



**Mwavue & 3 others v Pongah (Environment and Land Appeal
E009 of 2023) [2023] KEELC 19123 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19123 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E009 OF 2023
NA MATHEKA, J
JULY 25, 2023**

BETWEEN

**CHRISTOPHER MWAUVUE 1ST APPELLANT
AGNES WANYIKA MWAUVUE 2ND APPELLANT
HELLEN TALU MWAUVUE 3RD APPELLANT
CLEMENCE KINYONYI MWAUVUE 4TH APPELLANT**

AND

CHRISTOPHER KALE PONGAH RESPONDENT

RULING

1. The application is dated February 15, 2023 and is brought under section IA, 1B & 34 and 75 of the [Civil Procedure Act, 2010](#), Order 42 Rule 6 & 51 of the [Civil Procedure Rules 2010](#), and Article 25(c), 50(1) of the [Constitution of Kenya 2010](#) seeking the following orders;
 1. That the application be certified urgent and it be dispensed with at the first instance.
 2. That the Honourable Court be pleased to issue a temporary stay of the Orders and all further proceedings of Honourable CK Kithinji in ELC No E005 of 2021 between Christopher Mwavue, Agnes Wanyika, Hellen Talu Mwavue And Clemence Kinyonyi Mwavue vs Christopher Kale Pongah made on January 18, 2023 pending healing and determination of this application.
 3. That the Honourable Court be pleased to issue a temporary stay of the Orders and all further proceedings of Honourable C K Kithinji in ELC No E005 of 2021 between Christopher Mwavue, Agnes Wanyika, Hellen Talu Mwavue And Clemence Kinyonyi Mwavue versus Christopher Kale Pongah made on January 18, 2023 pending hearing and determination of the appeal.



4. That this Honourable Court be pleased to issue any other orders it deems fit and just in the circumstances.
 5. That costs of the application be provided for.
2. It is supported by the annexed affidavit of Agnes Wanyika Mwavue for the Appellant/Applicant herein together with the annexures thereto and on the following main grounds that natural justice demands that a party should not be condemned unheard or shut out of proceedings. The right to fair trial cannot be limited under any circumstances and more so in this suit herein as the issue in controversy concerns proprietary rights in the suit property. Every litigant has the right to be represented by an advocate of their own choice and be given time to prepare and strategize for the case. The applicant has a meritorious case with a high probability of success. That it is in the interest of justice, fairness and proportionality that the application herein be considered and allowed.
 3. The Respondent stated that the Application as filed is a gross abuse of the Court process as the Appellants have not met the requisite legal threshold for them to be granted the Orders they are seeking in the instant Application and neither does their intended Appeal have any chance of succeeding hence this Application ought to be struck out. That the Application together with its Affidavit in support as filed do not have any probative value in helping this Honourable Court dispense with the instant Application hence they ought to be struck out.
 4. 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.”
 5. 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.
 6. 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.”
7. 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.....”
8. 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”
9. 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.”
10. From this application the grounds are that, the Plaintiffs/Applicants appointed a new Advocate who filed a notice of change on the January 17, 2023. The matter came up for hearing on the January 18, 2023 the said new Advocate needed time to familiarize himself with the court file and hence sought an adjournment. The court ordered the Plaintiff to pay court adjournment fees and costs for the day of Kshs 4500/= in allowing the adjournment and set a hearing date for May 17, 2023. The Plaintiffs/Applicants being aggrieved has filed this application and the appeal. I do not see any substantial loss that would not be compensated with damages. 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 February 15, 2023 has no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF JULY 2023.

N.A. MATHEKA

JUDGE

