



REPUBLIC OF KENYA



KENYA LAW
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**Oyaro v Mwangeka & another (Environment and Land Appeal
22 of 2022) [2023] KEELC 21888 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21888 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 22 OF 2022
NA MATHEKA, J
NOVEMBER 29, 2023**

BETWEEN

ESTHER KEMUNTO OYARO APPELLANT

AND

MICHAEL MWANGEKA 1ST RESPONDENT

JANE MWANGEKA 2ND RESPONDENT

RULING

1. The application is dated 26th June 2023 and is brought under Sections 1A, 1B & 3A of the [Civil Procedure Act](#), Order 42 Rule 6 & Order 51 of the [Civil Procedure Rules](#) seeking the following orders;
 1. That this application be certified as urgent and heard *ex-parte* in the first instance.
 2. That the honorable judge be pleased to grant a stay of execution of the judgment delivered on 21st June 2023 pending hearing and determination of this application.
 3. That the honorable judge be pleased to grant a stay of execution of the judgment delivered on 21st June 2023 pending the hearing of the intend Appeal.
 4. That the honorable court be pleased to grant any other reliefs it deems fit in the circumstances of this case.
 5. That costs of thig application be in course.
2. The application is premised on the grounds that this honorable court delivered judgment herein on 21st June 2023 in which it dismissed the Appellant /Applicant's Appeal. That the Applicant felt aggrieved with the judge's decision and intends to prefer an appeal to the court of appeal and has so far filed a Notice of Appeal. Appellant/Applicant stands to suffer substantial loss and damages if the orders sought are not granted as this will amount to losing her parcel of land to the Respondents. That this



application has been timeously filed. That the Appellant/Applicant is ready to abide by any condition to be ordered by the honorable court for the due performance of the decree. That it is in the interest of justice and equity that the orders sought are granted so that the intended appeal is not rendered nugatory in the event it succeeds.

3. The Respondent stated that the said application is vexatious lacks merit and is an abuse of the Court's process. That the Appellant has not demonstrated that he has an arguable appeal with any chance of success. That the orders sought by the Applicant would be tantamount to eviction orders against him and his family as they are in current occupation of the suit property. That the proceedings and judgment of both the trial court and this appellate court confirmed that they have been in continuous occupation of the suit property. That the suit was filed under the doctrine of adverse possession whereby he sought to have the suit property registered in his names as he had been in occupation of the same for the last twenty years.
4. 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.”
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 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.....”

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 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.”

10. On perusal of the court record I find judgment was delivered in this matter on 21st June 2023. Applicant felt aggrieved with the judge's decision and intends to prefer an appeal to the court of appeal and has so far filed a Notice of Appeal. Appellant/Applicant stands to suffer substantial loss and damages if the orders sought are not granted as this will amount to losing her parcel of land to the Respondents. This is a case of adverse possession. The Respondents are in current occupation of the suit property. The proceedings and judgment of both the trial court and this appellate court confirmed that they have been in continuous occupation of the suit property. I do not see any prejudice that the Applicant would suffer if the stay is not granted. 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 6th June 2023 is unmerited and I dismiss it with costs.

11. It is so ordered.

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

N.A. MATHEKA

JUDGE

