



**Ng'era (Suing as personal representative of Joseph Boro Ng'era) v Sunbird Lodge Limited  
(Environment & Land Case 75 of 2017) [2023] KEELC 97 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 97 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 75 OF 2017  
FM NJOROGE, J  
JANUARY 19, 2023**

**BETWEEN**

**SAMMY NGUGI NG'ERA (SUING AS PERSONAL REPRESENTATIVE OF  
JOSEPH BORO NG'ERA) ..... PLAINTIFF**

**AND**

**SUNBIRD LODGE LIMITED ..... DEFENDANT**

**RULING**

1. This ruling is in respect of the defendant/applicant's Notice of motion application dated July 21, 2022. It has been brought under order 42 rule 6(1) & (2) of the *Civil Procedure Rules* 2010 and section 3A of the *Civil Procedure Act* and seeks the following prayers;
  - a. ...spent
  - b. ...spent
  - c. That there be a stay of execution of the aforesaid judgement/decree pending the hearing and determination of the appeal preferred therefrom against the court's judgement/decree dated May 30, 2022 in the Court of Appeal.
  - d. That the costs of this application be provided for.
2. The application is supported by the affidavit of Richard Corcoran sworn on July 21, 2022. The grounds on the face of the application and the supporting affidavit are that the hearing of the main suit was concluded on January 31, 2022 and judgement delivered on May 30, 2022; that being dissatisfied with the judgement, they instructed their advocates on record to lodge an appeal at the Court of Appeal against the entire judgement; that the notice of appeal was lodged and served on 2/06/2022; that they additionally instructed their advocates to request for typed proceedings for purposes of preparing the record of appeal; that he believes that the appeal filed has chances of success and that if execution is not



- stayed, the said appeal will be rendered nugatory; that the respondent will not suffer any prejudice if this application is allowed; that the applicant is willing to furnish security pending appeal and that they stand to suffer irreparable harm and financial loss over their heavy investments should the respondent execute the judgement and subsequent decree dated May 30, 2022 as the Sunbird Lodge is established on the suit land No LR No 9361/6.
3. In response to the application, the respondent filed a replying affidavit sworn on August 11, 2022 and filed on August 17, 2022. He deposed that the application dated July 21, 2022 is incompetent and bad in law as it is not supported by a valid affidavit; that the deponent of the said affidavit is foreign to these proceedings and is unknown to him; that the said Richard Corcoran has never been a party to the proceedings and has never participated in the same; that the said Richard Corcoran is neither a shareholder nor a director of the applicant; that the applicant has only two directors/shareholders who are Guenter Schabus and Othmar Pircher and that the deponent herein is not one of them; that the notice of appeal was lodged to delay the applicant from moving out of the suit property as it had admitted that there was no consent of the land control board and that there no change of user from agricultural land to hotel business as per the requirement of the law; that the applicant has not met the conditions set out under order 42 rule 6(1) 2(a); that the applicant has not demonstrated any substantial loss that it will suffer if the orders sought are not granted; that the lodge on the suit property is permanent and immovable and if the appeal succeeds, the applicant will find the business is ongoing; that there was a delay in filing of the application; that the applicant has no valid lease with the respondent and that it is time it moved out of its land and that the respondent should be allowed to enjoy the fruits of his judgement.
  4. In response to the application, Richard Corcoran filed a further affidavit sworn on August 31, 2022. He deposed that he is a *bona fide* director of the applicant, Sunbird Lodge Limited alongside Othmar Pircher who is currently in Austria; that he is in charge of the day to day running of the Sunbird Lodge business which directorship is known to Sammy Ngugi Ng'era; that it is not in the place of the respondent to dissect into the merits of their appeal; that it has demonstrated that they have an arguable appeal and it sought that its application be allowed as prayed.
  5. The application was argued by way of written submissions. The defendant/applicant filed its submissions dated September 30, 2022 on October 1, 2022.
  6. The applicant identified the following issues for determination; whether the appeal is arguable, whether substantial loss may result upon the applicant unless the order is made, whether the application was made without unreasonable delay and whether security for due performance of the decree has been given.
  7. On the first issue it was submitted that it has a meritorious appeal which may be rendered useless if the order for stay is not granted. The defendant also submitted that it attached to its supporting affidavit the draft memorandum of appeal which raises pertinent issues which seek to challenge the decision of the trial court issued on May 30, 2022; it relied on the case of *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR in support of its argument.
  8. On the second issue, it was submitted that the applicant stands to suffer substantial loss as its business known as Sunbird Lodge would be rendered unproductive, useless and unprofitable if the court declines to issue stay orders. The applicant relied on the case of *Dhanji Jadra Ramji v Commissioner of Prisons & another* [2017] eKLR in support of its argument. The applicant also submitted that the court ordered for its eviction from the suit property and if the orders of stay are not granted, then it would be evicted and will affect the livelihood of its employees.



9. On the third issue it was submitted that the application has been filed timeously as required under order 42 rule 6(2) of the *Civil Procedure Rules* as judgement in this matter was delivered on May 30, 2022 while its application was filed on July 25, 2022.
10. On the fourth issue, it was submitted that the applicant is ready and willing to adhere to such conditions regarding security. The applicant relied on the cases of *Gianfranco Manenthi & Another vs Africa Merchant Assurance Company Limited* [2019] eKLR and *Focin Motorcycle Co. Limited vs Ann Wambui Wangui & Another* [2018] eKLR in support of its argument.
11. The applicant concluded its submissions by seeking that its application be allowed as prayed.
12. The respondent filed his submissions on October 11, 2022. On whether the applicant will suffer substantial loss if the orders sought are not granted, it was submitted that the applicant has not demonstrated what irreparable harm it will suffer as no documentary evidence of substantial loss has been provided. The respondent relied on the cases of Civil Appeal No E052/2021 between *Michael Ntouthi Mitheu vs Abraham Kivondo Musau* and *RWW versus EKW* HCC No 25/2012 in support of its argument.
13. The respondent also submitted that the application was brought after unreasonable delay as judgment was delivered on May 30, 2022 while the application was filed on July 25, 2022.
14. On the issue of security, it was submitted that the applicant must offer security for the due performance of the judgement, however the said discretion lies with the court to determine the said security. The respondent relied on the cases of Misc Civil Application 42/2011 Application 42/2011 *James Wangwalwa & Another vs Agnes Naliaka Cheseto* and *Josphat Kitheme Kyalo vs Webster Muema Muambi* HCCA No 100 of 2017 in support of its arguments.
15. The respondent concluded his submissions by seeking that the applicant's application be dismissed with costs.

### **Analysis and Determination**

16. After considering the application, replying affidavit, further affidavit and submissions, the only issue that arises for determination is whether the court should grant stay of execution pending appeal.
17. Order 42 rule 6(1) and (2) of the *Civil Procedure Rules* provides 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 to 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 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.



18. In the case of *Halal & Another v Thornton & Turpin [1963] Ltd* [1990] eKLR the Court of Appeal held as follows:

“...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.”

19. The grant of an order for stay of execution is discretionary and it is meant to preserve the subject matter of the appeal.
20. In the present matter, judgement was delivered on May 30, 2022 while the application under consideration was filed on July 25, 2022, and it is therefore my view that the application was filed without unreasonable delay.
21. A perusal of the court record shows that there is a notice of appeal dated 2/06/2022 and filed on June 6, 2022 and therefore for purposes of this application, there is an appeal in place.
22. On the issue of substantial loss, the applicant stated that in the event the orders sought are not granted, it is likely to be evicted from the suit property which will taint its image and negatively affect its business reputation depriving it of the necessary good will or the continuity of its business operations which cannot be adequately remedied by damages.
23. The respondent on the other hand argued that the applicant has not provided documentary evidence to demonstrate that he will suffer any substantial loss in the event that the orders of stay are not granted.
24. The court in the case of *Samvir Trustee Limited vs Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997 held as follows:

“For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...”

25. The court in its judgement delivered on May 30, 2022 entered judgment in favor of the respondent and held that the lease agreement dated August 25, 2007 between the applicant and the respondent was a nullity for lack of a consent of the land control board and the applicant was therefore ordered to vacate the property.
26. The mere fact that the applicant is apprehensive that it will be evicted from the suit property does not automatically signal the probability of substantial loss. Loss has to be proved. It is my view therefore



that the applicant has not demonstrated the substantial loss that it is likely to suffer if the stay of execution orders are not granted. Without proof of such loss the application at hand has no merit.

27. The court in the case of *Sammy Some Kosgei V Grace Jeled Boit* [2013] eKLR held as follows:

The more critical issues herein are whether the applicant stands to suffer substantial loss if the order of stay is not granted and the question of security. In my view I think that if an applicant cannot demonstrate substantial loss, then the application ought to automatically fail and there would be no point in considering the question of security. It is the question of substantial loss which is the epicenter in an application for stay of execution pending appeal.

I therefore need first to interrogate if the applicant really will suffer substantial loss if stay is not granted. But even in this interrogation, I must be alive to the tenet that a successful party is entitled to the fruit of his judgment and there must be demonstrated good reason why he ought not to consume the fruit of his judgment, at least just yet. In *Machira t/a Machira & Co v East African Standard No 2* (2002) 2 KLR 63, It was stated as follows

“It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do. If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an award or decree or order, before disposal of the applicant's business (e.g appeal or intended appeal)” (at P 67).”

28. The applicant has demonstrated that the instant application was filed without delay and that it is ready to offer security but it has failed to establish the substantial loss that it is likely to suffer if the stay order is not granted. The applicant has not therefore met the threshold for grant of orders of stay of execution.

29. In conclusion, the applicant's application dated July 21, 2022 lacks merit and it is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 19<sup>TH</sup> DAY OF JANUARY, 2023.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**

