



REPUBLIC OF KENYA



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Zumzum Investment Limited v Ndoro & 14 others (on Behalf of 821 others) (Environment & Land Case 242 of 2017) [2023] KEELC 18114 (KLR) (21 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18114 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 242 OF 2017**

NA MATHEKA, J

JUNE 21, 2023

BETWEEN

ZUMZUM INVESTMENT LIMITED PLAINTIFF

AND

NDEGWA NDORO 1ST DEFENDANT

JOSPEH KITSAO SHIDA 2ND DEFENDANT

FRANCIS KANJA 3RD DEFENDANT

KITHI KALU 4TH DEFENDANT

KATANA KIBWANA 5TH DEFENDANT

HASHIM LOWA MAKAZI 6TH DEFENDANT

JUMA RUWA ALIAS BOLUDO 7TH DEFENDANT

FREDRICK CHARO 8TH DEFENDANT

KAZUNGU KAINGU 9TH DEFENDANT

JEFWA BAYA 10TH DEFENDANT

NGAWA NDORO 11TH DEFENDANT

CHIDZAYA NDEGWA ALIFAN 12TH DEFENDANT

CHARO MUMBA MASHA 13TH DEFENDANT

FLORENCE KALAMA 14TH DEFENDANT

WILSON NGALA KASSIM 15TH DEFENDANT

ON BEHALF OF 821 OTHERS



RULING

1. The application is dated December 14, 2022 and is brought under Sections IA, 1B, 65 and 95 Civil Procedure Act Order 42 Rule 6 (1) and 2 Order 50 and Order 51 Civil Procedure Rules seeking the following orders:-
 1. That the service of this application be dispensed with in the first instance.
 2. That there be a temporary stay of execution pending hearing and determination of this application.
 3. That there be a temporary stay of execution pending the hearing and determination of the Appeal herein.
2. It is supported by the Affidavit of Chidzaya Ndegwa and on the following grounds that the 12th to 821 Defendants have already lodge a Notice of Appeal in the Court of Appeal. That the 12th to 821 Defendants have an arguable Appeal with a high chance of success. That the 12th to 821 Defendants stands to suffer irreparable loss should the Plaintiff proceed to execute the honorable Court's Judgment.
3. This court has considered the application and the submissions therein. On September 27, 2022 this Court delivered a judgement allowing the Plaintiff's case and ordering the Applicants to vacate the suit property in 180 days. The Defendants/Applicants being aggrieved by the said orders of September 27, 2022 filed a Notice of Appeal. The Applicants state that if the order for stay is not given the appeal will be rendered nugatory. 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.”

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."
4. 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) v 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."
5. 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 v 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....."

6. In the case of *Mohamed Salim T/A Choice Butchery v 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"

7. We are further guided by this court's decision in *Carter & Sons Ltd v 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."



8. On perusal of the court record I find that the judgement appealed against was delivered on the September 27, 2022. This application for stay was filed on the December 14, 2022. I find that the Applicants are not guilty of inordinate delay. The said judgement gave the Applicants 180 days to vacate the suit land. I find that the Applicants are over 800 people and their families and if evicted their houses will be demolished and they will suffer irreparable loss. Secondly, I am 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 Applicants have fulfilled the above mentioned grounds to enable me grant the stay. I find the application dated November 9, 2022 is merited and I grant that there be a stay of the judgement delivered in this matter pending the hearing and determination of the appeal. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21ST JUNE 2023.

N.A. MATHEKA

JUDGE

