



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mwinzi & another v Kimanzi & 4 others (Civil Suit E012 of 2021)
[2023] KEHC 571 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 571 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT E012 OF 2021
HK CHEMITEI, J
FEBRUARY 9, 2023**

BETWEEN

CAROLINE MUTWA MWENDE MWINZI 1ST PLAINTIFF

KASYETHAU NOBLE TRADING LIMITED 2ND PLAINTIFF

AND

GEORGE NGUI KIMANZI 1ST DEFENDANT

ANNAH MWALE KIMANZI 2ND DEFENDANT

THE REGISTRAR OF COMPANIES 3RD DEFENDANT

THE HON. ATTORNEY GENERAL 4TH DEFENDANT

FRANCIS GATHENYA GATHUKU 5TH DEFENDANT

RULING

1. In their Notice of Motion dated November 14, 2022 the applicants pray for orders that there be stay of execution or implementation of the ruling delivered by this court on October 6, 2022 pending the hearing and determination of this application and thereafter the main appeal. They also prayed for costs.
2. The application is based on the grounds thereof and the affidavit of the 1st defendant/applicant sworn on the same date. The said affidavit deposes that the applicants were dissatisfied with the ruling delivered by this court on October 6, 2022 in its entirety. That the applicants had exercised their undoubted constitutional right of appeal against the said decision and had filed that a notice of appeal on the same. Further, that the aforesaid notice of appeal had been served on the parties in this case and they had also applied and paid for typed proceedings.



3. The 2nd defendant/applicant deposed that they aware that the plaintiffs had already extracted and obtained from the court an order arising from the impugned ruling and had put in place the appropriate mechanism of implementing the said order. That they were afraid that if the orders issued were implemented or executed, this application would become an academic exercise and the appeal in the Court of Appeal would be rendered nugatory.
4. He deposed further that in order to retain the substratum of the appeal in existence, it was only fair and just that the prayers sought be granted. That the plaintiffs would suffer no prejudice at all if the prayers sought were granted because the main suit was yet to be decided and they would still have their day in court. Further, that the applicants would abide by all the conditions granted by this court in order to issue an order of stay pending the hearing and determination of the applicants' appeal in the Court of Appeal.
5. The plaintiffs/respondents through their replying affidavit sworn on November 1, 2022 by the 1st plaintiff/respondent and grounds of opposition dated November 21, 2022 have vehemently opposed the application. The 1st plaintiff/respondent averred that she had been duly advised that the motion was bereft of merits and had failed by a wide margin to meet the threshold set for stay of execution for reasons that there was no proper appeal before the Court of Appeal. That she had already signed an application to strike out the notice of appeal for flouting provisions of Rule 75 (2) of the *Court of Appeal Rules* which mandates that: -

“ Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired appeal”
6. The 1st plaintiff/respondent averred further that the applicants lacked audience due to their blatant disobedience of orders of this court delivered on October 6, 2022. That an appeal in this instance did not lie as a matter of right but only subject to leave of this honourable court, which leave had not been sought or given despite the fact that the applicants' counsel was duly served with the ruling notice. She averred that she been advised that the orders complained of were simply conservatory. That the rental income so collected would only be expended towards statutory bills and outgoings but any party with a legitimate need for the same was at liberty to apply to this court for order to withdraw the monies. Further, that those orders were not detrimental to the applicants to warrant an order of stay of execution.
6. The 1st plaintiff/respondent went on to aver that House No. T6 in Milimani apartments had been vacant since June, 2021 so it made no sense for it to remain so. That if the orders of this court were stayed, her company herein would continue to incur losses. Also, that it was noteworthy that the 5th defendant/applicant had never laid claim over House No. U8 and the same remained vacant, occasioning the company more losses.
6. In addition, that the application has been brought 42 days since the ruling complained of was delivered; it is brought against conservatory orders meant to simply preserve the suit property and will greatly prejudice her because she would not be able to transact using her company and the huge losses already suffered by the said company would be sustained. On the other hand, that no prejudice will be suffered by the applicant because the rental collection would be done in an open and transparent manner.

Analysis and determination

9. I have considered the application and affidavits by the parties and the issue arising for determination is whether an order for stay of execution can issue against the ruling delivered on October 6, 2022.



10. The principles guiding the grant of a stay of execution pending appeal are well settled. The same are provided for under Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides as follows:

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.

11. In [RWW v EKW](#) [2019] eKLR, the court addressed 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.

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.”

12. In view of the above authority, it is clear the purpose of stay of execution is to preserve the substratum of the case pending the hearing and determination of an appeal. A successful litigant has a right and expectation to enjoy the fruits of the decision rendered in his or her favour by the court, but a respondent who has lost a case also has a right of appeal to ventilate his or her displeasure with the said decision of the court.

13. Further, in the case of [Regional Institute of Business Management v Lucas Ondong' Otieno](#) [2020] eKLR the court observed as follows;

20. Weighing the Applicants' right to have his dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of the Constitution of Kenya and the equally important Respondent's fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of the Constitution of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Applicants if they were denied an opportunity to ventilate their Appeal on merit in the event an order for stay of execution was not granted”.

14. On substantial loss, the applicants deponed in their affidavit that they were aware that the plaintiffs/ respondents had already extracted and obtained from the court an order arising from the impugned ruling and had put in place the appropriate mechanism of implementing the said order. That they were afraid that if the orders issued were implemented or executed, this application would become an academic exercise and the appeal in the Court of Appeal would be rendered nugatory. In the case of [Silverstein vs. Chesoni](#) [2002] 1 KLR 867, the court observed that substantial loss is the cornerstone of both jurisdictions and is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.



15. The respondents have argued that the application was filed out of time that is 42 days from the date of the delivery of the judgement. From the court records I note that the ruling was indeed delivered on October 6, 2022 and the present application together with the notice of appeal were filed on November 14, 2022. This is approximately 40 days which is clearly outside the 14-days period available for a party to file notice appeal Rule 75 (2) of the *Court of Appeal Rules*.
16. The applicants in their affidavit stated that that they would abide by all the conditions granted by this court in order to issue an order of stay pending the hearing and determination of the appeal in the Court of Appeal. As earlier noted, the grant of stay of execution is discretionary and the court will exercise this discretion on case by case basis depending on the circumstances of the case.
17. Having taken into the consideration the reasons advanced by the applicants and the court being seized of this matter, the question is whether the applicants shall suffer any loss should the orders are not granted. Will the appeal be rendered nugatory.?
18. A closer reading of the ruling which is being impugned by the applicants clearly showed a win win situation by both parties. It is meant to actually preserve the status quo pending the determination of the dispute. As a matter of fact, any prolonged time in litigation or any other form of delay will render both parties and the entire estate suffer loss by virtue of the fact that liabilities will continue accruing.
19. In other words, it is necessary that the parties in my view pursue the road map as directed by this court. Nevertheless, the freedom to exercise the option of appeal by the applicants cannot be gainsaid. It cannot be hindered or denied. This nonetheless must be balanced with the interest of the other parties including the respondent herein.
20. Consequently, and for the above reasons, i do not find the application meritorious for now. The same is hereby dismissed. Costs shall await the outcome of the main suit.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 9TH DAY OF FEBRUARY 2023.

H. K. CHEMITEL.

JUDGE

