



**Mwangangi v Nduva (Environment and Land Appeal E016 of 2022)
[2023] KEELC 15780 (KLR) (22 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15780 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E016 OF 2022
TW MURIGI, J
FEBRUARY 22, 2023**

BETWEEN

PATRICK MUTUNGA MWANGANGI APPELLANT

AND

BONIFACE WAMBUA NDUVA RESPONDENT

RULING

1. By a notice of motion dated August 29, 2022 brought pursuant to the provisions of order 51 rule 1, order 10 and 11, order 5 rule 15(2) of the [Civil Procedure Rules 2010](#), sections 1A, 1B & 3A of the [Civil Procedure Act](#) and all other enabling laws, the applicant seeks the following orders:-
 1. Spent.
 2. That an order of stay of execution be issued against the respondent by himself, his agents, servants and any other person claiming under him from auctioning the proclaimed goods of the applicant pending the hearing and determination of this application.
 3. That an order of stay of execution be issued against the respondent by himself, his agents, servants and any other person claiming under him from auctioning the proclaimed goods of the applicant pending the hearing and determination of the appeal.
 4. That this honourable court do issue summons to this court process server one Andrew K Mwanzia for examination.
 5. That an order to set aside the lower court civil case No 149/2019 and all other consequential orders therein and grant the appellant/applicant leave to file defence and all compliance documents and the matter to start afresh.
 6. Costs be provided for.



2. The application is premised on the grounds appearing on its face together with the supporting affidavit of the applicant sworn on the even date.

The Applicant's Case

3. It is the applicant's case that the respondent's agents, Kande Auctioneers, have proclaimed his goods and is threatening to sell them by way of a public auction. The applicant applied to cross examine the process server on the grounds that he was never served with summons to enter appearance. The applicant further averred that tawa law courts does not have jurisdiction to hear and determine the suit since it is within Makueni county while the suit property is situated in Machakos county. He argued that he will suffer irreparable loss if the orders sought are not granted.

The Respondent's Case

4. Opposing the application, the respondent *vide* his replying affidavit sworn on September 6, 2022 averred that the application is grossly incompetent and defective as it is brought under the wrong provisions of the law. He contended that the application is a delaying tactic which is meant to deny him the fruits of his judgment. He further averred that the application does not meet the threshold for the grant of an order of stay of execution pending appeal. He argued that the applicant has not demonstrated that the process of execution has been put in motion nor provided security for costs.
5. He urged the court to direct the applicant to pay him Kshs 167, 628/- before the appeal is heard and determined and that he is ready to refund the amount in the event the appeal is successful. He maintains that the memorandum of appeal does not raise triable issues since it is seeking to appeal against the ruling of a lower court which acted within its discretion.
6. The application was canvassed by way of written submissions.

The Applicant's Submissions.

7. The applicant's submissions were filed in court on October 31, 2022.
8. Counsel for the applicant raised the following issues for the court's determination:-
 - i. Whether this honourable court should grant a stay of execution pending hearing of the appeal.
 - ii. Whether the court should set aside the ruling delivered on August 16, 2022 and re-instate the dismissed application among other issues.
9. On the first issue, the applicant submitted that the claim before the lower court emanated from a dispute involving acquisition of land between the respondent who was the buyer and a resident who had occupied a portion of land parcel number Masii/Mithini/386. The applicant submitted that he has built his house and lived on the same piece of land for several uninterrupted years. He further submitted that he was never consulted when the respondent was purchasing the said parcel of land which would have resolved the issue. He maintains that he was not served with a demand letter or summons to enter appearance.
10. He further submitted that he has been in occupation of the suit property for many years and will suffer irreparable loss if he is evicted or if his goods are sold by way of public auction. He maintains that his appeal has high chances of success which would be rendered nugatory if the orders are not granted. He argued that the respondent will not suffer if the orders sought are granted since he is not occupation of the suit property. On security for costs for the due performance of the decree, the applicant submitted that the court has discretion to determine the same.



11. On the second issue, the applicant urged the court to set aside the orders issued by the lower court *vide* its ruling dated August 16, 2022 as he was not accorded an opportunity of being heard.

The Respondent's Submissions

12. The respondent's submissions were filed in court on November 22, 2022.
13. Counsel for the respondent raised the following issues for the court's determination:-
 - i. Whether the appellant's application meets the threshold of principles guiding the grant of stay of execution pending appeal.
 - ii. Whether the court process server should be summoned for examination.
 - iii. Whether civil suit no 149 of 2019 was wrongfully tried at a court outside the jurisdiction of this suit.
14. On the first issue, counsel submitted that the principles governing the grant of stay of stay of execution pending appeal are founded on order 42 rule 6 (2) of the *Civil Procedure Rules*. Counsel submitted that the applicant has not demonstrated the loss that he is likely to suffer if the orders sought are not granted or expressed his willingness to provide security for the performance of the decree sought. Counsel further submitted that the applicant has not met the threshold for the grant of stay of execution of the money decree which is only considered in special circumstances.
15. On the second issue, counsel submitted that the applicant was duly served with summons and pleadings in the lower court case but failed to enter appearance and/or file a defence. He argued that the applicant did not seek leave from the lower court to cross examine the process server or challenge the manner, time and place in which service of summons was effected.
16. On jurisdiction, counsel submitted that Tawa law courts has jurisdiction to hear and determine the suit since at the time when the suit was filed, the respondent was carrying out his business in Tawa.
17. Finally, counsel submitted that the applicant has not proved the sound principles in setting aside the ruling of the lower court.
18. Counsel maintains that the application is incurably defective and is aimed at frustrating the process of execution and to further delay the conclusion of this this matter.

Analysis And Determination

19. Having considered the application, the affidavits and the rival submissions, I find that the issue that arises for determination is:-
 - i. Whether the applicant has satisfied the conditions set out in order 42 rule 6 of the *Civil Procedure Rules* for the grant of stay of execution pending appeal.
20. Order 42 rule 6 (1) and (2) of the *Civil Procedure Rules* outlines the guiding principles to be met for the grant of stay and provides that;

6(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.

6(2) 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 of costs for the performance of such decree or order as may ultimately be binding on him has been given by applicant.

21. In considering an application for stay of execution, I am guided by the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 where the Court of Appeal gave the following guidelines;

“The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicants at the end of the proceedings. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

22. The grant of an order of stay of execution is a discretionary one. In the case of *RWW v EKW* (2019) eKLR the court held that;

“...the purpose of an application for stay of execution pending an appeal is to preserve the subject 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 the 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 damages.”

23. The court is therefore called upon to balance both the successful party so as not to hinder him from his fruits of judgment and those of the appellant whose appeal may succeed and be rendered nugatory if stay of execution is not granted.

24. Going by the above provisions of the law, it is clear that in an application for stay of execution pending appeal the applicant must satisfy the following three conditions: -

- a. The court is satisfied that substantial loss may result to the applicant unless the order is made.
- b. The application has been made without unreasonable delay.
- c. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

25. The applicant is seeking to stay execution of the ruling delivered on September 8, 2021.

26. The court will now determine whether the applicant has satisfied the conditions upon which the orders can be granted.



27. As regards the first condition, the applicant should not only state that he is likely to suffer substantial loss, he must prove that he will suffer substantial loss if stay orders are not granted.
28. In *Mukuma v Abuoga* (1988) KLR where the court held that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
29. In *Tropical Commodities Suppliers Ltd and others v International Credit Bank Ltd (in Liquidation)* the court defined substantial loss as follows;

“substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal....”
30. The applicant averred that he will suffer irreparable loss if he is evicted from the suit property or if his goods are sold by way of public auction. I have read the ruling delivered by Hon Mwendwa on April 14, 2021 in Tawa civil case No 149 of 2019. The ruling was pursuant to the applicant’s a notice of motion dated June 2, 2022 where he sought to have the *ex-parte* judgment and all the consequential orders set aside and he be allowed to defend the suit. The trial court in its ruling found that the applicant was duly served with the summons to enter appearance and that he does not have a triable defence. In a nutshell the court found that the application was devoid of merit and dismissed it with costs to the respondent.
31. The applicant averred that the respondent’s agent, Kande Auctioneers, have already proclaimed his goods and are threatening to sell them by way of a public auction. In this regard, he annexed a copy of the decree, warrant of sale in execution of a decree and proclamation.
32. Going by the ruling delivered on April 14, 2022, it is clear that the application to set aside the judgment delivered on August 14, 2022 was dismissed with costs. From the record, it is clear that the applicant’s goods were proclaimed on April 9, 2022 by Kande Auctioneers who have since obtained a warrant of sale in execution of the decree. That being the case, I find that the applicant’s fears that the respondent may sell his goods and evict him from the suit property are not baseless.
33. I find that the applicant has satisfied this court that he is likely to suffer substantial loss if the substratum of the appeal is sold or transferred to third parties.
34. As regards the second requirement which requires that the application be made without unreasonable delay, it is not in dispute that the ruling was delivered on April 14, 2022. The applicant averred that he was not granted a stay of execution pending his appeal before the lower court. The present application was filed on August 26, 2022. I find that the application was brought without undue delay.
35. On the last condition as to the provision of security for costs, order 42 rule 6 (2) (b) of the *Civil Procedure Rules* is couched in mandatory terms to the effect that the applicant must furnish security for the performance of the order or decree. In the case of *Arun C Sharma v Ashana Raikundalia T/A Raikundalia & Co Advocates* [2014] eKLR, the court held that;

“The purpose of the security under order 42 is to guarantee due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor....civil process is quite different because in civil process the judgment is like a debt hence the applicant become and are judgment debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the civil procedure rules acts as a security



for the performance of such decree or order as may ultimately be binding on the applicants.
I presume the security must be one which can serve that purpose.”

36. Although the applicant has not expressed his willingness to provide security for the performance of the decree or order, he submitted that he is ready to subject himself to the discretion of the court.
37. In the end I find that the applicant has satisfied the conditions required for the grant of an order of stay of execution pending appeal.
38. The upshot of the foregoing is that the application dated October 6, 2021 is allowed in the following terms;
 - i. Stay of execution of the judgment/decrees be and is hereby granted pending the hearing and determination of the applicant’s appeal.
 - ii. The applicant shall deposit Kshs 100,000/= as security for costs in court within 21 days from the date of delivery of this ruling in default the stay orders shall automatically lapse.
 - iii. Each party to bear its own costs.

HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIRTUALLY THIS 22ND DAY OF FEBRUARY, 2023.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi

Ms Kellen holding brief for Musyimi for the Respondent.

Appellant/Applicant in person.

