



**Mbui v Said & another (Environment and Land Appeal 5 of 2023)
[2023] KEELC 20332 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20332 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 5 OF 2023
EK MAKORI, J
SEPTEMBER 28, 2023**

BETWEEN

RAMA MBUI APPLICANT

AND

MBARAK SAID 1ST RESPONDENT

INUKA AFRIKA PROPERTIES LTD 2ND RESPONDENT

RULING

1. The applicant in this matter seeks a stay of execution arising from the judgment delivered by Honourable J.M Kituku on January 31, 2023 dismissing the applicant’s suit against the respondents
2. On April 24, 2023, parties were directed to file written submissions. They did comply hence this ruling.
3. The applicant contended that if no stay is granted, he is likely to suffer irreparable loss because he faces imminent eviction.
4. The applicant had filed a suit in the lower court claiming one acre of land from a suit property known as Kilifi/Mtondio/114 or the equivalent of Kshs. 3,500,000 having been promised by the 1st respondent upon sale of the same to the 2nd respondent. On hearing the suit, the trial Magistrate dismissed the applicant’s claim provoking the current move to appeal to this court.
5. The issue to determine will be whether the applicant has met the conditions for the grant of stay pending appeal. Whether the appeal is merited. Moreover, whether the applicant will suffer substantial loss if the stay is not granted.
6. The applicant submitted that if no stay is granted he will end up being evicted and the suit property will change hands.



7. The applicant has quoted the decision in *Absolom Dove v Turbo Transporters* [2013] eKLR, which espouses the right to be heard on merit on appeal and the use of discretion by doing so to meet the ends of justice by balancing the interests of the combatants in the suit. The need to preserve the subject matter as enunciated in the case of *RWW v EKW* [2019] eKLR.
8. On the other hand, the respondents are of the view that the current application and intended appeal lack merit and should be dismissed because the applicant failed to prove that he had constructed his structure on the suit land in question. He failed to prove that he was entitled to any commission once the land was sold. No new issues to show the appeal is meritorious and that if the Appellate Court overturns the Lower Court's decision, the applicant will suffer a loss that cannot be compensated by any other award of damages.
9. The respondents argued that the appeal has not met the conditions and threshold set in Order 42 Rule 6(2) and the decisions in - *James Wangalwa & another v Agnes Naliaka Cheseto* [2012]eKLR on the irreparability of the loss that may be suffered by the applicant if no stay is granted and *RWW v EKW* [2019] eKLR on the need to preserve the echelon of the suit to avoid futility upon a successful appeal.
10. The applicant failed to show the equitable or legal rights he had over the one acre of land in issue and the contested structure he is living in. The 1st respondent contended that the 2nd respondent who has been paying utilities for it, built the structure in contention.
11. It is argued that the 1st respondent advanced the applicant 240,000 to finish a house he was building for himself. It has also been argued that if the appeal succeeds he has the money to claim –Kshs 3,500,000 from the 1st respondent. The respondents further quoted the authorities in *Danros (K) Ltd & another v Murtaza Adaamjee* [2021] eKLR and *Kenya Shell Ltd v Kibiru & another* [1986] eKLR, both elucidating on the issue of substantial loss
12. The respondents further quoted the decisions in *Vishram Ravji Halai v Thornton & Turpin* [1990] KLR 365 and *Samvir Trustees Ltd v Guardian Bank Ltd* [2000] eKLR, on the balancing act the court has to undertake to preserve the right of appeal and that of a successful litigant who needs to enjoy the fruits of the judgment subject of an appeal.
13. At this point, I am not going over the trial court's conclusions in its contested judgment on its merits; instead, I am trying to strike a balance between the interests of the two parties involved in the fight - on the one hand, the right to appeal (for the applicant), and on the other, the benefits accruing to be enjoyed from the decision that has been appealed against (for the respondents).
14. I have gone through the decision of the lower court in this matter. The applicant had filed a suit against the respondent significantly seeking that he was entitled to 1 acre in that portion of land known as Kilifi/Mtondio/114 or the equivalent of Kshs. 3,500,000 being an agreed 10% commission from the sale of the land in question. The plaintiff had been a caretaker of that land for a long time. He averred he had even built a structure on the land. Upon hearing both sides the trial court found that the 1st defendant was the initial registered owner of the land before selling it to the 2nd respondent on the 15th of June 2020 at a consideration of Kshs 37,520,000 @ 2,500,000 per acre.
15. At the time of the sale, the plaintiff and his family were residing on the piece of land utilizing it for farming and excavation of blocks. After selling the land, the 2nd respondent was desirous of taking possession. The applicant opposed the move and was compensated to the tune of Kshs 240,000 by the 1st respondent vide agreement dated November 16, 2020. The plaintiff could still not yield and approached the Lower Court as previously mentioned.



16. The court found that the alleged oral agreement on his commission could not be proved. The court further found that the applicant had no privity of contract with the 2nd respondent. The court further found that in the applicant's claim, he was seeking a commission and not 1 acre of land. It also found that the plaintiff had no equitable or legal interest in the land in question. He was not asserting that he had acquired the 1-acre in question through the doctrine of adverse possession. His claim was dismissed.
17. The intended appeal particularly this motion seeks that he should not be evicted pending the determination of his appeal. Several authorities have been cited on what to consider before granting of stay - in *James Wangalwa & another v Agnes Naliaka, Cheseto* [2012] eKLR - on the irreparability of the loss that may be suffered by the applicant if no stay is granted and *RWW v EKW* [2019] eKLR on the need to preserve the stratum of the suit property to avoid futility upon a successful appeal.
18. In *Visbram Ravji Halai v Thornton & Turpin* [1990] KLR 365 and *Samvir Trustees Ltd v Guardian Bank Ltd* [2000] eKLR, on the balancing act the Court has to undertake to preserve the right of appeal and that of a successful litigant who needs to enjoy the fruits of the judgment subject of an appeal - as succinctly stated by Warsame J. in the *Samvir Trustees Ltd Case* (*supra*) that:
- “I agree that every party aggrieved with a decision of this court has a natural and undoubted right to seek the intervention of the court of appeal. And as far as this matter is concerned, I do not think this court should put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. In my understanding, a stay would be granted unless there is overwhelming hindrance to the exercise of the discretionary powers of the court.
- I appreciate and understand that the court in considering whether to grant or refuse an application for a stay is empowered to see whether there exist any special circumstances which can sway the discretion of the Court in a particular manner. But the yardstick is for the Court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement, hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant.”
19. In this suit, the applicant will seek to convince this court that he was entitled to either 1 acre of land or a commission of Kshs 3,500,000. The findings of the trial court were that he had no equitable or legal right over the land in question, he had not pleaded that he was to be allotted 1 acre of land instead of a commission as orally promised by the 1st respondent upon the sale of the land. He was a caretaker. He had not acquired the said 1 acre by dint of the operations of the doctrine of adverse possession. There will therefore be no land to preserve pending the appeal. The predominant feature in the appeal will be the commission promised. Balancing his right of appeal and that of the respondents who need to enjoy the fruits of the judgment in place, the appeal will largely deal with the issue of the commission rather than the 1-acre. The commission was promised in monetary terms and can be recovered in the future if the appeal succeeds.
20. At the end, the application dated January 31, 2023 is hereby dismissed with costs as there is nothing to stay.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY



THIS 28TH DAY OF SEPTEMBER 2023 IN THE ABSENCE OF PARTIES WHO WERE NOTIFIED, AND TO BE EMAILED THIS RULING FORTHWITH

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E. K. MAKORI

JUDGE

