



REPUBLIC OF KENYA



**Ladha v Essak & another (Environment and Land Appeal 11 of 2023)
[2023] KEELC 21889 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21889 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 11 OF 2023
NA MATHEKA, J
NOVEMBER 29, 2023**

BETWEEN

SHENAZ HUSSEIN HAJI LADHA APPELLANT

AND

SALIM HAJI ESSAK 1ST RESPONDENT

BILQIS SALIM SULEIMAN 2ND RESPONDENT

RULING

1. The application is dated 5th July 2023 and is brought under Order 42 Rule 6, Order 51 Rule 1 of the [Civil Procedure Rules](#) 2010 under Section IA, 1B, 3A of the [Civil Procedure Act](#) 2010 Cap 21 Laws of seeking the following orders;
 1. This application be certified urgent and be heard *Ex-parte* at the first instance.
 2. That this Honourable Court be pleased to stay execution of the judgment delivered on 13th November 2020 in Mombasa Civil Suit no 956 of 2020 *Salim Haji Essak & another v Shenaz Hussein Haji Lad-ha* and subsequent decrees/Orders pending hearing and determination of this Appeal the interpartes hearing and determination of this case.
 3. That the Appellant be reinstated to the suit property being Plot no MSA/ Block XXII/155 pending hearing and determination of this Application.
 4. That this Honourable Court be pleased to issue an order restraining the Respondents by themselves and/or their agents employees or servants from executing and/or evicting, harassing interfering with the Appellant's occupation of the suit property pending hearing and determination of the Appellant's Appeal.
 5. That this Honourable Court be pleased to issue any other order it may deem fit in this circumstances.



6. That the costs of this Application be provided for.
2. It is based on the grounds that the judgment was delivered on 13th November 2020 in the absence of the Parties. That on 11th November 2022 the Respondents through their auctioneers sought to evict the Appellant from the suit property. The Appellant filed an Application on 14th November 2022 before Mombasa Chief Magistrate Court in Civil Suit no 956 of 2020 *Salim Haji Essak and another v Shenaz Hussein Haji Ladha* seeking orders of stay of execution. That the lower Court granted stay pending hearing and determination of the Appellant's Application dated 14th November 2022. That the lower Court delivered its ruling on 23rd February 2023 and dismissed the Appellant's Application dated 14th November 2022. That the Appellant filed an appeal against the ruling delivered on 23rd February 2023 before this Honourable Court which Appeal is yet to be heard. That the Appellant had filed an Application before the trial Court Application dated 24th February 2023 and pending hearing and determination of the Appeal before this Honourable Court. That the trial Court delivered its ruling on the Application dated 24th February 2023 on 30th June 2023 and dismissed the Appellant's Application for stay of execution.
3. That the Appellant is in danger of imminent evictions since the orders of stay of execution and or eviction in the judgment delivered by the trial Court on 13th November 2022 lapsed upon open delivery of the trial Courts ruling on 30th June 2023. That unless this Honourable Court intervenes to grant orders of stay of execution and or eviction pending hearing and determination this Application and Appeal the Appeal will be rendered nugatory and Appellant rendered homeless. That the Appeal has high chances of success and if execution proceeds The Appellant will be rendered homeless and it would be difficult of the Appellant to prosecute the Appeal as she would have suffered loss of the suit property which is the subject of the Appeal. That the Appellant had another case with the Respondent in respect of the same suit property Plot no MSA/ Block XXII/155 and judgment was entered in the Appellant's favour in Mombasa ELC no 282 of 2008.
4. The Respondents in their grounds of opposition state that the Applicant's application dated 5th July 2023 is highly vexatious, incompetent and an abuse of this honorable Courts process and should be dismissed. That the application is guilty of inordinate delay and laches having been brought three (3) years after the judgment was delivered on 13th November 2020 in Mombasa CMCC no 956 of 2020. That the application is ambiguous and omnibus as it seeks to reinstate the Applicant to the suit premises and at the same time obtain an injunction against eviction when the Applicant/Appellant is already out of the suit property and is not in occupation hence the said court orders are in vain and based on fatal misrepresentation facts.
5. That the intend annexed memorandum of appeal annexed the Application does not disclose any sufficient ground for interfering with the ruling by the trial court in the ruling delivered on 23rd February 2023 being a negative order incapable of execution there is nothing to stay and hence the application is frivolous and must be struck out by the court on its own motion under the Proviso of Section 79B of the [Civil Procedure Act](#). That without prejudice to the aforementioned, the Applicant has not offered deposit security for cost on the appeal as per provisions of Order 42 rule 6 (2) (b) of the [Civil Procedure Rules](#) hence prayers for stay must be denied and the Application dated 5th July 2023 should be dismissed with costs.
6. 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.”

7. 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.

8. 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.”

9. 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.....”

10. 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

11. 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.”

12. On perusal of the court record I find that judgment was delivered in this matter on 13th November 2020. That the lower Court delivered its ruling on 23rd February 2023 and dismissed the Appellant's Application dated 14th November 2022 for stay pending appeal. That the Appellant filed an appeal against the ruling delivered on 23rd February 2023 before this Honourable Court. The Applicant submitted that the Appeal has high chances of success and if execution proceeds the Appellant will be rendered homeless and it would be difficult of the Appellant to prosecute the Appeal as she would have suffered loss of the suit property which is the subject of the Appeal. The Respondent states that the application is seeks to reinstate the Applicant to the suit premises and at the same time obtain an injunction against eviction when the Applicant/Appellant is already out of the suit property and is not in occupation hence the said court orders are in vain and based on misrepresentation facts. It is not disputed that the Applicant is already out of the suit premises. The Applicant seeks a mandatory injunction which cannot be issued at this interlocutory stage. The ruling was delivered on the 23rd February 2023 and this application is dated 5th July 2023. I find the Applicant is indolent and the delay is inexcusable. 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 5th July 2023 is unmerited and I dismiss it with costs.

13. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 29TH DAY OF NOVEMBER 2023.

N.A. MATHEKA

JUDGE

