



**Mwawana v Mwandawa (Environment and Land Miscellaneous Application
E060 of 2022) [2023] KEELC 15760 (KLR) (22 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15760 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E060 OF 2022
SM KIBUNJA, J
FEBRUARY 22, 2023**

BETWEEN

SAMUEL MWAWANA APPELLANT

AND

ZAINA NEVERSON MWANDAWA RESPONDENT

RULING

1. The applicant moved the court vide the notice of motion dated October 5, 2022 seeking for;
 - a. Stay of the judgement and its consequential orders by Hon C Kithinji in Voi ELC No 27 of 2020 pending the hearing and determination of the intended appeal.
 - b. Leave for the applicant to appeal out of time against the whole judgement of the Principal Magistrate at Voi delivered on 24th August 2022 in Voi ELC No. 27 of 2020 without notice to the applicant.
 - c. The annexed memorandum of appeal be deemed as duly filed and served.
 - d. Costs of the application be provided for.

The application is premised on the ten (10) grounds on its face marked 1 to 10 respectively, and supported by the affidavits sworn by Samuel Mwawana on the 5th October 2022 and 21st October 2022 stating inter alia that the judgement was delivered on the 24th August 2022 in favour of the respondent; the applicant applied for a certified copy of the proceedings and judgement on the same date of delivery; the court supplied the applicant with a certified copy of judgement on the 31st August 2022; that while waiting to be supplied with proceedings, the respondent went to the suit property on the 4th October 2022 with the intention to execute the judgement; that the extracted order was not served until 4th October 2022 at 4.25pm and unless the orders sought are granted, the respondent will proceed to execute at the detriment of the applicant and the intended appeal will be rendered nugatory.



2. The application is opposed by the respondent through her replying affidavit sworn on the 13th October 2022, in which she inter alia deposed that the judgement was delivered on the 24th August 2022 in open court and in the presence of all parties; that she applied for the decree that was issued on the 29th August 2022; that after waiting for the stipulated time for filing appeal to lapse and noting that no application for stay had been filed, she instructed her sons and casual workers to proceed to the land and remove the beacons as per the judgement; that she later learnt that the appellant had gone to the land and caused a fracas and halted the work; that it was thereafter that the appellant, who had obtained the judgement on 31st August 2022, approached this court; that this appeal is merely meant to deny her the fruits of her judgement.
3. The learned counsel for the applicant and respondent filed their submissions dated the 20th October 2022 and 9th November 2022 which the court has carefully considered.
4. The following are the issues for the determinations by the court;
 - a. Whether applicant has established the threshold for stay of execution order to issue.
 - b. Whether the applicant has made a reasonable case for leave to appeal out of time to be granted.
 - c. Who pays the costs.
5. The court has after considering the grounds on the application, affidavit evidence, submissions by the learned counsel, and the superior courts decisions cited thereon come to the following conclusions;
 - a. That as properly captured in the submissions of both counsel, Order 42 Rule 6 of the Civil Procedure Rules sets the threshold to be satisfied in an application for stay pending appeal. An applicant should establish sufficient cause, show the substantial loss to be suffered and that the application has been filed without unreasonable delay, and tender security for due performance of the decree or order. There are superior courts decisions that have expounded on the above provision of the law including the Court of Appeal in the case of *Halal & Another versus Thornton & Turpin* (1963) Ltd [1990] eKLR, where it held that;

“...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 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 versus 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.”



- b. From the copy of the trial court’s judgement delivered on August 24, 2022 and the decree issued on August 29, 2022 that are attached to the applicant’s supporting affidavit, the court found in favour of the plaintiff, now respondent, and ordered as follows;

“

“43. My finding on the basis of the foregoing consideration is that the plaintiff has proven the matters she pleads on a balance of probabilities and is entitled to the orders sought. I thus order that;

An injunction order is hereby issued restraining the defendant by himself, his servants, agents and any authorized person acting on his behalf from trespassing, constructing, harassing and or erecting structures on the subject sections of the suit property being the section between the barbed wire fence and the gully and that past the gully on the left side and that below and as shown at the site visit as well as the 2nd portion to remain with the existing boundary as initially shown.”

That looking at the grounds on the notice of motion, affidavit evidence by the applicant and the submissions by his learned counsel, the court has noted there is no mention of any substantial loss that the applicant is likely to suffer were the stay of execution order not issued. That further, and as contended by the respondent, the applicant has not made any offer for security for the due performance of the decree or offered any explanation for the lapse of over forty (40) days from the date of the judgement, to the date the instant application was filed.

- c. That further to the decision referred to in (a) above, the court in the case of James Wangalwa & Another versus Agnes Naliaka Cheseto, Bungoma HC Misc. Appl. No. 42 of 2011 stated the following about an application for stay;

“The application 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. This is what substantial loss would entail.”

In the case of *Charles Wabome Getbi versus Angela Wairimu Getbi* [2008] eKLR, the Court of Appeal held as follows;

“...it is not enough for the applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The applicants must go further and show the substantial loss that the applicants stand to suffer if the respondent execute the decree in this suit against them.”

As already pointed out above, the applicant herein has not established that he will suffer any substantial loss if stay order is not granted. The court has noted that contrary to the contention of the applicant that the trial court’s judgement was delivered without his participation, the copy of the judgement annexed to his supporting affidavit shows it was delivered in the presence of both counsel for the parties. The respondent has deposed in her replying affidavit that the appellant and herself were indeed present when the judgement was delivered in open court, and that has not been challenged by the applicant. However, the applicant has not tendered a reasonable explanation why an application for stay of execution pending appeal was not made orally before the trial court after delivery of the judgement on the 24th August 2022, or a formal one filed and served soon thereafter. The court is of the view that the period of over 40 days that had lapsed without the appellant, who was not only present when



the judgement was delivered but also subsequently supplied with a copy of the judgement on the 31st August 2022, amount to unreasonable delay for a party interested in seeking for stay pending the filing an appeal.

- d. That indeed, what the applicant has relied on at ground number 9 of the application, and paragraph 10 of the supporting affidavit is that the appeal will be rendered nugatory if the stay order is not granted. That however, the applicant has not expounded in what manner the execution of the trial court's order as set out above, would make the appeal nugatory. It is apparent that if the order is executed, the net effect is to taken the specified portions of the suit land and placing them under the respondent. That in case the appellant gets leave to lodge his appeal and is eventually successful, appropriate orders reverting the possession of the affected portions of the land to the rightful owner will easily be made. There is therefore nothing presented to the court to suggest that the intended appeal will be rendered nugatory if stay order is not granted.
- e. The court has the discretion to grant stay order after a party has come within the threshold required by the law. In the case of *JMM versus PM* [2018] eKLR, the court stated that;

“As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given parallel with that is the equally important proposition that a litigant if successful, should not be deprived of the fruits of a judgement in his favour without just cause.”

And in the case of *Edward Kamau & Another versus Hannah Mukui Gichuki & Another* [2015] eKLR, the court held that;

“Therefore, to ensure that the parties to the suit fight it out on a level ground on equal footing, stay can be granted on terms, since there is no absolute guarantee that the appeal as filed shall be successful on all fours, while appreciating the respondent has a lawful judgement whose execution is being suspended.

In the end, I employ a balancing act between two rights – that of appeal by the applicants and of enjoyment of a lawful judgement and not being discriminated for being of unknown financial means, for the *Constitution* commands that justice shall be done to all irrespective of status.

In the circumstances of this case and in the absence of any substantive response by the appellant, I find and hold that the execution process was irregular and must be stopped.

The result is that the warrants of attachment and sale of property issued on February 26, 2020 and the proclamation of attachment issued on February 27, 2020 are lifted.”

Further, in the case of *Machira t/a Machira & CO. Advocates versus East African Standard* (NO.2) [2002] KLR 63, the court rendered itself as follows;

“...to be obsessed with the protection of an appellant or intending appellant in total disregard or fitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or



execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

In the instant scenario, the applicant has not filed any pending appeal. He has not established any substantial loss that is likely to befall him if stay orders are not issued. He has also not attempted to explain the apparent delay in filing the stay application and has not shown preparedness to tender security for the due performance of the decree should the order be issued, and he subsequently fails to be successful on appeal. He has therefore failed the tests for entitlement to an order of stay of execution pending the intended appeal.

- f. The provisions of sections 79G and 95 of the Civil Procedure Act chapter 21 of Laws of Kenya, and Order 50 Rule 6 of the Civil Procedure Rules leaves no doubts that the court has jurisdiction to extend or enlarge time for filing of the appeal as sought by the applicant. That further, the provisions of Articles 48 and 50 of the Constitution of Kenya 2010 on access to justice and right to be heard militates against the court locking the justice door to the applicant after he has expressed the desire to have a second round on the contest between him and the respondent before the constitutionally ordained forum of justice. Time will therefore be enlarged and or extended.
 - g. On the issue of costs, the appellant is the one who failed to act within the thirty (30) days prescribed by the law. Even if he has succeeded in the prayer for time, he will nevertheless pay the respondent’s costs of the application the provision of section 27 of the Civil Procedure Act notwithstanding.
6. In view of the above conclusions on the applicant’s notice of motion dated October 5, 2022, the court finds and orders as follows;
- a. The Applicant’s prayer for stay of execution pending the intended appeal has no merit and is hereby dismissed.
 - b. The Applicant is hereby granted leave to file an appeal out of time. The memorandum of appeal be filed and served within the next fifteen (15) days.
 - c. The Applicant will pay the Respondent’s costs in the application in any event.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 22nd DAY OF FEBRUARY 2023.

S.M. Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF;

APPLICANT/INTENDED APPELLANT : Absent

RESPONDENT/INTENDED RESPONDENT : Absent

COUNSEL : Mr. Mwzighe for Applicant

M/s Wambura for Mutinda for Respondent.

GILLIAN .. COURT ASSISTANT

S.M. Kibunja, J.



ELC MOMBASA.

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