



Gathuri & another v Mohamed & another (Environment & Land Case 239 of 2018) [2023] KEELC 21920 (KLR) (28 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21920 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 239 OF 2018
NA MATHEKA, J
NOVEMBER 28, 2023**

BETWEEN

PETER THUO GATHURI 1ST PLAINTIFF

NELLY NGONYO KAMAU 2ND PLAINTIFF

AND

MWANAISHA KIRIALE MOHAMED 1ST DEFENDANT

MOHAMED KHAMISI MBARAK 2ND DEFENDANT

RULING

1. The application is dated 22nd June 2023 and is brought under Sections 3A and 63(e) of the [Civil Procedure Act](#) and Order 42 Rule 6 of the Civil Procedure Rules seeking the following orders;
 1. That this application be certified as urgent and service be dispensed with at the first instance.
 2. That this Honourable Court be pleased to order the stay of execution of the Ruling and subsequent order issued on 29th June 2022 pending the hearing and determination of this application inter parties.
 3. That this Honourable Court be pleased to order the stay of execution of the Ruling and subsequent order issued on 29th June 2022 pending the hearing and determination of the intended appeal.
 4. That costs of this application be provided for.
2. It is based on the grounds that the Plaintiffs have filed and served a Notice of Appeal against the ruling of this Honourable Court delivered on 29th June 2022. That the court proceedings are yet to be made available to the Plaintiffs for purposes of compiling a record of appeal. That warrants of execution have since been issued to Fantasy Auctioneers. That on 20th June 2023 the Plaintiffs movable properties



were attached and proclaimed by Fantasy Auctioneers. That in view of the said proclamation and attachment the Plaintiff is apprehensive that the auctioneers will sell their property before the appeal is heard and determined. That unless this Honourable Court stays the execution of the ruling herein delivered on 29th June 2022 and subsequent orders herein the Plaintiffs will suffer irreparable loss and the appeal rendered nugatory. That in view of the foregoing circumstances, it is in the Interest Justice and fairness that the orders sought herein be granted.

3. The 1st Defendant/Respondent submitted that the ruling dated 29th June 2022 dismissed the plaintiffs suit with costs hence there is nothing to stay. That a negative order dismissing a suit cannot be the subject of a stay pending appeal order. That in any event, the applicant did not file an appeal within sixty (60) days of filing and service of the Notice of Appeal hence the Notice of Appeal is deemed to be withdrawn under the Court of Appeal rules. That it is about one year since the order dismissing the applicant suit was made hence there is inordinate and unexplained delay in filing the current application. That allowing the payment of the respondent costs as decreed by the court will not occasion the applicant substantial and irreparable loss. That contrary to the rules on stay pending appeal, the applicant has not offered security as is the requirement. It thus does not deserve an order of stay pending appeal.
4. This court has considered the application and submissions therein. 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. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#), the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions.
6. Section 1A(2) of the [Civil Procedure Act](#) provides that

“the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective”

while under section 1B some of the aims of the said objectives are;

“the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
7. Therefore, an application for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely
 - (a) that substantial loss may result to the applicant unless the order is made,
 - (b) that the application has been made without unreasonable delay, and



- (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
8. As to what substantial loss is, it was observed in *James Wangalwa & Another vs Agnes Naliaka Cheseto* (2012) eKLR, that;
- “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
9. 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.”
10. 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.....”
11. 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



12. 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.”

13. In the instant case, the applicants aver that they stand to suffer substantial loss of over Kshs. 5,000,000/ = as this is the accumulated value of the Plaintiff's attached goods which is way above the demanded amount which has been deposited in a joint account. I do not see any substantial loss that would not be compensated with damages as the money has already been deposited. The Plaintiffs have filed and served a Notice of Appeal against the ruling of the Court delivered on 29th June 2022 against a ruling delivered on 20th July 2020. This application has filed on the 26th June 2023. Reasons given for the delay is that the court proceedings are yet to be made available to the Plaintiffs for purposes of compiling a record of appeal. No evidence of the same has been given e.g. a letter requesting for the same or a certificate of delay. I find the delay inordinate. Be that as it may, this court is not persuaded, that the appeal or intended appeal is arguable, that is to say it is not 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 any of the grounds to enable me grant the stay. I find this application dated 22nd June 2023 has no merit and I dismiss it with costs.

14. It is so ordered.

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

N.A. MATHEKA

JUDGE

