



REPUBLIC OF KENYA



KENYA LAW
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**Nyambu v Tune & another (Civil Suit 85 of 2019)
[2023] KEELC 821 (KLR) (13 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 821 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CIVIL SUIT 85 OF 2019
MAO ODENY, J
FEBRUARY 13, 2023**

BETWEEN

CHAI TUNE NYAMBU APPLICANT

AND

KITSAO TUNE 1ST RESPONDENT

KAINGU TUNE 2ND RESPONDENT

RULING

1. This ruling is in respect of a notice of motion dated September 10, 2021 by the plaintiff/applicant seeking the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That this honourable court be pleased to order a stay of execution of the judgment entered herein on August 31, 2021 pending hearing of the intended appeal.
 - d. That the costs of this application be provided for.
2. The application is supported by the affidavit of the Applicant sworn on September 10, 2021 where he deponed that he has an arguable appeal with high chances of success and that he stands to suffer a great loss since he has always resided on the suit premises Kilifi/Ngerenyi/952.
3. The respondents filed a replying affidavit sworn on May 5, 2022 by Muli Musau, counsel acting on their behalf and deponed that the respondents also reside on the suit property and that it is only fair they are allowed to enjoy the fruits of judgment.



4. Counsel deponed that the application has no basis as the applicant has not served any notice of appeal. Further that the applicant has not demonstrated any substantial loss and that should the application be allowed, the applicant be directed to deposit the title deed of the suit property to this court as security.

Applicant's Submissions

5. Counsel submitted that the applicant has an arguable appeal with high chances of success and relied on the cases of *Reuben & 9 others v Nderitu & another* [1989] KLR 459; *Transouth Conveyors Ltd v Kenya Revenue Authority & another* Civil Application No 37 of 2007; *Kenya Tea Growers Association & another v Kenya Planters & Agricultural Workers Union* Civil Application Nai No 72 of 2001.
6. Counsel further submitted that the Defendants will not suffer any prejudice if the orders sought are granted and cited the case of *Mbaabu Mbui & another v Lang'ata Gardens Limited* [2011] eKLR, and urged the court to allow the application as prayed.

Respondent's Submissions

7. Counsel identified two issues for determination namely, whether the applicant has an arguable appeal and whether stay of execution should be granted to the applicant.
8. Counsel relied on the provisions of order 42 rule 6 on stay of execution and submitted that the applicant has not met the requirements for grant of the same. That the applicants should have gone beyond stating that they would suffer substantial loss since they reside on the suit premises.
9. Counsel relied on the cases of *JP Machira T/a Machira & Co Advocates v East African Standard Ltd* [2001] eKLR, *Charles Wabome Gethi v Angela Wairimu Gethi* [2008] eKLR, and *Arun C Sharma v Ashana Raikundalia T/a Rairundalia & Co Advocates & 2 others* [2014] eKLR and submitted that the provision of security, order 42 rule 6 (2) (b) of the *Civil Procedure Rules* stipulate in mandatory terms that a party must furnish security and that the plaintiff/applicant has not pledged his willingness to deposit the title deed for the suit land with the court as security for due performance of any decree that may be binding on him.

Analysis And Determination

10. The issue for determination is whether the applicant has met the conditions for stay as provided for under order 42 rule 6 of the *Civil Procedure Rules* which stipulates 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 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 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.



11. The principles that guide the court in the exercise of its discretion to grant an application for stay pending appeal were enunciated in the case of *Elena D Korir v Kenyatta University* [2014] eKLR where Justice Nzioki wa Makau stated as follows;

“the application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & another vs Thornton & Turpin Ltd* where the Court of Appeal (Gicheru JA, Chesoni JA & Cockar Ag JA) held that

“The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay.”An applicant who seeks for stay of execution must meet the conditions he will suffer substantial loss of the order of stay is not granted; that the application has been made without unreasonable delay; and that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.”

12. It is undisputed that the instant application was filed without unreasonable delay. On the issue whether the applicant will suffer substantial loss if the order is not granted, the applicant averred that he has heavily invested on the suit premises as opposed to the respondents who do not reside on the suit premises.
13. What amounts to substantial loss was described in the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR. The court observed that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 rule 6 of the CPR. This is so because execution is a lawful process. The applicant 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 ... 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.”

14. Further in the case of *Antoine Ndiaye v African Virtual University* [2015] eKLR Gikonyo, J. stated that the applicant must show he will be totally ruined in relation to the appeal if he pays over the decretal sum to the respondent.

15. It is also well established that the purpose of stay pending appeal is to preserve the substratum of the case especially in land matters where the character of the suit property may be changed while the appeal is pending. In *RWW v EKW* [2019] eKLR the court held as follows: -

8. The purpose of an application for stay of execution pending an appeal is to preserve the subject matter 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 this 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 costs.



9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellant with those of the respondent. In that regard what is at stake in this cause is that if the stay herein is not granted the respondent would be at liberty to sell the immovable property and the proceeds thereof distributed or distribute the property 50:50.”
16. The present dispute was over a parcel of land where the court dismissed the plaintiff’s suit and entered judgment for the respondents as prayed in their counterclaim. One of the prayers sought in the counterclaim was a declaration that the suit premises be sub-divided between the applicant and respondents. Execution in this case would mean sub-dividing the suit premises which would change the character of the property pending appeal.
17. Counsel for the respondent submitted that the applicant should deposit the title to the suit property in court pending the hearing and determination of the appeal. In the case of *Felix Kipchoge Limo Langat v Robinson Kiplagat Tuwei* [2018] eKLR this court held as follows; -
- “.....on the issue of security for the performance for the decree, counsel for the applicant submitted that they are ready and willing to offer security for the performance of the decree as the court may order, this is a case involving land where the defendant has title to the suit land. In the interest of justice, I will order a stay of execution of the decree with a condition that the defendant deposits the title to the suit land in court within 30 days and not to interfere with the character of the land until the appeal is heard and determined....”
18. In the circumstances, I find that the applicant has met the threshold for grant of stay of execution and order that The applicant deposits the title to the suit land in court within 14 days, parties not to interfere with the substratum or character of the suit land until the appeal is heard and determined.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF FEBRUARY, 2023.

MA ODENY

JUDGE

NB: In view of the Public Order No 2 of 2021 and subsequent circular dated March 28, 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*.

