



**Mleghwa & another (Suing as the legal representatives and administrators
of the Estate of Samuel Mbogho Mshila) v Duwe (Appeal E008 of 2023)
[2023] KEELC 20099 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20099 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
APPEAL E008 OF 2023
NA MATHEKA, J
SEPTEMBER 28, 2023**

BETWEEN

ALLEN MWADALI MLEGHWA 1ST APPELLANT

STANLEY BARISA MLEGHWA 2ND APPELLANT

**SUING AS THE LEGAL REPRESENTATIVES AND ADMINISTRATORS OF
THE ESTATE OF SAMUEL MBOGHO MSHILA**

AND

GETRUDE SOKO DUWE RESPONDENT

RULING

1. The application is dated 17th February 2023 and is brought under Orders 22, 42 and 51 of The *Civil Procedure Rules* and Sections IA, 1B, 3A and 95 of The [Civil Procedure Act](#) Cap 21 Laws of Kenya seeking the following orders;
 1. That this application be certified as urgent and be heard ex-parte in the first instance and service of the same be dispensed with.
 2. That the firm of Gichuhi Kivindy and Associates be granted leave to come on record for the Appellants.
 3. That there be a stay of execution of the Judgement delivered on 18th January 2023 and/or any other consequential Orders herein pending the hearing and determination of this application inter-parties.
 4. That there be a stay of execution of the Judgement delivered on 18th January 2023 and/or any other consequential Orders herein pending the hearing and determination of the Applicants' Appeal herein.



5. That costs be in the cause.
2. It is based on the annexed affidavit of Paul Gichuhi, Counsel for the Appellants/Applicants and the following grounds that the Applicants herein being dissatisfied with Judgment delivered on 18th day of January 2023 have lodged an appeal herein. That the Applicants herein being dissatisfied with Judgment delivered on 18th day of January 2023 have lodged an appeal herein. That although the said Appeal has overwhelming chances of success, it does not operate as a stay of execution. That the trial court issued orders of injunction permanently restraining the Appellants from entering into or occupying any part of the suit property. That the Appellants have been occupying and living in the suit property since they were born and the same comprises their ancestral land. That the lapse of the appeal period is imminent and the Appellants are apprehensive that the respondent will move swiftly to execute the judgment herein whose immediate result will be physical ejection and displacement of the Appellants and numerous members of their extended family from the suit property thus rendering them homeless. That in that event, the Appellants will suffer irreparable damages as well as render the intended appeal nugatory. That it is therefore fair necessary, just and expedient for the judgement herein and all consequential orders be stayed to preserve the subject matter of the intended appeal and for the ends of justice to be attained.
3. This court has considered the application and the submissions therein. 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.”
4. 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) 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.”

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 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

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. On perusal of the court record I find that the Applicants herein being dissatisfied with Judgment delivered on 18th day of January 2023 have lodged an appeal herein. 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 above grounds mentioned to enable me grant the stay. I find the application dated 17th February 2023 is unmerited and I dismiss it with costs.

It is so ordered.



DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF SEPTEMBER 2023.

N.A. MATHEKA

JUDGE

