



**Bwanaadi & another v Khator & 9 others (Environment & Land Case  
414 of 1996) [2023] KEELC 18325 (KLR) (20 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18325 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 414 OF 1996  
NA MATHEKA, J  
JUNE 20, 2023**

**BETWEEN**

**MOHAMED BWANA BWANAADI ..... 1<sup>ST</sup> PLAINTIFF  
ABDULRAZAK KHALIFA (AS ADMINISTRATORS OF THE ESTATE OF  
KHATOR BIN SAUM DECEASED) ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**RISHAD ABDULREHMAN KHATOR ..... 1<sup>ST</sup> DEFENDANT  
ALI MOHAMED (DECEASED) ..... 2<sup>ND</sup> DEFENDANT  
LAXMICHAND VIRCHAND KARAMSHI SHAH ..... 3<sup>RD</sup> DEFENDANT  
ZENA AHMED (DECEASED) ..... 4<sup>TH</sup> DEFENDANT  
AMINA AHMED (DECEASED) ..... 5<sup>TH</sup> DEFENDANT  
ABDULQUADIR SA SHURUTY ..... 6<sup>TH</sup> DEFENDANT  
THE PUBLIC TRUSTEE ..... 7<sup>TH</sup> DEFENDANT  
BURBANK ENTERPRISES LIMITED ..... 8<sup>TH</sup> DEFENDANT  
THE REGISTRAR OF TITLES ..... 9<sup>TH</sup> DEFENDANT  
THE COMMISSIONER OF LANDS ..... 10<sup>TH</sup> DEFENDANT**

**RULING**

1. The application is dated August 8, 2022 and is brought under Section 3A of the [Civil Procedure Act](#) and Order 42 Rule 6, Order 51 Rule 1 of the [Civil Procedure Rules, 2010](#) seeking the following orders;



1. At first instance service hereof on the defendants is dispensed with to prevent grave mischief that may ensue due to delay.
  2. Further hearing and taking of proceedings on this file be stayed to enable the Legal Representative of the estate of the deceased 5<sup>th</sup> defendant to appeal the ruling of this court March 22, 2022 before the Court of Appeal.
  3. The costs of this application be provided for.
2. The application is based on the following grounds that a notice of appeal was filed on March 29, 2022 and served on 30<sup>th</sup> and 31<sup>st</sup> day of March, 2022 respectively. Hearing of this case in the absence of the legal representative of the estate of the 5<sup>th</sup> defendant, as well as the estates of 3<sup>rd</sup> and 4<sup>th</sup> defendants (all deceased) would portend serious mischief and irreversible consequences to the said estates and their interests in the suit land. The intended appeal has high chances of success given the basic error that the said defendants had not filed a statement of defence yet there is on record a statement of defence filed by M/S Asige Kiverenge & Anyanzwa Advocates, who are still on record for the said defendants but have not been participating in these proceedings, for alleged want of instructions. That the reason for exercise of discretion in refusing to join the applicant as a legal representative to continue the defence of the 3<sup>rd</sup>-5<sup>th</sup> defendants' case is unconvincing and based on the wrong premises. The 8<sup>th</sup> respondent was aware of the statement of defence filed by co-defendants and it was both dishonest and uningenuous and its objection was raised very late. There was sufficient cause why the court was not moved earlier as the legal representative was not appointed until November, 2021.
3. This court has considered the application and submissions therein. 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.”
4. 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.
5. 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.”
6. 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.....”
7. 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 .....”
8. 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.”
9. From the of the application the grounds are that, hearing of this case in the absence of the legal representative of the estate of the 5<sup>th</sup> Defendant, as well as the estates of 3<sup>rd</sup> and 4<sup>th</sup> Defendants (all deceased) would portend serious mischief and irreversible consequences to the said estates and their interests in the suit land. The court notes that this is a very old matter, part heard and the cases abated twice before. The Applicant has been indolent and the delay is inexcusable. Be that as it may, this court is not persuaded, that the appeal or intended appeal is arguable, that is to say it is not 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 any of the grounds to enable me grant the stay. I find this application dated August 8, 2022 has no merit and I dismiss it with costs.
10. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 20<sup>TH</sup> DAY OF JUNE 2023.**

**N.A. MATHEKA**



**JUDGE**

