



**Maina & 2 others v Ndichu & another (Environment and Land Case Civil Suit 69 of 2020) [2023] KEELC 16759 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16759 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND CASE CIVIL SUIT 69 OF 2020  
BM EBOSO, J  
MARCH 23, 2023**

**BETWEEN**

**FAITH WANJIRU MAINA ..... 1<sup>ST</sup> PLAINTIFF  
PHILIP M'MIONKI M'MWERERIA ..... 2<sup>ND</sup> PLAINTIFF  
STANLEY KIPTANUI ROP ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**JEREMIAH MUIRURI NDICHU ..... 1<sup>ST</sup> DEFENDANT  
PETER MAINA MUNDIA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Judgment in this suit was rendered by this Court on September 23, 2022. The court made a finding in favour of the plaintiffs. A stay of execution was granted by the court for 45 days. Subsequently, the defendants, Jeremiah Muiruri Ndichu and Peter Maina Mundia, brought an application dated October 6, 2022, seeking orders of stay of execution of the Judgement rendered on September 23, 2022, pending the hearing and determination of an intended appeal to the Court of Appeal. That application is the subject of this Ruling.
2. The application was supported by an affidavit sworn on October 6, 2022 by the 2nd defendant, Peter Maina Mundia, and premised upon the grounds that the defendants had an arguable appeal with a good likelihood of success and that the defendants stood to suffer irreparable loss and damage if the orders sought were not granted. The 2nd defendant deposed that he intended to file a memorandum of appeal in the Court of Appeal in Nairobi. He contended that he had been advised by his advocates on record that substantial loss may be visited upon him unless an order of stay of execution was granted.
3. The plaintiffs opposed the application through a notice of preliminary objection dated November 14, 2022 together with a replying affidavit dated November 23, 2022, sworn by Philip M'mionki



M'mwereria. They contended that the application was devoid of merit and was an abuse of the court process because the applicants had not filed and served a notice of appeal. They further contended that failure to file and serve a notice of appeal pursuant to Section 77(2) of the Court of Appeal Rules was fatal.

4. The application was canvassed through written submissions dated January 13, 2023, filed by Ms Kamau J Mwangi & Co Advocates. Counsel for the applicants identified the following as the two issues that fell for determination: (i) Whether the application dated October 6, 2022 should be allowed as prayed and, (ii) Whether the preliminary objection was merited. Counsel submitted that the applicants had satisfied the conditions for grant of an order of stay. Counsel argued that the objection raised by the plaintiffs raised mere technicalities. Counsel urged the court to allow the application.
5. In response, the plaintiffs filed written submissions dated January 12, 2023 through M/S Karanja Kang'iri & Co Advocates. Counsel for the plaintiffs identified the following as the two issues that fell for determination: (i) Whether the applicants were entitled to an order of stay of execution; and (ii) Whether the applicants were entitled to the orders sought. Counsel submitted that no appeal had been filed by the defendants and in absence of an appeal, the court could not entertain the application for stay orders. Reliance was placed on the case of Abraham Lenauia Lenkeu v Charles Katekeyo Nkaru (2016) eKLR where the court held that where no appeal is filed, the court had no jurisdiction to grant stay orders.
6. The court has considered the application, the response to the application, and the parties' respective submissions. The single question to be determined in this application is whether the defendants (intended appellants) have satisfied the criteria upon which the court exercises jurisdiction to grant an order of stay of execution pending disposal of an appeal.
7. The legal framework which guides this court's exercise of the court's jurisdiction to grant an order of stay pending disposal of an appeal is set out under Order 42 rule 6 (2) thus:
  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.
8. The jurisprudential principles upon which this court's jurisdiction to grant an order of stay of execution pending appeal is exercised are well settled. An applicant must satisfy the court that the intended appeal or appeal is arguable. Secondly, the applicant must satisfy the court that unless an order of stay is granted, the appeal, if successful, would be rendered nugatory. Lastly the applicant must satisfy the requirements of Order 42 rule 6 (2) of the Civil Procedure Rules, to the effect that substantial loss may result to the applicant unless the order of stay is made and that proper security is available for the due performance of the decree.
9. Besides the above, if a party brings a formal motion for an order of stay after the lapse of the period prescribed for filing and serving the notice of appeal, the party is obligated to demonstrate compliance with the mandatory requirements of the law relating to filing and service of the notice of appeal.
10. In the present application, the affidavit sworn in support of the application does not bear any evidence of a duly filed and duly served notice of appeal. Indeed, the plaintiffs raised this as a key ground of opposition. Even after the plaintiffs raised this issue as one of the key grounds of opposition, the defendants did not deem it necessary to address the issue.



11. It is not lost to this court that filing and service of a notice of appeal are, by law, time-bound legal requirements. Indeed, one would not talk about a pending appeal if a proper notice of appeal has not been filed and served within the stipulated time. Consequently, the defendants' application would fail on this ground. That is not all.
12. The defendants had an obligation to satisfy the requirements of Order 42 rule 6 (2) in relation to substantial loss and security for the due performance of the ultimate decree of the court. No attempt was made to satisfy the two requirements. All that the 2nd defendant said in relation to substantial loss was:

“That I'm advised by my advocates on record, which advise I verily believe to be true that substantial loss was be visited upon me when the order of stay is made”
13. Nothing was said in the supporting affidavit about security for the due performance of the decree. Consequently, reading the materials presented to the court, the defendants/applicants cannot be said to have satisfied the criteria for grant of an order of stay of execution pending an appeal. That is the finding of the court.
14. The result is that the application dated October 6, 2022 is dismissed for lack of merit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 23RD DAY OF MARCH 2023**

**B M EBOSO**

**JUDGE**

**Ms Mugo for the Plaintiffs**

**Ms Wanjiru for the Defendants**

