



REPUBLIC OF KENYA



KENYA LAW
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**Maore v Munjuri (Environment and Land Appeal E038 of 2022)
[2023] KEELC 727 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 727 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E038 OF 2022
CK YANO, J
FEBRUARY 15, 2023**

BETWEEN

PHENEAS MWIRIGAGUA MAORE APPELLANT

AND

ALEX MUNJURI RESPONDENT

RULING

1. This is a ruling in respect of an application dated July 18, 2022 by the appellant seeking the following orders;
 - a. That the application be certified urgent in the first instance.
 - b. That the Honourable court be pleased to grant orders of stay of execution of the decree herein pending the hearing and determination of this application.
 - c. That the Honourable court be pleased to grant orders of stay of execution of decree herein pending the hearing and determination of the appeal
 - d. That the cost of the application be provided for.
2. The application is based on the grounds that:-
 - a. That the judgment was delivered on July 7, 2022.
 - b. That the appellant/applicant is aggrieved by the said decision and desirous of appealing the same.
 - c. That the appellant/applicant is currently the registered proprietor of the land Parcel No Tigania/Thananga/1791.



- d. That the orders of cancellation of the certificate of title have been granted which will adversely affect the proprietary right of the applicant in the event of execution of the decree herein.
 - e. That there are orders to have the applicant lose the occupation in the event the decree is implemented.
 - f. That the orders are to ensure that the appeal is not rendered nugatory pending the hearing and determination of the appeal.
3. The application is supported by the affidavit of Pheneas Mwirigua Maore.
 4. The applicant averred that the trial magistrate delivered the judgment on July 7, 2022 and that he was aggrieved by the trial court decision hence desirous to appeal as a matter of right
 5. The applicant stated that the trial court ordered the cancellation of the certificate of title of land parcel No Tigania/Thananga/1791 which is the legal instrument of the ownership and that the orders of stay of execution are to ensure that the appeal is not rendered nugatory pending the hearing and determination of the appeal.
 6. The applicant averred that he is currently in occupation of the subject parcel of land hence the orders of the status quo will serve justice pending the hearing and determination of the appeal and that he had filed the appeal and finds it meritorious and that the appeal has high chances of success
 7. The applicant stated that the judgment is not monetary in nature hence the order of stay in terms of the status quo shall be fair and reasonable and that the respondent is not in occupation of land parcel No Tigania/Thananga/1791.
 8. In response to the application, the respondent herein has filed a replying affidavit dated 23rd August 2022 and averred that the applicant has not satisfied the court that cancellation has physically not taken place and that the applicant has not tendered any evidence to show the nature of loss likely to be suffered should an order of stay be denied.
 9. The respondent avers that the applicant has not made any offer for security for the due performance of the decree which is a requirement in an application of this nature and that the applicant has not demonstrated that the appeal has high chances of success.
 10. The respondent contends that it is trite law that being the successful party he is entitled to fruits of judgment upon conclusion of his judgment.
 11. The respondent averred that based on the standards set in stay of execution pending appeal he prays the Honourable court to find that the applicant has not met the threshold to warrant issuance of orders of stay pending appeal pursuant to the provisions of Order 42 Rule 6.
 12. The application was canvassed by way of written submission pursuant to courts directions given on the September 26, 2022. The appellant filed his submissions dated November 14, 2022 and the respondent filed his dated November 10, 2022 and filed on November 11, 2022.

Analysis And Determination

13. I have considered the pleadings, the authorities and the submissions filed by the parties to buttress their assertions. I have also taken into account the legal authorities proffered by the parties. What calls for determination in this matter is the issue for stay of execution pending appeal.



14. Stay of execution pending appeal is a discretionary power bestowed upon this court by the law. The court of appeal in the case of *Butt Vs Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how a court should exercise the said 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 present 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 the proceedings.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of 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.
15. The principles upon which stay of execution pending appeal can be allowed are now well settled from the authorities from this court and from the superior courts. Generally, stay of execution is provided for under Order 42 Rule 6 of the *Civil Procedure Rules*. Sub rule 1 gives the court discretionary powers to stay execution and 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 appeal case of 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 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 undue 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.”
16. As such, for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that



the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.

17. As for the applicant having to suffer substantial loss, in the case of *Kenya Shell Limited – vs – Benjamin Karuga Kigibu & Ruth Wairimu Karagu* (1982 – 1988) KAR 1018, the Court of Appeal pronounced itself to the effect that-;

“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 rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay”.

(See also the case of *Macharia T/A Macharia & co. Advocates Vs East African Standard (No 2)* (2002) eKLR 63).

18. The applicant has a burden to show the substantial loss he is likely to suffer if no stay is ordered. This is in recognition that both parties have rights, the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. (see the case of *Absalom Dora Vs Turbo Transporters* (2013) eKLR)

19. As F. Gikonyo stated in *Geoffrey Muriungi & another Vs John Rukunga M’Imonyo suing as legal representative of the estate of Kinoti Simon Rukunga (deceased)* [2016] eKLR and which wisdom I am persuaded with-;

“...the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as substantial loss: with the jurisprudence in the High Court, or “rendering the appeal nugatory” within the judicial precincts of the court of appeal and that is the loss which is sought to be prevented by an order of stay of execution pending appeal.

20. The applicant deposed that the intended appeal will be rendered nugatory if the stay is not granted. In his written submissions, he submitted that he is apprehensive that if the orders of stay are not granted, he will suffer irreparable loss in the sense that he will lose his interest over the suit land and the said appeal will be rendered moot.

21. It has been held by the courts that the applicant bears the legal burden to prove that substantial loss would occur. This is also in recognition that both parties have rights with the applicant having the right to appeal and the respondent having a right to enjoy the fruits of his judgment which must not be restricted or postponed except on a lawful and justifiable cause. The court as such has to balance these competing rights.

22. From the deposition on record it is more probable that the issue at hand calls for status quo pending the hearing of the appeal. Indeed, if the respondent is left to execute the decree the applicant may have his title cancelled and he will lose his interest over the suit as he may be evicted. In my view the applicant must be granted his right to be heard at the appellate court. The cancellation of the said title deed will render the said appeal moot and therefore, the applicant stands to suffer immeasurable loss should the application be dismissed.



23. That being the case and in balancing the rights of the parties herein, the balance tilts in favour of the applicant. The respondent will not suffer prejudice which cannot be compensated by way of costs as in most cases, costs are awarded to the winning party. If at all the respondent wins the appeal, the costs awarded to him will be a reasonable panacea to him for the period he shall have to wait so as to enjoy the fruits of his judgment. This is further bearing in mind that interests are also awardable. In my view, the applicant stands to suffer substantial loss if there is execution herein.
24. As to the applicant giving security for due performance of the decree the applicant did not offer any security in that regard and the respondent has argued that security is a prerequisite in an applicant under Order 42 Rule 6 of the Civil Procedure Rules. The respondent prayed for application to be dismissed.
25. I would therefore exercise my discretion in favour of the applicant and allow the application for stay but on condition that the applicant gives security.
26. In the end, the application dated July 18, 2022 is allowed in the following terms;
- a. There shall be stay of execution of the judgment /decree dated July 7, 2022 in Tigania PM ELC No 68 of 2019 pending hearing and determination of this appeal.
 - b. The stay is granted in (a) above on condition that the applicant shall deposit the sum of Kshs 50,000/= in court as security within thirty (30) days from the date hereof, in default, the conditional stay of execution shall automatically lapse.
 - c. Costs of the application are awarded to the respondent.
27. It is so ordered.

DELIVERED DATED AND SIGNED AT MERU THIS 15TH DAY OF FEBRUARY, 2023

In the presence of:

C.A Kibagendi

Mwiti For Applicant

Wambua For Respondent

C.K YANO

JUDGE

