



**Muhsin v Registrar of Titles & 3 others (Environment & Land Petition  
12 of 2019) [2023] KEELC 18146 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18146 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND PETITION 12 OF 2019**

**NA MATHEKA, J  
JUNE 21, 2023**

**BETWEEN**

**ABDULKARIM SALEH MUHSIN ..... PETITIONER**

**AND**

**THE REGISTRAR OF TITLES ..... 1<sup>ST</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**THE KENYA REVENUE AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The application is dated November 9, 2022 and is brought under Section 1A, 1B and 3A of the [Civil Procedure Act](#), order 42 rule 6 (1) and (2), order 51 of the [Civil Procedure Rules 2010](#), Section 3 and 13 of the [Environment and Land Court Act](#) seeking the following orders that:-
2. This application be certified as urgent and service of this application be dispensed with in the first instance.
3. This Honourable Court be pleased to grant an order of stay of execution of the judgment and decree passed on October 26, 2022 in Mombasa ELC Petition No. 12 of 2019 pending hearing and determination of this Application.
4. This Honourable Court be pleased to grant an order of stay of execution of the judgment and decree passed on October 26, 2022 in Mombasa petition No. ELC 12 of 2019 pending hearing and determination of the intended appeal to be heard by the Court of Appeal.
5. The costs of this application be provided for.



It is supported by annexed affidavit of Abdulkarim Saleh Muhsin and grounds that the Petitioner/Applicant filed an Amended Petition dated May 23, 2019 seeking various orders to preserve his proprietary rights in land parcel No. LR No. MN/1/3092. That on 26<sup>th</sup> October 2022 this Honourable Court delivered a judgment dismissing the said Amended Petition. That being aggrieved and dissatisfied with the Judgment the Petitioner/Applicant instructed his advocates, M/S Janet, Jackson & Susan LLP Advocates to appeal against the same to which they are awaiting to be supplied with certified copies of the proceedings so as to enable them prepare the Record of Appeal. That the effect of the Judgment is that it gives the 3<sup>rd</sup> Respondent the right to claim ownership of the suit property wherein at all material times the Petitioner/Applicant has been the lawful registered owner of the property. Transfer of the Petitioner's parcel No. LR No. MV1/3092 is imminent as there are no stay of execution orders from this Honourable Court and therefore the 3<sup>rd</sup> Respondent is at liberty to take ownership of the said property. The intended Appeal is arguable and unless a stay of execution of the decree is granted, the intended appeal if successful would be rendered nugatory since the Petitioner/Applicant will have lost ownership of the suit property, which cannot be capable of monetary compensation.

6. This court has considered the application and the submissions therein. On October 26, 2022 this Honourable Court delivered a judgment dismissing the said Amended Petition. That being aggrieved and dissatisfied with the Judgment the Petitioner/Applicant instructed his advocates, M/S Janet, Jackson & Susan LLP Advocates to appeal against the same to which they are awaiting to be supplied with certified copies of the proceedings so as to enable them prepare the Record of Appeal. That the effect of the Judgment is that it gives the 3<sup>rd</sup> Respondent the right to claim ownership of the suit property wherein at all material times the Petitioner/Applicant has been the lawful registered owner of the property. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the [Civil Procedure Rules](#) as follows:

“No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”

Order 42, rule 6 states:

“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 appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:
  1. Substantial loss may result to the applicant unless the order is made.



2. The application has been made without unreasonable delay, and
  3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.
8. The principles governing the exercise of the court's jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicant must show that they have an arguable appeal and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of *Reliance Bank Ltd (In Liquidation) vs Norlake Investments Ltd* – Civil Appl. No. Nai. 93/02 (UR), thus;

Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,
  2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”
9. The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in *Chris Munga N. Bichange vs Richard Nyagaka Tongi & 2 Others* eKLR where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus;

..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

10. In the case of *Mohamed Salim T/A Choice Butchery vs Nasserpuria Memon Jamat* (2013) eKLR, the court stated that;

That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right .....

11. We are further guided by this court's decision in *Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others* Civil Appeal No. 291 of 1997, at Page 4 as follows:

... the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . . the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

12. On perusal of the court record and this is not disputed the 1<sup>st</sup> Respondent published in the Kenya gazette on June 8, 2011 the revocation of titles among them the suit property and went ahead to revoke the same. The notice declared the allocations illegal and unconstitutional on the ground of



public interest. This court agreed with the 1<sup>st</sup> Respondent and stated that this was not compulsory acquisition but revocation. The titles are already revoked hence there is nothing to preserve. I find that the intended appeal is not arguable and is frivolous. Secondly, I am not persuaded that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the applicant has not fulfilled the abovementioned grounds to enable me grant the stay. I find the application dated November 9, 2022 is unmerited and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21<sup>ST</sup> JUNE 2023.**

**N.A. MATHEKA**

**JUDGE**

