



Disja & 2 others v D'costa & 3 others; Tembo & another (Interested Parties) (Environment and Land Case 1 of 1982) [2023] KEELC 20128 (KLR) (26 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20128 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE 1 OF 1982
NA MATHEKA, J
SEPTEMBER 26, 2023**

BETWEEN

**NYALE MWANGO DISJA 1ST PLAINTIFF
KITI MWANGO NYALE 2ND PLAINTIFF
KHAMIS NYALE MWANGO 3RD PLAINTIFF**

AND

**VINCENT SABASTIAN D'COSTA 1ST DEFENDANT
SETTLEMENT AND ADJUDICATION OFFICER KILIFI 2ND DEFENDANT
LAND REGISTRAR KILIFI 3RD DEFENDANT
THE HON. ATTORNEY GENERAL 4TH DEFENDANT**

AND

**MBIGO KADZO TEMBO INTERESTED PARTY
ARNOLD KARISA MUHAMBI INTERESTED PARTY**

RULING

1. The application is dated 24th May 2023 and is brought under Sections 3, 13, 14, 16, 18 and 19 of the [Environment and Land Court Act](#), 2011 and Order 42 Rule 6 of the [Civil Procedure Rules](#) seeking the following orders:
 1. This application be certified as urgent and heard ex parte, in the first instance.
 2. Pending the hearing and determination of this application, there be an order restraining the plaintiffs either by themselves, their servants, agents, proxies, or anyone acting on their behalf from entering, transferring, leasing, charging, pledging, disposing of or in any manner



interfering with the quiet use, occupation and possession by the administrator of the 1st defendant of land parcel Kilifi/Mtwapa/II (or its subdivisions being Kilifi/Mtwapad8575, 8576, 8577 and 8578).

3. Pending the hearing and determination of the intended appeal by the administrator of the 1st defendant, there be an order restraining the plaintiffs either by themselves, their servants, agents, proxies, or anyone acting on their behalf from entering, transferring, leasing, charging, pledging, disposing of or in any manner interfering with the quiet use, occupation and possession by the administrator of the 1st defendant of land parcel Kilifi/Mtwapa/11 (or its subdivisions being Kilifi/Mtwapa/8575, 8576, 8577 and 8578).
 4. The costs of this application be provided for.
2. It is based on the grounds that on March 2023, this court delivered a ruling in which it directed the Kilifi, Land Registrar Kilifi to remove the caution registered on 20th April 2018 against land parcel Kilifi/Mtwapa/11 by Leonard Da Costa (the applicant) claiming beneficiary interest. The applicant was dissatisfied with that decision and on 27th March 2023, he filed a Notice of Appeal to the Court of Appeal together with a request to be supplied with typed proceedings. On 30th March 2023, the administrator filed a notice of motion dated 29th March 2023 seeking orders to stay the removal of the caution and preservation of the suit property in the name of the 1st defendant (deceased) pending the hearing and determination of the appeal. On the same date, the duty court granted an interim order staying the order directing the Kilifi Land Registrar Kilifi to remove the caution registered on 20th April 2018 against the suit property and that the title to the suit land be preserved in the name of the 1st defendant (deceased) until 3rd May 2023 when the notice of motion dated 29th March 2023 was scheduled to be heard. On 2nd May 2023, the plaintiffs' counsel served the applicants' counsel with a replying affidavit to the notice of motion dated 29th March 2023 in which they indicated that the caution that was registered on the suit property by the administrator was removed on 30th March 2023 and a title deed to the suit property issued in their names and they thereafter proceeded to subdivide the suit property into four new properties. In the circumstances, the notice of motion dated 29th March 2023 became spent. The applicant is in actual possession of the suit property. In light of the foregoing, the applicant has withdrawn his application dated 29th March 2023 and filed the notice of motion dated 24th May 2023 in which he is seeking to restrain the plaintiffs from disposing of the title to the suit property (or its subdivisions) pending the hearing and determination of the appeal. The application is made with a view to preserve the suit property and prevent it from being transferred to third parties pending appeal. The application has been made without unreasonable delay. The applicant is ready and willing to abide by any order that this court may issue as a condition for granting the injunction sought pending appeal. The applicant's right of appeal will be curtailed if the injunction sought is not granted. It is fair and just for this application to be allowed. It is supported by the affidavit of Leonard Da Costa.
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.”

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 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.....”



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. On perusal of the court record I find that the ruling was delivered on 22nd March 2023 which directed the Kilifi Land Registrar to remove the caution on the suit property placed by the applicant. The Respondent states that the land has been sold to County Eagles Limited and Riziki Dama Abdala. The Applicant states that he is in possession of the suit premises having employed two security guards who are paid a monthly salary. The court notes that judgement was delivered in this matter way back in 2014. 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 mentioned grounds to enable me grant the stay. I find the application dated 24th May 2023 is unmerited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF SEPTEMBER 2023.

N.A. MATHEKA

JUDGE

