



REPUBLIC OF KENYA



**Kaiganira v Wangati (Environment and Land Appeal E36 of 2022)  
[2023] KEELC 937 (KLR) (21 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 937 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND APPEAL E36 OF 2022  
FM NJOROGE, J  
FEBRUARY 21, 2023**

**BETWEEN**

**JAMES KIBIRO KAIGANIRA ..... APPELLANT**

**AND**

**EUNICE WAMBUI WANGATI ..... RESPONDENT**

**RULING**

1. This is a ruling in respect of the Appellant's Notice of Motion application dated 17/10/2022 brought under Articles 159, 40,23, 165, 258 and 259 of the Constitution of Kenya, Order 40 Rule 1, Order 45 Rule 1, Order 51 Rule 1 and 3 of the Civil Procedure Rules 2010 and Sections 1A, 1B, 3A & 80 of the Civil Procedure Act which seeks the following prayers:
  - a. Spent
  - b. That this honorable court be pleased to grant leave to the applicant to file an appeal against the ruling and orders of the court dated 22<sup>nd</sup> September 2022.
  - c. That this honorable court be pleased to grant a stay of execution of the ruling and orders made in Nakuru Chief Magistrate's Court case number 307 of 2019 by the Honorable B. Ochieng pending the hearing and determination of the applicants intended appeal.
  - d. That the costs of this application be considered in the appeal.
  - e. That the honorable court be pleased to allow the Applicants Notice of Motion application dated 19<sup>th</sup> August 2021 as prayed.
  - f. Any such and or further orders as the honorable court shall deem just and expedient in the circumstances.



2. The application is supported by the affidavit of JKK sworn on 17/10/2022. He deposed that by a plaint dated 12/11/2019 he was sued by the respondent in the Chief Magistrate's court; that he filed the application dated 19/08/2021 that was dismissed by the lower court on 22/09/2022; that the said ruling is the basis of the present appeal; that he filed the Memorandum of Appeal dated 13/10/2022; that the suit property has vast developments thereon worth Kshs.3,500,000; that the suit property is his matrimonial home; that if the consent judgment dated 13/03/2020 is allowed in the current form, it will cause substantial loss which cannot be compensated by the respondent; that he has demonstrated great effort to safeguard the property in dispute as he has made major strides in servicing the loan and that the respondent does not stand to suffer any loss if stay pending the hearing and determination of the intended appeal is granted.
3. In response to the application, the respondent filed a replying affidavit sworn on 28/10/2022 on 31/10/2022. She deposed that the matter was concluded by the consent order entered into on 20/05/2020; that the terms of the consent order were that the appellant was to purchase the suit property; that the appellant did not purchase the property but continued to develop it; that the appellant read and signed the said consent before it was adopted by the court; that the appellant failed to fulfil the terms of the consent order and is now filing applications to subvert and delay the judgement; that the appellant filed the Notice of Motion application dated 19/08/2021 seeking to renegotiate the terms of the said consent; that in the said application he sought to be allowed to make payments within one year which payments he has yet to make and that if the court is persuaded to allow the application, then he should provide security for costs.
4. The appellant thereafter filed an affidavit sworn on 14/11/2022 on the same day. He deposed that he disagrees with the various averments in the respondent's replying affidavit; that the suit property initially belonged to him; that he was in a relationship with the respondent herein and they had a son; that he wanted to develop the suit property so he approached the respondent who proposed that she could take a loan from the [Particulars Withheld] where she worked; that they agreed that he would surrender the suit property to the respondent to use it as a collateral for the loan; that it was agreed that the appellant would repay the loan through the respondent; that he continued to repay the loan through the respondent until the relationship between them broke down irretrievably; that the respondent eventually left her employment at [Particulars Withheld]; that he became unwell and was unable to continue repaying the loan; that later he begun to repay the loan directly to the [Particulars Withheld]; that he disputes the consent dated 13/03/2020; that he was very ill at the time the consent was entered into; that the consent is ambiguous; that the parties had intended to have the consent amended but instead it was filed and adopted by the court on 20/05/2020; that the suit property is registered in the respondent's name but he is the one repaying the loan; that he has no formal source of income and is crippled with medical expenses and so he prays that the money deposited continuously for service of the loan be deemed as security for costs.
5. The appellant filed his submissions dated 14/11/2022 on the same date while the respondent filed her submissions dated 28/11/2022 on 30/11/2022.
6. The appellant in his submissions submitted that the respondent will not suffer any prejudice if stay of execution is granted pending appeal since she will be entitled to her judgement if the appeal does not succeed. The appellant also submitted that the application under consideration was filed on time; that the ruling was delivered on 22/09/2022, the memorandum of appeal filed on 13/10/2022 and the present application was filed on 17/10/2022 which he submits satisfies Section 79G of the *Civil Procedure Act*.



7. The appellant also submitted that the respondent will not suffer any prejudice in the event no security of costs is given as he is still servicing the bank loan and that the property is safe from being disposed off through an action by the bank. The appellant relied on Order 42 Rule 6 of the *Civil Procedure Rules* and the cases of *Rhoda Mukuma v John Abuoga* [1988] eKLR, *Absalom Dove v Tarbo Transporters* [2013] eKLR in support of his arguments. The appellant further relied on the cases of *Jayesh Hasmukh Shab v Narin Haira and another* [2015] eKLR, *Noor Mohammed Abdullah v Ranchbodbhal J. Patel* [1962] EA 448 and sought that orders of stay of execution be granted.
8. The respondent in her submissions identified the following issues for determination;
  - a. Whether the applicant’s application meets the threshold for granting of the orders as sought by the applicant;
  - b. Whether the applicant should pay security for costs;
  - c. Who should bear the costs.
9. On the first issue, the respondent submitted that the appellant failed to comply with the consent order that he entered into. The respondent further submitted that the appellant only challenged the consent after she tried to enforce it. That the appellant’s applications are only meant to delay the respondent’s enforcement of the orders of the court.
10. On the second issue, the respondent submitted that the court has the discretion to order the payment of security for costs on reasonable terms that would not impede the appeal and will protect the respondent.
11. She relied on the case of *Joseph Oduor Anode v Kenya Red Cross society* [2012] eKLR and the book Judicial Hints on Civil Procedure 2<sup>nd</sup> Ed (Nairobi; Law Africa, 2011) p. 94 in support of her arguments and sought that the appellant’s application be struck out with costs.

### **Analysis and determination**

12. After considering the application, affidavits and submissions, the only issue that arises for determination is whether the appellant is entitled to orders sought in his application.
13. The appellant is first seeking for leave to appeal against the ruling and orders of the court dated 22/09/2022. As indicated by the appellant, the court delivered its ruling on 22/09/2022 while the applicant filed his memorandum of appeal on 13/10/2022. Section 79G of the *Civil Procedure Act* provides as follows:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
14. It is my view that the appellant filed his appeal within the required time frame and therefore there is no need for leave to be granted.
15. Secondly the appellant is seeking for stay of execution of the ruling and orders made in Nakuru Chief Magistrate’s Court case number 307 of 2019 pending the hearing and determination of the appellant’s intended appeal.



16. Order 42 Rule 6(2) of the *Civil Procedure Rules*, 2010 provides as follows:
- (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 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.
17. The court in the case of *Butt v Rent Restriction Tribunal* [1979] held as follows:
- i. The power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an Appeal.
  - ii. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an Appeal may not be rendered nugatory should the Appeal court reverse the judge's discretion.
  - iii. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
  - iv. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
18. The first criteria the appellant must meet is that the application was filed without unreasonable delay. The ruling the appellant is appealing from was delivered on 22/09/2022 while he filed the application under consideration on 17/10/2022 which action in my view was without unreasonable delay.
19. The second criteria the appellant must meet is that is that he stands to suffer substantial loss if the orders of stay of execution are not granted. The court in the case of *Silverstein v Chesoni* (2002)1 KLR 867 held as follows on what constitutes substantial loss:
- “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.”
20. The appellant is seeking for stay of execution orders of the ruling delivered by the magistrates' court on 22/09/2022 in Nakuru Chief Magistrate's Court case number 307 of 2019. The appellant annexed a copy of the order arising from the said ruling to his application.
21. The learned trial magistrate in his ruling delivered on 22/09/2022 dismissed the appellant's application dated 19/09/2021 with costs. The Court of Appeal in the case of *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others* [2016] eKLR held as follows:
16. In *Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah* [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:
- “The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is



incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences v Oranga & Others* [1976] KLR 63 at page 66 paragraph C).”

17. The same reasoning was applied in the case of *Raymond M Omboga v Austine Pyan Maranga (supra)*, that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise...”
22. In the present matter, the appellant’s application dated 19/08/2021 for review was dismissed by the learned trial magistrate in his ruling delivered on 22/09/2022. That being the case, it is a negative order which is incapable of execution save in respect of costs as was held in the case of *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others (supra)*. Since he has lost nothing by virtue of the said ruling, the issue of substantial loss does not arise. This court cannot for that reason grant orders of stay of execution of that particular order.
23. However, I have perused the record of appeal placed before me and I am of the view that the wider perspective of this matter begs to be addressed. It is not disputed that land parcel No. Bahati/Bahati Block 1/4XX8 is registered in the names of the respondent. It is also not disputed that the appellant had made some developments thereon. The respondent had sued the appellant herein before the trial court in Nakuru Chief Magistrate’s Court case number 307 of 2019. The matter before the trial court was concluded by the consent dated 13/03/2020. There was no hearing on merits. The principal issue in the appeal revolves around the issue of whether the consent dated 13/03/2020 as recorded by the court can be executed as it is or not. That is one triable issue and it is sufficient to enable this court exercise its discretion regarding issuance of orders that may prevent appeal from being rendered nugatory.
24. I have examined the appellant’s supplementary affidavit filed on 23/9/2021. It states that the appellant developed the suit land. It also states that the respondent appears to demand the payment of the market value of the land placed at Kshs 3,250,000/= yet the valuation of the land was only Kshs 750,000/= as per a valuation dated 22/7/2020; that valuation came after the consent; that the consent presupposes the payment of the value of the land without the improvements. It is stated that the consent remains executable for reason of non-disclosure of values of land and fixtures thereon. Further the appellant states that he was not present in court during the adoption of the consent and so could not confirm its contents to the court for the purpose of settlement of the matter. The appellant avers that the overarching objective is administration of justice and the defects of ambiguity in the consent should be cured. The appellant states that the execution of the consent would occasion him irreparable loss.
25. Regarding the environment within which the consent was executed the appellant states that on 11/3/2020 and during the period of the appellant’s sickness, the respondent’s advocate asked for a meeting the next day on 14/3/2020 for purposes of execution of a consent. On the latter date after he received medical attention the appellant met the counsel who only produced a drafted consent and also an application for orders of judgment on admission; the latter was scheduled for hearing three



- days later on 18/3/2020. The counsel advised him that it would be in his best interests to execute the consent which he did on the understanding that it would be polished up when they appeared before the court to record it. He alleges that the counsel agreed to have another detailed consent prepared which would not have any omissions or mistakes and which would consider how the land was to be transferred back to him, how much to be paid to the appellant and valuation of the property among others. He alleges that another consent was prepared but that it was never recorded. He claims that he was not present during the adoption of the consent but the extracted order reflects that both parties were present, thus begging the question as to what is the true position.
26. The immediate history of this matter is that the respondent filed a suit on 12/11/2019 claiming she is the registered owner of the suit land and that the appellant has trespassed on the same and erected a permanent structure thereon. She alleged consequential loss and damage and sought a permanent injunction and in the alternative an eviction order and also costs.
27. The appellant filed an undated defence and denied the claim. I have considered the record of documents filed by the appellant in this matter and in particular the defence and a replying affidavit dated 14/10/2020 and a supplementary affidavit dated 21/9/2021. The appellant's story is replete with details which the plaint and defence read alone do not let the court into, and since this is an application within a proposed appeal by the appellant, I will take time to analyze some allegations here, if only to enable the court decipher whether there is a triable issue in the proposed appeal.
28. According to the appellant, the background of the matter is that initially the suit property belonged to him; that he was in a love relationship with the respondent herein and that they had an offspring; that he wanted to develop the suit property and so he approached the respondent who acceded to his request and lent him some Kshs 250,000/= and further proposed that she could take a loan from the [Particulars Withheld] where she worked and which loan the appellant would repay with interest for 180 months up to 2031; that to obtain the credit facility the respondent needed collateral; that the two agreed that he would surrender the suit property to the respondent to use it as a collateral for the loan that the respondent was to take, and she would therefore purport to be buying the property from the appellant; that he handed over the title to the respondent on the basis of trust that it would be re-transferred to him once he cleared the loan; that it was agreed that the appellant would repay the loan through the respondent by depositing the instalments, as they became due, in her account while her employer deducted corresponding amounts from her salary; that the first lump sum deposit by the appellant covered about 17 months; that the costs of the credit facility were paid by the appellant and the appellant had furnished proof of such payment to the court. All the while the appellant was developing the property with the knowledge of the respondent, and then he fell seriously ill and defaulted on monthly repayments. At the same time the relations between him and the respondent soured when he rejected to enter into proposed nuptials with the respondent and got engaged with another woman. Consequently, the respondent forcefully demanded repayment of her money, threatened eviction and introduced a sort of a debt collector into the scene who collected some amounts from the appellant; the appellant alleged that at some point, the respondent defaulted in repaying the loan and that he is the one now repaying the same directly to [Particulars Withheld]. The respondent did not respond to the said allegations.
29. The court in the case of *Ikechukwu Anoke v CFC Stanbic Bank Limited* [2018] eKLR cited with approval the decision in the case of *Siegfried Busch v MCSK* [2013] eKLR where it was held as follows:

“...A superior court to which an application has been made must recognise and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render



an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his Judgment...”

30. When considered circumspectly, the history of this case reveals a respondent who has a judgment in her favour but whose prospective further loss in terms of delay of enjoyment of the fruits of her judgment is not only remediable but does fade in the light of the serious loss that the appellant apparently stands to sustain should the appeal be decided in his favour long after execution has already issued. Without going into the merits of the appeal and in order to preserve the substratum of the suit land, it is my view that orders of status quo can be granted pending the hearing and determination of the appeal.
31. The appellant is also seeking that the court allows his Notice of Motion application dated 19/08/2021 which was dismissed by the learned trial magistrate. It is my view that this prayer cannot be granted at this stage as it goes to the merits of the appeal.
32. Consequently, the appellant’s application dated 17/10/2022 partially succeeds and the court grants orders of status quo to be maintained and there be a stay of execution of the consent entered into on 20/05/2020 pending the hearing and determination of the appeal. In my view those are the directions necessary to ensure that justice is done by giving the appellant a chance to be heard on his appeal before any substantial loss and irreversible consequences befall him.
33. For the expeditious disposal of the appeal before me I order that the Deputy Registrar of this court shall call for and annex to this appeal record the lower court file in the case appealed from to enable admission and directions as to hearing of the appeal. The appeal shall be mentioned online on 15/3/2023 by way of Microsoft Teams.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2023.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**

