Applicant has been in possession although the Respondent has never made any payments towards its acquisition.

4. The Respondent avers That the Applicant does not stand to suffer any prejudice in the event of execution of the trial Court's Judgment as opposed to him, the Respondent, who has been denied the right to use and enjoy the property even after paying the purchase price. The Respondent further avers That the Applicant does not have a known residence in Kenya and has not offered any security for due performance of the decree hence he will suffer great injustice if the application is allowed.

Analysis And Determination

5. Having considered the Application and the responses filed, the sole issue for determination is whether the court can grant the orders of stay sought by the Applicant in this case.
6. The law on stay of execution is enshrined under Order 42 Rule 6(2) of the Civil Procedure Rules which provides: -

“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”
7. Further, this Court associates itself with the finding by the court in the case of RWW v EKW [2019] eKLR, where the court 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.

8. Taking cue from the above, it is apparent That the court cannot grant stay of execution unless the following three conditions are met:-
 - a. The application has been made without unreasonable delay.
 - b. The Applicant will suffer Substantial loss
 - c. The Applicant has offered security for due performance of the decree.
9. Considering if those conditions have been met in view of the facts of this case, on the first condition, whether there was reasonable delay, the Judgment subject of this Appeal was delivered on 9th May, 2023, while the present application was filed on 5th June, 2023, hence it cannot be said That the application was filed after unreasonable delay. Furthermore, the Respondent does not dispute That the Application was timeously filed and find this condition as met.
10. On the second condition, on whether the Applicant stands to suffer substantial loss, it will be noted That the Applicant submitted That she is likely to suffer substantial loss if stay of execution is not



granted and substantiated this with an explanation That in its Judgment delivered on 9th May, 2023, the trial Court ordered her to immediately furnish the respondent with signed transfers for the property and failure of compliance with the order, the Court Administrator is directed to execute the transfer forms without any further reference to court. In the case of Kenya shell Limited v Benjamin Karuga Kibiru & Another [1986]eKLR, the Court was clear That a party seeking an order of stay, must offer evidence to substantiate the loss he or she is likely to suffer as this is what can justify why the other party should be kept away from its fruits of its Judgment. I was held That:-

“Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”

11. Thus, while the Court totally agrees That without sufficient evidence on the likelihood of suffering substantial loss, it is difficult to grant the orders of stay sought, it will be noted That if stay is not granted, the Respondent will proceed to execute the trial Court’s order and the suit property, which is a building comprising of Title No.Ngenda/Kimunyu/2682 and forms the substratum of this appeal, will be transferred to a Third party, a fact admitted by the Respondent at Paragraph 12 of his Replying Affidavit and this will render the appeal nugatory.
12. Lastly, on whether the Applicant offered security for the due performance of the decree, the Applicant has stated That she is not in possession of the property and neither does she hold the title thereto. She submits That the Respondent will not be prejudiced if stay of granted as it will only prevent the transfer of the property to a Third Party. However, the Applicant has appreciated the court’s discretion in this regard. In the case of Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd [2019] eKLR, where the Court held, thus: -

“... the Applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite That the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails...”

13. In the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012]eKLR, the Court had this to say on what amounts to ‘substantial loss’.

“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 Civil Procedure Rules. 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. And in the case of Jason Ngumba Kagu & 2 Others v Intra Africa Assurance Co. Limited [2014]eKLR, the Court stated as follows:-

“The Court arrives at a decision That substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his Judgment and the right of the Applicant on the prospects of his appeal. Even though many say That the test in the High Court is not That of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails That his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the Judgment requires, he will become a pious explorer in the judicial process.”

15. In the instant case, the Applicant submits That the Judgment is not a money Judgment/Decree as the subject matter in this appeal is land, which she may not recover if she succeeds in the appeal. Further, the Applicant has invoked the overriding objective as stipulated in Sections 1A, 1B, 3A and 63E of the *Civil Procedure Act*. The Respondent’s take is That the Applicant has not offered any security for the due performance and therefore her move is calculated at evading satisfaction of the Judgment of the court.

16. Section 1A states:-

1A. Objective of Act

1. The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
2. The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
3. A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to That effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

17. Section 1B states:-

1B. Duty of Court

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
 - a. the just determination of the proceedings;
 - b. the efficient disposal of the business of the Court;
 - c. the efficient use of the available judicial and administrative resources;
 - d. the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and (e) the use of suitable technology.

18. Section 3A provides:-

3A. Saving of inherent powers of court.



Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.

19. And Section 63(e) provides:-

(63) In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—

- e. make such other interlocutory orders as may appear to the court to be just and convenient.

20. The above provisions give this court orders That are necessary to meet the ends of justice or prevent an abuse of court process. The Respondent has faulted the Appellant/Applicant on the intent to delay him from enjoying fruits of his Judgment. However, the court has taken note of his timeliness by the Applicant in filing the application and the indication That the Record of Appeal has since been filed and served so That all That remains is to file directions on hearing of the appeal and therefore the likelihood of an expeditious disposal of the issues between the parties.

21. In view of the above findings, the Notice of Motion application is hereby allowed in the following terms:-

- a. That there be a stay of execution of the judgment and or Decree in Thika CMCC NO.204 of 2020 by Hon. Stella Atambo on 9th May, 2023 pending the hearing and determination of the appeal filed herein on condition That the Applicant/Appellant deposits a sum of Kshs.400,000/= as security for costs within thirty (30) days from the date hereof.
- b. The appellant to serve the Respondent with the Record of Appeal, if need be, within fourteen (14) days from the date hereof.
- c. Mention on 30th January, 2025 for parties to confirm compliance and take further directions, failure to which the orders of stay issued herein will stand lapsed.
- d. The orders and or directions and notice to be served upon the Appellant.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 30TH DAY OF JANUARY, 2025.

D. O. CHEPKWONY

JUDGE

In the presence of:

Martin – Court Assistant

No appearance for and by Appellant

Mr. Otieno holding brief for Mr. Anne Mutindi counsel for Respondent

