



**Kabugua v Mwatata & another (Civil Appeal 1 of 2021)
[2023] KEELC 15715 (KLR) (20 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15715 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CIVIL APPEAL 1 OF 2021
MAO ODENY, J
FEBRUARY 20, 2023**

BETWEEN

JOHN MUNENE KABUGUA APPELLANT

AND

LELAH BOMA 1ST RESPONDENT

DANIEL PIRI MWATATA 2ND RESPONDENT

RULING

1. The Appellant through the application dated 21st April, 2022 sought the following orders: -
 - a. Spent.
 - b. That the Honourable court be pleased to grant a stay of execution of the Order emanating from the decision of Honourable Justice M. A. Odeny delivered against the Applicant on the 22nd day of March, 2022 pending the hearing of this application inter partes.
 - c. That the Honourable court be pleased to grant a stay of execution of the Order emanating from the decision of Honourable Justice M. A. Odeny delivered against the Applicant on the 22nd March, 2022 pending the hearing and determination of the appeal in the Court of Appeal.
 - d. That the costs of this application be provided for.

Applicant's Case

2. The application was supported by the affidavit of the 2nd Respondent Lelah Boma sworn on the 21st April, 2022 where she deposed that being aggrieved by the decision delivered against the Respondents on the 22nd March, 2022, she preferred an appeal to the Court of Appeal which appeal raises serious issues of law.



3. She further deponed that she will suffer irreparable loss as the court had granted an order for vacant possession which the Appellant had not sought in the appeal to this court and that the Appellant will be justly enriched if the order of vacant possession is effected in that the Appellant only bought a 7 roomed house and the judgment decreed unto him a 13 roomed house. She further deponed that this application and the appeal have been lodged without undue delay.

Respondent's Case

4. The Respondent John Munene Kabuguaswore an affidavit on the 30th day of March, 2022 where he deponed that the grounds in the draft memorandum of appeal are matters of facts which cannot be canvassed during a second appeal and do not raise triable issues.
5. He further deponed that that the balance of convenience is in his favour having poured all his investment money in the property and that the application is only meant to deny him the enjoyment of the fruits of his judgment.
6. It was his case that the appeal has been filed in bad faith in order to delay the matter and further that the Applicant has not established that he will suffer any substantial loss if the order is not granted.

Applicant's Submissions.

7. Counsel for the Applicant relied on the provisions of Order 42 rule 6 of the Civil Procedure Rules and the case of *RWW v EKW* (2019) eKLR and submitted that the Applicant will suffer substantial loss if the order of stay of execution is not granted. Counsel reiterated the contents of the affidavit and urged the court to allow the application as prayed

Respondent's Submissions

8. Counsel gave background to the case and submitted that for an application made under Order 42 Rules 1,2 and 4 of the *Civil Procedure Rules* to succeed, the Applicant has to establish that she has a competent and arguable appeal with probability of success, that the appeal shall be rendered nugatory if the stay order is not granted, that substantial loss will occur if orders are not granted, that they have provided security and that the application has been made timeously.
9. Counsel relied on the case of *Peter Njuguna Njoroge vs Zipporah Wangui Njuguna* (2013) eKLR and on whether the application is competent, counsel submitted that Section 72 (1) of the *Civil Procedure Act* which gives the Court of Appeal powers to deal with the following three grounds; the decision being contrary to law or to some usage having the force of law, the decision having failed to determine some material issue of law or usage having the force of law and substantial error or defect in the procedure provided by the *Civil Procedure Act* or by any other law for the time being in force which may possibly have produced error or defect in the decision of the case upon the merits.
10. Counsel relied on the case of *Charles Kipkoech Leting vs Express (K) Ltd & Another* (2018) eKLR where the court held that on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.
11. On the issue whether there is sufficient cause to grant stay order as prayed for, counsel submitted that a draft of the intended memorandum of appeal attached to the application does not amount to an arguable appeal and that the Applicant has not demonstrated the irreparable damage that she has suffered or that she is likely to suffer should the application be denied by the court. That the value of the property granted to the Respondent is ascertainable and the rental income being received is known.



12. Counsel submitted that the balance of convenience is in favour of the Respondent who has totally been denied economic use of his investments since the case started. That the Applicant is earning income from her teaching career while the Respondent is being denied rental income for his life time investment and that the application is only meant to deny the Respondent the enjoyment of the fruits of his judgment and relied on the case of Anne Njeri Mwangi vs Muzafer Musafee Essajee & another (2014) eKLR.

Analysis And Determination.

13. The issue for determination is whether the Applicant has met the threshold for grant of stay of execution as per Order 42 rule 6 of the Civil Procedure Rules which provides as follows: -

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.

14. The purpose of stay of execution is to preserve the substratum of the case as was held in the case of *Consolidated Marine. vs. Nampija & Another*, Civil App.No.93 of 1989 (Nairobi), where the Court stated as follows: -

“The purpose of the Application for stay of execution pending Appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of Appeal are safeguarded and the Appeal if successful is not rendered nugatory”

15. Grant of stay of execution orders are discretionary but the discretion must be exercised judiciously. The Court of Appeal case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 provides guidance on how a court should exercise discretion and held that: -

1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. 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 that appeal court reverse the judge's discretion.
 3. 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 proceedings.
 4. The court in exercising its discretion whether to grant(or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The court in exercising its powers under Order XLI rule 4 (2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse’.
16. This is a second appeal which the Applicant has filed in the Court of Appeal. The court is not concerned with the appeal but the Applicant must demonstrate that she has an arguable appeal, will suffer substantial loss if the order of stay is not granted.



17. Proof substantial loss is the cornerstone of applications for stay of execution. An Applicant must go a step further to prove such loss and not merely stating that he/she will suffer substantial loss.
18. In the case of *Kenya Shell Limited vs. Kibiru* [1986] KLR 410, it was held as follows:
- “It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. 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”.
19. Similarly, in the case of *Charles Wabome Gethi vs. Angela Wairimu Gethi* [2008] eKLR, the Court of Appeal held that; -
- “... 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.”
20. Substantial loss is what has to be prevented in an application for stay so as not to render the appeal nugatory. Where such loss has not been established as in the present case there would be no need to grant the stay orders.
21. I have considered the application and submissions by counsel and find that the Applicant has not satisfied the conditions set out in Order 42 rule 6 of the Civil Procedure Rules and hence the application is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF FEBRUARY, 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

