



**Baghrab v Al-Busaidy & 2 others (Environment and Land Appeal
37 of 2022) [2023] KEELC 17234 (KLR) (26 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17234 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 37 OF 2022
EK MAKORI, J
APRIL 26, 2023**

BETWEEN

SWALEH OMAR BAGHRAB APPLICANT

AND

SEIF MOHAMED SAID NASSOR AL-BUSAIDY 1ST RESPONDENT

HILAL MOHAMED SAID NASSOR AL-BUSAIDY 2ND RESPONDENT

KHALIFA MOHAMED SAID NASSOR AL-BUSAIDY 3RD RESPONDENT

RULING

1. Before this court for determination is a Notice of Motion dated 26th October 2022 brought under Section 1A, 1B, and 3A of the *Civil Procedure Act*, and Order 42 Rule 6 of the *Civil Procedure Rules*. The orders sought are as follows:
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That pending the hearing and determination of the appeal herein, respondents themselves, their servants, their agents or any other person claiming under their name be stopped from execution of the judgment dated 21st September 2022 and the decree and orders resulting from that judgment.
 - e. That the costs of this Application be provided for.
2. The application is premised on the grounds stated on the face of it and supported by the affidavit sworn by Swaleh Omar Baghrab. The Applicant deposed that following the judgment delivered by the Lower



Court on 21st September 2022, he preferred the present appeal. That, if a stay is not granted the appeal, will be rendered nugatory since the said judgment ordered the demolition of the structures on the suit property. The Applicant deposed that he would subsequently suffer substantial loss. He expressed willingness to provide any security or observe any conditions that may be imposed.

3. The Respondents have opposed the application. They filed grounds of opposition dated 21st November 2022. They aver that the application is an afterthought and incompetent for being filed inordinately late with no reasonable explanation for the delay. That on 21st September 2022, the Applicant was granted 14 days stay of execution to make a formal application for stay but disregarded those directions. The Respondent urge the court to dismiss the application.
4. The application was canvassed by way of written submissions.
5. Counsel for the Applicant submitted that the duty of this court in such an application was to determine whether the Applicant has met the threshold set under Order 42 Rule 6 of the *Civil Procedure Rules*. That is, whether the application has been made without unreasonable delay; that the Applicants have demonstrated substantial loss will be occasioned if no stay is granted; and such security for the due performance of the decree has been provided.
6. On the first condition, counsel submits that a period of 36 days after judgment was delivered was reasonable. On the second issue, counsel relied on the case of *James Wangalwa and another v Agnes Naliaka Cheseto* [2012] eKLR to define substantial loss. Counsel submits that the Applicant would suffer substantial loss if the structures were to be demolished by the Respondent before the appeal is heard. Moreover, the Respondent failed to demonstrate their ability to pay the costs of the structures in the event that the appeal succeeds. This was the Respondent's burden to discharge. Counsel relied on the case of *National Credit Bank Limited v Aquinas Francis Wasike and Anor*. UR Nairobi Civil Application No. 238 of 2005 to buttress this point.
7. Counsel for the Respondents similarly citing the case of James Wangalwa [supra] submits that the Applicant did not prove their inability to refund the costs in the event the impugned judgment is executed. He argued that there must be a just cause for depriving the Respondent of their right to enjoy the fruits of judgment as it was held in *Mohamed Salim t/a Choice Butchery v Nasserpuria Memon Jamat* [2013] eKLR.
8. Having carefully considered the application, grounds of opposition, submissions, and authorities cited by both sides, I find that the sole issue for determination is whether the Applicant has met the conditions for granting an order for stay of execution pending appeal.
9. Order 42 Rule 6 of the *Civil Procedure Rules* 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 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.
10. In *Butt v Rent Restriction Tribunal* [1979] eKLR, the Court of Appeal stated what ought to be considered in determining whether or not to grant stay of execution pending appeal. The court explained that the power of a court to grant or refuse an application for stay of execution is discretionary, and the discretion should be exercised in such a way so as not to prevent an appeal; That if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judgment; That a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the Applicant at the end of the proceedings; and finally, the court will consider the special circumstances of the case and its unique requirements.
11. It is also well established that the purpose of a stay pending appeal is to preserve the substratum of the case, especially in land matters where the character of the suit property may be changed while the appeal is pending. In *RWW v EKW* [2019] eKLR the Court held as follows:
- “ 8. 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. In that regard what is at stake in this cause is that if the stay herein is not granted the Respondent would be at liberty to sell the immovable property and the proceeds thereof distributed or distribute the property 50:50.”
12. The position on the preservation of the substratum of the subject matter has also been reiterated, by the Court of Appeal in the case of *Mwadzaya Wachanda Clan Welfare Registered Trustees & 58 others v Petro Oil Kenya Ltd & 6 others* (Civil Application E055 of 2021) [2022] KECA 402 (KLR), as follows:
- “In this regard, the principles applicable in the exercise of the Court’s unfettered discretion under Rule 5(2) (b) to grant an order of stay are well settled. Firstly, an Applicant has to satisfy that he or she has an arguable appeal. Secondly, an Applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR.
 14. The Applicants herein have referred the Court to their memorandum of appeal and the grounds of its appeal therein to demonstrate that it has an arguable appeal. The Applicants have in their grounds faulted the ELC on the application of the doctrine of *res judicata*, which we find arguable and ought



to be canvassed fully. The Applicants' appeal is therefore not frivolous. The first limb of arguability has therefore been satisfied. On the nugatory aspect, it was stated by this Court in *Reliance Bank Limited vs Norlake Investments Ltd* [2002] 1 E.A. 227, that "the term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling." See also *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [*supra*] wherein it was held, *inter alia*, that whether or not an appeal will be rendered nugatory depends on whether the status of the subject matter sought to be stayed is reversible; or if not reversible whether damages will be an adequate remedy for the party aggrieved.

15. It is notable that the 1st Respondent does not dispute that the Applicants are in occupation of the property which was the subject of the ruling in Malindi ELC Case No E063 of 2020, namely Kilifi/Madzimbani/Mitangoni/835 and 841. In the circumstances it is our view that the appeal will be rendered nugatory, if the current status quo with regard to possession and the status of the title to the suit property is disturbed before the determination of the Applicants' appeal.
16. The 1st Respondents has urged that certain conditions be imposed if the orders sought are found to be merited. We are however of the opinion that we cannot impose the conditions sought for two reasons. Firstly, there is no monetary claim sought by, or awarded to the 1st Respondent against the Applicants in relation to the suit land; and secondly, the nature of some of the conditions sought require supervision by this Court, which is not possible. It is our view that justice will be better served for all parties in the circumstances of this application by the expeditious hearing and determination of the Applicants' appeal."
13. I have perused the impugned judgment in CMCC Land Case No. 11 of 2019, what I establish is that the Respondents herein commenced proceedings against the Appellant for inter alia vacant possession of the portion of land known as Plot No. 4314 Malindi [the suit property], and demolition of the Appellant's structures thereon within seven days of the court's order. In the end, the lower court issued orders *inter alia*, a mandatory injunction against the Appellant to demolish the said structures. It is this demolition that is the subject of the present appeal.
14. In the circumstances, execution, in this case, would mean the demolition of the structures on the suit premises, which would in my view change the character of the property. I have weighed the rights of the Respondents *vis-a-vis* those of the Applicant to appeal, I find that no prejudice will be occasioned to the Respondent if the substratum of the suit is preserved.
15. In the foregoing, I hereby direct that the status quo on the ground be maintained pending the hearing and determination of the appeal. Moreover, the appeal in any event be heard expeditiously. Costs in the intended appeal.

DATED, SIGNED, AND DELIVERED AT MALINDI

THIS 26TH DAY OF APRIL, 2023.

E.K. MAKORI

JUDGE

