



**Ndolo v Asiyo & another (Environment & Land Case 1295 of 2013)  
[2023] KEELC 16754 (KLR) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16754 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1295 OF 2013**

**JO MBOYA, J  
MARCH 29, 2023**

**BETWEEN**

**JOSEPHAT MAILU NDOLO ..... PLAINTIFF**

**AND**

**MARY ASIYO ..... 1<sup>ST</sup> DEFENDANT**

**NAIROBI CITY COUNCIL ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The suit herein was filed and or commenced by and on behalf of the Plaintiff/Respondent who sought to recover the suit property, namely, Plot No D-436 Kayole (hereinafter referred to as the suit property), from the 2<sup>nd</sup> Defendant herein.
2. Upon the filing of the instant suit, the Plaintiff took out summons to enter appearance, which were variously (sic) served upon the Defendants, for purposes of enabling the Defendants to enter appearance and file their Statement of Defense, if any and where appropriate.
3. Nevertheless, despite having been duly served with the Plaint and the Summons to Enter Appearance, none of the Defendants entered appearance nor filed the requisite Statement of Defense. Consequently, the Plaintiff took the necessary steps and caused the suit to proceed on the basis of Formal proof.
4. Furthermore, after the conclusion of the Formal proof, the Honourable court proceeded to and rendered a Judgment on the May 22, 2015 and in respect of which, the Honourable court entered Judgment in favor of the Plaintiff/Respondent.
5. On the other hand, it is also worthy to state and underscore that after the entry of Judgment in favor of the Plaintiff/Respondent, the 1<sup>st</sup> Defendant/Respondent herein filed an application dated the



- February 10, 2017; and wherein same sought to review, set aside and or vacate the impugned Judgment of the court.
6. Nevertheless, the named application dated the February 10, 2017 was heard and disposed of by the Honourable court vide ruling rendered on the August 30, 2018, whereupon the Honourable court declined to set aside the Default Judgment. For clarity, the application under reference was dismissed.
  7. First forward, the 2<sup>nd</sup> Defendant herein also filed an Application dated the September 22, 2022 and in respect of which same sought to set aside and/or vary the Judgment hitherto rendered by the Honourable court on the May 22, 2015.
  8. Suffice it to point out that the said Application was thereafter set down for hearing and was ultimately heard and disposed of vide Ruling rendered on the February 16, 2023. For completeness, the Honourable court declined to set aside the Judgment.
  9. Following the delivery of the Ruling rendered on the February 16, 2023, the 2<sup>nd</sup> Defendant/Applicant (sic) felt aggrieved and dissatisfied. In this regard, same proceeded to and lodge a Notice of Appeal.
  10. Other than the foregoing, the 2<sup>nd</sup> Defendant/Applicant has now filed and mounted the current Application dated the February 17, 2023; and in respect of which same now seeks the following reliefs;
    - i. ....Spent.
    - ii. That the Plaintiff/Respondent herein be restrained by Stay of Execution of the Judgment and Decree issued herein dated the 22<sup>nd</sup> day of May, 2015 pending the hearing and determination of the Intended Appeal at the Court of Appeal at Nairobi against the Ruling by Honourable Justice Oguttu Mboya, Judge, issued on the 16<sup>th</sup> day of February 2023.
    - iii. That the Costs of this Application be provided for.
  11. The instant application is anchored and premised on various grounds which have been alluded to and enumerated at the foot thereof. Besides, the application is further supported by the affidavit of the Applicant sworn on the February 17, 2023.
  12. Upon being served with the instant application, the Plaintiff/Respondent filed a Replying affidavit sworn on the February 28, 2023 and wherein the Plaintiff/Respondent has averred, inter-alia, that the Applicant has neither met nor satisfied the requisite threshold to warrant the grant of the orders of stay of execution pending the hearing and determination of the Intended appeal.
  13. Be that as it may, the Applicant herein latter sought for and obtained Leave to file and serve a Further affidavit. In this regard, the Applicant thereafter proceeded to and indeed filed the Further affidavit sworn on the 2<sup>nd</sup> of March 2023.
  14. Notwithstanding the foregoing, it is appropriate to state and underscore that the 1<sup>st</sup> Respondent did not file any Response to the named application.
  15. Furthermore, the instant Application came up for Hearing on the March 22, 2023, whereupon the advocates for the respective Parties agreed to canvass and ventilate the application by way of written submissions. In this regard, the Honourable court thereafter circumscribed the timelines for the filing and exchange of written submissions.



## Submissions by the Parties

### a. Applicant's Submissions:

16. The Applicant herein filed written submissions and same has raised, highlighted and amplified three (3) issues for consideration and determination by the Honourable court.
17. Firstly, learned counsel for the Applicant has submitted that the Applicant herein bought and or purchased the suit property from a Public auction carried out and undertaken by the 1<sup>st</sup> Respondent herein.
18. Furthermore, it was the submissions of counsel for the Applicant that prior to and before the suit property was disposed of vide Public auction, same had lawfully been repossessed by the 1<sup>st</sup> Defendant/ Respondent. In this regard, learned counsel for the Applicant submitted that the 1<sup>st</sup> Respondent was therefore at liberty to sell and or dispose of the suit property.
19. Secondly, learned counsel for the Applicant has submitted that even though it is contended that the summons to enter appearance were advertised pursuant to and in line with the orders of the Honourable court, same ( Applicant), however did not come across the named advertisement. Consequently, the Applicant has contended that as a result of not having come across the advertisement, same was therefore not aware of the existence of the instant suit.
20. Thirdly, learned counsel for the Applicant has submitted that the Applicant has a good and arguable appeal, with overwhelming chances of success and hence there is need/necessity to grant an order of stay of execution pending the hearing and determination of the intended appeal.
21. In addition, learned counsel for the Applicant has submitted that it is the Applicant herein who has been in possession of the suit property and hence a failure to grant the orders sought, would culminate into the Applicant being evicted from and deprived of possession and occupation of the suit property.
22. Finally, learned counsel for the Applicant has also submitted that the Plaintiff/Respondent herein can be compensated by way of costs and in any event, the Plaintiff/Respondent shall not suffer any prejudice or inconvenience at all.
23. In view of the foregoing, learned counsel for the Applicant has implored the Honourable court to find and hold that the Applicant has satisfied the requisite conditions and similarly, met the threshold, to warrant the grant of the orders sought.

### b. Plaintiff's/Respondent's Submissions:

24. The Plaintiff/Respondent herein has filed written submission dated the March 22, 2023 and in respect of which, same has raised and highlighted three (3) pertinent issues for due consideration and eventual determination by the Honourable court.
25. Firstly, learned counsel for the Plaintiff/Respondent has submitted that the Applicant herein has neither placed before the Honourable court any evidence of substantial loss or at all. In this regard, learned counsel has submitted that in the absence of evidence of substantial loss, no order of stay of execution can issue and/or be granted.
26. In support of the submissions that the Applicant has neither laid nor placed before the Honourable court evidence of substantial loss, learned counsel for the Plaintiff/Respondent has cited and quoted various decisions *inter-alia*, [Henry Sakwa Maloba v Boniface Papando Tsabuko](#) (2020)eKLR, [James](#)



Wangalwa & Another v Agnes Naliaka Cheseto (2018)eKLR, Michael Ntouthi Mitheu v Abraham Kivondo Musau (2021)eKLR and Samvir Trustee Ltd v Guardian Bank Ltd (2007)eKLR, respectively.

27. Secondly, learned counsel for the Plaintiff/Respondent has submitted that the Applicant herein has neither offered nor proposed to provide any Security for the Due Performance of the Decree that may ultimately arise and/or ensue.
28. Owing to the fact that the Applicant herein has failed to offer security for the due performance of the decree that may ultimately arise and/or ensue, learned counsel for the Plaintiff/Respondent has further submitted that the Applicant is not entitled to an order of stay of execution, either as sought or at all.
29. As pertains to the question/issue of provision of Security for the Due Performance of the Decree that may ultimately ensue, learned counsel for the Plaintiff/Respondent has cited and relied on the decision in the case of Giofranco Manenthi & Another v African Merchant Assurance Company Ltd (2019)eKLR.
30. Thirdly, learned counsel for the Plaintiff/Respondent has also contended that the Honourable court ought to invoke and apply the Overriding principle with a view to enabling the Plaintiff/Respondent to appropriate of and to benefit from the Judgment of the court. In this regard, learned counsel has submitted that the grant of an order of stay of execution shall deny and/or deprive the Plaintiff/Respondent of the legitimate rights and expectation to partake of the fruits of the Judgment.
31. Furthermore, learned counsel has also submitted that the instant suit has been pending before the Honourable court for more than 10 years and hence it is in the interest of justice and fair play that the application for stay be declined.
32. In this regard, Learned Counsel for the Plaintiff/Respondent has invited the Honourable court to take cognizance of the provisions of Section 1A and 1B of the Civil Procedure Act, Chapter 21 Laws of Kenya.
33. In addition and for emphasis, learned counsel for the Plaintiff//Respondent has also cited and quoted the decision in the case of Michael Ntouthi Mitheu v Abraham Kivondo Musau (2021)eKLR, to vindicate and underscore the relevance of the Principle of Overriding Interests.
34. Premised on the foregoing, learned counsel for the Plaintiff/Respondent has therefore submitted that the Applicant herein has neither established nor met the requisite threshold to warrant the grant of an order of stay of execution pending the hearing and determination of the Intended appeal.
35. Put differently, learned counsel for the Plaintiff/Respondent has invited the Honourable court to dismiss the instant application and thereafter pave way for the execution and realization of the Judgment of the Honourable court.

**c. 1<sup>st</sup> Defendant's/Respondent's Submissions:**

36. Though the 1<sup>st</sup> Defendant/Respondent did not file any response to the instant application, same however, proceeded to and filed written submissions dated the March 21, 2023; and in respect of which same has raised and highlighted two issues for due consideration by the Honourable court.
37. First and foremost, learned counsel for the 1<sup>st</sup> Respondent has submitted that though the Plaintiff/Respondent was hitherto allocated the suit property, same failed and/or neglected to comply with the terms of the allotment. In this regard, learned counsel for the 1<sup>st</sup> Defendant/Respondent has therefore contended that the 1<sup>st</sup> Defendant/Respondent was therefore authorized to proceed to and repossess the suit property.



38. Secondly, learned counsel for the 1<sup>st</sup> Defendant/Respondent has submitted that the Intended appeal by and on behalf of the 2<sup>nd</sup> Defendant/Applicant raises arguable issues and hence it is appropriate that an order of stay of execution be granted pending the hearing and determination of the intended appeal.
39. Based on the foregoing, learned counsel for the 1<sup>st</sup> Defendant has therefore implored the court to find that the instant application is meritorious and thus ought to be granted.

### **Issues for Determination**

40. Having reviewed and evaluated the Application dated the February 17, 2023, together with the Supporting affidavit thereto; and having taken into account the contents of the Replying affidavit in opposition thereto and finally having considered the written submissions filed by and on behalf of the Parties, the following issues do arise and are thus germane for determination;
  - i. Whether the Applicant herein has shown/established Sufficient cause and/or basis as envisaged under the law, namely, Order 42 Rule 6 (2) of the *Civil Procedure Rules*?
  - ii. Whether the Applicant has established and/or proved that substantial loss shall arise and/or accrue, if the orders of stay of Execution sought are not granted?

### **Analysis And Determination**

#### **Issue Number 1**

Whether the Applicant herein has shown/established Sufficient cause and/or basis as envisaged under the law, namely, Order 42 Rule 6 (2) of the *Civil Procedure Rules*?

41. The Applicant herein had hitherto filed and/or mounted an application dated the September 22, 2022 and in respect of which, same had sought to set aside and/or vary the Judgment of the court rendered on the May 22, 2015.
42. Suffice it to point out that the named application was thereafter canvassed and ventilated before the Honourable court, culminating into the delivery of a ruling rendered on the February 16, 2023. For coherence, the Application by and on behalf of the 2<sup>nd</sup> Defendant/Applicant was dismissed.
43. Following the dismissal of the named application, the Applicant herein was (sic) aggrieved and/or dissatisfied. In this regard, the Applicant thereafter proceeded to and lodged a document titled a Notice of appeal, whereby same signified her intention and desire to file an appeal against the impugned ruling rendered on the February 16, 2023.
44. Ordinarily and by Law, a Notice of appeal occupies a critical and pivotal position in determining whether or not a sufficient cause or basis has been laid.
45. In this regard, there is no gainsaying that once a valid Notice of appeal has been filed and lodged in accordance with the Rules of the Court of Appeal, then it is deemed that the Applicant has shown a clear and deliberate intention to pursue an appeal to the Court of appeal.
46. Consequently and in the premises, it is not lost on this Honourable court that a valid of a Notice of appeal would therefore serve two critical purposes. Firstly, express and document the intention of the Applicant to appeal to the court of appeal.
47. Secondly, the filing or lodgment of a valid and requisite Notice of appeal would confer upon and bestow upon this Honourable court the requisite Jurisdiction to grant an order of stay pending appeal,



subject to proof of (sic) substantial loss in accordance with the provisions of Order 42 Rule 6(2) of the *Civil Procedure Rules, 2010*.

48. Having made the foregoing remarks, it is now important to venture forward and to discern whether the Applicant herein has lodged and or mounted the requisite Notice of appeal as pertains to the Ruling, which is sought to be appealed against.
49. To this end, I beg to point out that though a Notice of appeal dated the February 17, 2023, was lodged on behalf of the Applicant, however, same was directed to and lodged with the Registrar, the High Court of Kenya at Nairobi.
50. Besides, the named Notice of appeal was intended to be signed and executed by the Deputy Registrar, High Court of Kenya and not otherwise.
51. Clearly, the impugned Notice of appeal was never directed to the Deputy Registrar of the Environment and Land Court and neither was same intended to be executed by the Deputy Registrar of the Environment and Land Court.
52. In the circumstances, a question does arise as to whether the 1<sup>st</sup> Defendant/Applicant has established a sufficient cause and/or basis, in terms of showing that same has complied with the requisite preliminary steps towards the lodgment of an appeal to the Court of appeal, as pertains to the Decision of this Honourable Court.
53. To my mind, even though the validity or otherwise of a notice of appeal falls within the requisite Jurisdiction of the Court of Appeal, but this Honourable court is similarly enjoined to consider the Notice of appeal by virtue of the provisions of Order 42 Rules 6(4) of the Civil Procedure Rules, 2010.
54. Consequently and given the importance and significance of the provisions of Order 42 Rules 6(4) of the *Civil Procedure Rules, 2010*, it is appropriate and imperative that same be reproduced.
55. For ease of reference, the provisions of Order 42 Rules 6(4) of the *Civil Procedure Rules* (supra) are reproduced as hereunder;

6. Stay in case of appeal [Order 42, rule 6.]

- (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 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.
  - (3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
  - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
56. In my humble view, the filing of the requisite notice of appeal, which essentially constitutes an appeal to the court of appeal by dint of Order 42 Rules 6(4) (Supra) would constitute a sufficient cause and/or basis.
57. However, where there is an evident and obvious fault/defect, like the one which I have alluded to in the preceding paragraphs, a debate does arise as to whether the Applicant has indeed met/satisfied the threshold of establishing sufficient cause.
58. To my mind, I am afraid that the Applicant herein has neither established nor proved the existence of a sufficient cause, which is a pre-requisite to the invocation of the Jurisdiction of this Honourable court in matters pertaining to and concerning the grant of an order of stay of execution pending appeal.
59. As pertains to the importance of sufficient cause in considering an application for stay of execution pending the hearing and determination of an appeal to the Court of Appeal (read intended appeal), it is imperative to take cognizance of the holding in the case of *Carter & Sons Limited v Deposit Protection Fund Board & 2 Others*, Civil Appeal No 291 of 1997, at page 3 thereof, where the Court of Appeal said:-

“As was held by the Court of Appeal in *Vishram Ravji Halai & Another Vs. Thornton & Turpin (1963) Limited*, Civil Application 15 of 1990 (unreported)

“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 a stay; and thirdly, the Applicant must furnish security. The application must, of course, be made without unreasonable delay.”

## Issue Number 2

Whether the Applicant has established and/or proved that substantial loss shall arise and/or accrue, if the orders of stay of Execution sought are not granted?

60. Other than the issue/question of sufficient cause being shown, nay established, an Applicant seeking for an order of stay of execution pending appeal is also called upon to demonstrate and or established that substantial loss is likely to arise or accrue, if the orders sought are not granted.
61. In any event, it has been held hitherto that substantial loss is the cornerstone to granting an order of stay of execution pending appeal. Consequently, it behooves the Applicant to place before the Honourable court cogent and credible evidence to vindicate the likelihood of substantial loss arising.



62. To underscore the foregoing observations, it is appropriate to restate and reiterate the holding in the case of *Kenya Shell Ltd v Benjamin Karuga Kibiru & Another* (1986)eKLR, where the Court of Appeal stated and held as hereunder;

“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.

63. Furthermore, the need to plead and avail evidence of substantial loss by an Applicant seeking an order of stay of execution was also underscored in the case of *Samvir Trustee Ltd v Guardian Bank Ltd* (2007)eKLR, where the Honourable court stated and held as hereunder;

“It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss.

64. Moreover, the question of substantial loss was also adverted to and elaborately analyzed in the case of *Machira T/A Machira & Company Advocates v East African Standard* (2002)eKLR, where the court held as hereunder;

“If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant’s business (eg appeal or intended appeal).”

65. From the foregoing decisions, the golden thread that runs across is to the effect that an Applicant is called upon to implead evidence of substantial loss and thereafter to establish same, albeit on a balance of probabilities.

66. Additionally, it is also discernible that it is not enough for an Applicant to make and put forth mere assertions and/or allegations of substantial loss. For clarity, it behooves the Applicant to go the extra mile and to vindicate that indeed substantial loss shall arise and/or accrue.

67. Having taken into account, the ratio decidendi, espoused in the decisions (supra), I must now return back to the instant matter and to consider whether the Applicant herein has indeed met and/or satisfied the requisite threshold in terms of proving substantial loss.

68. Firstly, though the Applicant has contended that same has developed the suit property and has been collecting rents therefrom, no evidence of any approved building plans were annexed and/or attached to the supporting affidavit to vindicate the claims/allegations that the suit property has (sic) been developed in the manner alluded to.

69. Secondly, it is also worthy to recall that the Applicant has also failed to annex and/or exhibit even a copy of a Lease/Tenancy agreement bespeaking to the existence of a tenant, if any, in the premises.



70. Thirdly, the Applicant has also not placed before the Honourable court any evidence to establish and prove that same has undertaken any development over and in respect of the suit property, either in the manner alleged or otherwise.
71. Other than the foregoing, it is also worthy to point out that the Applicant also did not venture to elaborate and substantiate, the allegations and/ or averments that same was disposed to suffer Substantial Loss. Clearly, the mere statements and allegations per se do not constitute proof or establishment of such loss.
72. In the absence of such evidence, the Honourable court is left in wonderland, to guess or better still, second guess whether the mere allegations or averments contained in the supporting affidavit of the Applicant are factually correct or empirically warranted.
73. Be that as it may, it is worthy to recall that the burden of proving and/or establishing that the Applicant shall be disposed to suffer substantial loss, if any, laid on the Applicant and not otherwise.
74. For the avoidance of doubt, it was incumbent upon the Applicant to meet and discharge the Evidential burden, before the burden would shift to the Plaintiff/Respondent for rebuttal. However, where the Applicant fails to discharge the evidential burden in the first instance, then the Respondent cannot be called upon to discharge any burden, whatsoever.
75. In a nutshell, the Applicant herein has not discharged the statutory obligation placed upon her in accordance with the law. In this regard, the Honourable court cannot be called upon to grope in darkness, in an endeavor to ascertain whether or not substantial loss will accrue.
76. Other than the foregoing, it is also important to point out that the suit property is immovable in nature and that the Applicant's intended appeal can still be prosecuted and if same ultimately succeeds, appropriate and necessary orders shall be made to revert the suit property unto her.
77. Furthermore, the suit property can also be preserved vide an order directed to the Plaintiff/Respondent not to alienate, sell, dispose of and/or otherwise charge the suit property, pendete lite, to wit, pending the hearing and determination of the intended appeal.
78. In a nutshell, I come to the conclusion that the Applicant herein has neither established nor availed any cogent and credible evidence to warrant a finding that same shall be disposed to suffer substantial loss or otherwise.
79. Consequently and taking into account that Substantial loss is the cornerstone to granting an order of stay of execution, it then becomes apparent, nay, evident that such an order cannot therefore issue and/ or be granted in respect of the instant matter.

### **Final Disposition**

80. In conclusion, it is my finding and holding that the Applicant herein has failed to meet and/or satisfy the requisite threshold to warrant the grant of the orders of stay of execution of the impugned Judgment pending the hearing and determination of the intended appeal.
81. Consequently and having failed to meet the requisite threshold, the Honourable court is left with no alternative, but to dismiss the Notice of Motion Application dated the February 17, 2023.
82. Nevertheless and for good measure, even though the subject application has been dismissed thus paving way for the Plaintiff/Respondent to execute the Judgment rendered on the May 22, 2015, it is appropriate to add a rider that the suit property shall not be alienated and/or disposed of pending the hearing and determination of the intended appeal.



83. Save for caveat alluded to in the preceding paragraph, the Application dated the February 17, 2023; be and is hereby Dismissed with costs to the Plaintiff/Respondent only.

84. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF MARCH 2023.**

**OGUTTU MBOYA,**

**JUDGE.**

**In the Presence of;**

**Benson - Court Assistant**

**Mr. Karanja h/b for Mr. Osoro Juma for the 2<sup>nd</sup> Defendant/Applicant**

**Ms. L Magotsi h/b for Ms. Kethi Kilonzo for the Plaintiff/Respondent**

**N/A for the 1<sup>st</sup> Defendant/Respondent**

