



**Kimbio v Kimbio (Environment and Land Appeal E010 of 2024)
[2024] KEELC 6280 (KLR) (Environment and Land) (27 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6280 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E010 OF 2024
EK WABWOTO, J
SEPTEMBER 27, 2024**

BETWEEN

JACKTON MWAKABA KIMBIO APPELLANT

AND

MAXWELL MALISO KIMBIO RESPONDENT

RULING

1. This is a ruling in respect to a Notice of Motion dated 24th July 2024 in which the Applicant is seeking inter alia stay of execution pending appeal.
2. The Applicant contends that judgment against him was delivered on 19th June 2024. Being dissatisfied with the said judgment, he has now preferred an appeal against the said judgment to this court. He therefore prays for a stay of execution of the said judgment as he pursues the appeal.
3. The application is opposed by the Respondent through a Replying Affidavit sworn on 16th August 2024. The Respondent contends that the application has not met the threshold for grant of stay pending appeal. The Respondent states that the court had already entered judgment in his favour that he is the absolute owner of Voi/Ndara 'A'/4389 measuring 21.23Ha and restrained the Appellant from interfering with the property.
4. Counsel for the parties were allowed to make oral submissions on 24th September 2024. Learned Counsel Mr. Mwazighe submitted on behalf of the Applicant while Learned Counsel Mr. Motuka submitted on behalf of the Respondent.
5. The issue of whether to grant stay pending appeal is a matter of discretion. This discretion is fettered by four conditions. First, an applicant must demonstrate that there is just cause to grant stay. Second, the Applicant has to demonstrate that he or she will suffer substantial loss should stay not be granted.



Third, there has to be security provided for the due performance of the decree as may ultimately be binding upon the Applicant. Fourth, the application has to be brought without unreasonable delay.

6. The principles are further outlined under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, which provides:

(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.

7. The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“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.

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.”

8. It therefore means that the court should endeavour to balance the interests of both the successful party in litigation so as not to unnecessarily bar him from enjoying the fruits of judgment and that of the Appellant whose appeal may succeed and be rendered nugatory if stay of execution is not granted.

9. The Applicant contends that the Appeal will be rendered nugatory if stay is not granted and that no prejudice will be suffered by the Respondent if stay is granted. However, in the instant case, the Applicant has not demonstrated any substantial loss that he may suffer, the Applicant has not demonstrated whether he resides in the suit property and further he has not demonstrated any threat of execution of the judgment and decree of the trial court upon which he stands to be prejudiced. For this reason, the court is not persuaded that the appeal would be rendered nugatory were it to decline to grant the orders sought in this application and further if the appeal were to succeed. In the case of *James Wangalwa & Anor Vs Agnes Naliaka* [2012], the Court stated 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...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 a successful party in the Appeal.”

10. The mere filing of the Memorandum of Appeal does not guarantee the issuance of the orders of stay of execution by this court without considering the merits of the Application. In any event the law, in Order 42 Rule 6(1) of the Civil Procedure Rules, provides that an appeal is not an automatic stay of execution of the decree of a Court. The general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In *Machira T/A Machira & Co Advocates vs. East African Standard (No 2)* [2002] KLR 63 it was held that:

“The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled”.

11. The court has also painstakingly gone through the entire application and affidavit made in support and it is indeed clear that the applicant has not expressed whether he is ready and willing to offer any form of security for the performance of the decree pending the hearing and determination of the Appeal considering that the Respondent was the successful party before the trial court.
12. Consequently, it is the finding of this court that the Applicant has not satisfied the principles for the grant of an application for a stay of execution pending appeal.
13. In conclusion, the Motion dated 24th July 2024 fails and is dismissed in its entirety with costs. The Applicant shall pay the costs of the application assessed at Kshs 15,000.00.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 27TH DAY OF SEPTEMBER 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

..... for the Appellant.

..... for the Respondent.

Court Assistants; Mary Ngoira and Norah Chao.

