



**Willy v Musonga (Environment and Land Appeal E003 of 2022)  
[2022] KEELC 13441 (KLR) (11 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13441 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT AND LAND APPEAL E003 OF 2022  
LG KIMANI, J  
OCTOBER 11, 2022**

**BETWEEN**

**AURELIA MUNYIA WILLY ..... APPELLANT**

**AND**

**MUTIA MUSILA MUSONGA ..... RESPONDENT**

*(Being an appeal from the Judgment of the Chief Magistrate at Kitui Chief Magistrate's Courts Case no. ELC 74 of 2019 Hon. S. Mbungi ((Mr.) delivered on 21{^st} January 2022)*

**RULING**

1. The Appellant/Applicant filed the Notice of Motion Application dated March 9, 2022 under Certificate of Urgency seeking for the following orders:
  1. Spent.
  2. That there be temporary injunctive orders/Stay of execution of the Judgment delivered on January 2022 by Hon S Mbungi in Kitui CMCC ELC Case No 74 of 2019: Mutia Musila Musonga v Aurelia Munyiva Willy and decree and all consequential orders emanating therefrom pending the hearing and determination of this application inter-partes..
  3. That there be temporary injunctive orders/Stay of execution orders of the Judgment, Decree and all consequential orders emanating therefrom pending the hearing and determination of the Appellant's/Applicant's Appeal.
  4. That the costs of this Application be in the cause.
2. The Application is premised on the grounds on the face of the application and the supporting affidavit. The Applicant claims that the Trial Court conducted its proceedings ex parte and irregularly without affording her a chance to ventilate her case despite filing her Defence and judgment was entered in favour of the Plaintiff on January 21, 2022. It is her claim that the Trial Court irregularly relied on a



defective Mention Notice and affidavit of service filed by the Respondent before ordering the case to proceed *ex parte*.

3. The Appellant claims that the Trial Court issued irregular declarations and orders over Land Title No Yatta/Ilika/568. She states that the Respondent deliberately failed to notify the Trial Court that there could be an issue with wrong/double allocation of the subject land that could be Land Parcel Number Yatta/Ilika/568.
4. The Trial Court ordered a permanent injunction against her and ordered that the Appellant/Applicant vacates the land but she insists that the land belongs to her and wonders how she could be barred from accessing her own land on which she has been living with her family and cultivating for decades.
5. The Appellant further claims that she was condemned to pay Ksh 100, 000 in damages for trespass, as well as costs of the suit with interest, which money she cannot afford as she is a housewife who purely depends on subsistence farming for a living.
6. The Appellant is therefore apprehensive that unless this Honourable Court intervenes urgently, the Applicant runs the risk of being evicted from her own land and suffering irreparable and substantial loss and damage. She states that it is imperative that the subject matter of the Appeal be preserved so as to not render the Appeal nugatory if the Respondent is left to pursue execution of the Lower Courts Judgment.

### **Applicant's submissions**

7. The Appellant/Applicant submits that the Trial Magistrate was wrong in law to allow an interlocutory judgment against her in a suit of this type being a suit of unliquidated award and a land case is not subject to an interlocutory judgment being entered as provided in Order 10 of the Civil Procedure Rules as the courts have pronounced. As such, the Applicant submitted that the trial court needed to ensure that she was sufficiently served and that all possible means of ensuring she was aware of the suit were exhausted before rushing to enter an interlocutory judgment.
8. The Appellant cited the cases of *Apollo Muinde & 2 others v Ernest Oyaya Okemba* (2018) eKLR and *Ibrahim Gatobu v Mwichwiri Farmers Co Ltd* [2020] eKLR.

### **The respondent's case**

10. In response to the application thereto, the Respondent filed Grounds of Opposition dated March 16, 2022 on the following grounds:
  1. There is no competent Appeal filed before the Court.
  2. The Applicant has not demonstrated that she will suffer substantial loss
  3. The Applicant has not demonstrated sufficient case.
11. The Respondent submitted that according to Order 42 Rule 6(2) of the Civil Procedure Rules (2010) on the jurisdiction of this Court to grant an order of stay of execution, the Applicant should satisfy the Court that Substantial loss may result to him unless the order is made, that the application has been made without unreasonable delay and the Applicant has given such security as the court orders for the due performance of such decree or order as may be ultimately binding on him.
12. The Respondent cited the cases of Jamii Bora Bank Ltd and Another v Samuel Wambugu Ndirangu in Nyeri Civil Appeal NoE30 of 2021 and in *Shell Ltd v Kibiru and Another* 1986 KCR 410 where



the courts pronounced that it must confirm that substantial loss will occur before a stay of execution order is granted.

13. According to the Respondent, there is no competent appeal before the court, since the appeal was filed on February 21, 2022 against the judgment if the Court that was delivered on January 21, 2022, 32 days after the delivery of the judgment, therefore was filed out of time without the leave of the court. Further, the Respondent submits that the application for stay of execution was made on March 10, 2022, 49 days from the date of the judgment and the delay is inordinate and is not explained.
14. On the matter of security, the Respondent submitted that the Court had ordered for payment of Ksh 100, 000 as general damages for trespass. The Respondent relied on the cases of Co-operative Bank of Kenya Ltd v Simon Kiplagat Biroott 2019 eKLR, Ena Investment Ltd v Bernard Ochau Mose & 2 Others 2022 eKLR where the Applicants were ordered to deposit the decretal sums as security for costs.
15. It is therefore the Respondent's submission that the Applicant should be ordered to deposit the entire sum of Kshs 100, 000/= ordered as general damages within a period to be fixed by the Court if her application is found to be merited but should otherwise be dismissed.

### **Analysis and determination**

16. The Appellant/Applicant has made an application for stay of execution of the trial court's ruling of January 21, 2022. Order 42 Rule 6(2) of the Civil Procedure Rules(2010) provides that:

“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.
- (3) Notwithstanding anything contained in subrule (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.”

17. The case of HGE v SM [2020] eKLR summarized the principles governing grant or refusal of stay of execution thus:

“An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) 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. See Antoine Ndiaye v African Virtual University [2015] eKLR.

18. The purpose of stay of execution order pending appeal as was emphasized in the case of RWW v EKW (2019) eKLR cited by Musyoka J in HE v SM (2020) eKLR where the Court held that 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.



19. The first issue raised by the Respondent is that the appeal was filed out of time without leave of the court. Section 79G of the *Civil Procedure Act* provides that:

“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.....”

20. In this case judgment was delivered on January 21, 2022 while the Memorandum of Appeal was filed on February 21, 2022. In accordance with Order 50 Rule 8 on Computation of days it is provided that:

“In any case in which any particular number of days not expressed to be clear days is prescribed under these Rules or by an order or direction of the court, the same shall be reckoned exclusively of the first day and inclusively of the last day”.

21. After computing the days from January 21, 2022 to February 21, 2022, the 30<sup>th</sup> day would be February 20, 2022 which happens to have been on a Sunday which according to Order 50 Rule 3 of the Civil Procedure Rules is an excluded day. It is thus the courts view that the appeal was filed within the prescribed statutory time limit. Order 50 Rule 3 of the *Civil Procedure Rules* provides for time expiring on Sunday or day offices closed and states:

“Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.”

22. On the question of the requirements for grant of stay of execution, it is quite evident that the Appellant herein stands to suffer substantial loss if the stay of execution is not granted as she claims that she resides on the suit property and that it belongs to her. She has stated that she has lived there for years and has no other home. She was also decreed by the Trial Court to pay General damages as well as costs of the suit and therefore stands to lose if she succeeds in this Appeal but is not granted stay of execution.

23. Secondly, the issue of costs for the due performance of the decree arises. The Trial Court had ordered that the Appellant pays the sum of Ksh 100,000/= as general damages for trespass and the costs of the suit with interest as well. Security is ordered to guarantee that the Appellant shall pay the decadal amount in the event that the Appeal fails. In the case of *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR the Court held that:

“...the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree.



The court would order for the release of the deposited decretal amount to the respondent in the appeal.”

24. However, the Appellant herein states that she is a housewife with no means of paying the Ksh.100, 000 plus costs of the suit. Stay of execution orders are not meant to be punitive. The issue of security was discussed in *Arun C Sharma v Ashana Raikundalia t/a Rairundalia & Co Advocates & 2 others* [2014] eKLR, where the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

25. In my view the trial court issued several orders in its judgement including a declaration of ownership of the suit land, order of vacant possession and/or eviction, permanent injunction, general damages and costs of the suit. In granting the orders of stay of execution the court balances the interests of the Respondent decree holder and the Appellant judgement debtor. I find it fair and just that the orders sought be granted in the following terms:

1. There be stay of execution of the Judgment delivered on January 21, 2022 by Hon S Mbungi in Kitui CMCC ELC Case No 74 of 2019: Mutia Musila Musonga v Aurelia Munyiva Willy and decree and all consequential orders emanating there from pending the hearing and determination of this Appeal.
2. The stay of execution is hereby granted on condition that the Appellant/Applicant deposits in court within 30 days from the date hereof the sum of Kshs 100,000/= as security for the due performance of the decree.
3. The Appeal to be prosecuted within 90 days from the date hereof
4. Costs of this application to abide the outcome of the appeal

**DATED, SIGNED AND DELIVERED AT KITUI THIS 11<sup>TH</sup> DAY OF OCTOBER 2022.**

**HON L. G. KIMANI**

**JUDGE ENVIRONMENT AND LAND COURT, KITUI**

**Ruling read in open court in the presence of:**

**C/A Musyoki**

Aurelia Munyiva Willy the Appellant /Applicant in person

Kalili Advocate for the Respondent

