



**Bell Atlantic Communications Ltd v Rwingo (Environment and Land Appeal
1 of 2023) [2023] KEELC 22161 (KLR) (13 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22161 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 1 OF 2023
NA MATHEKA, J
DECEMBER 13, 2023**

BETWEEN

BELL ATLANTIC COMMUNICATIONS LTD APPELLANT

AND

EPHRAIM MAINA RWINGO RESPONDENT

RULING

1. The application is dated 22nd September 2023 and is brought under Section 1A (1), 3A and 63(e) of the [Civil Procedure Act](#), Order 42 Rule 6(1) & Order 51 Rule 1 of the [Civil Procedure Rules](#) seeking the following orders;
 1. This application be certified-as urgent and service be dispensed with in the first instance.
 2. This Honourable Court be pleased to stay proceedings in this matter pending the hearing and determination of the Appeal.
 3. Costs of this application be provided.
2. It is premised on the annexed supporting affidavit of Ephraim Rwingo and grounds that this case is scheduled for 26th September 2023 to take directions on the Appeal dated 10th January 2019. On 23rd January 2023 the Applicant filed an application dated 23rd January 2023 seeking that the Court strike out the Memorandum of Appeal dated 10th January 2019 and the entire Record of Appeal because the Appeal is a nullity and not transferable to this Court. On 21st June 2023, Honourable N. Matheka gave a Ruling dismissing the Application with costs. On 21st June 2023, the Applicant herein being dissatisfied by the said ruling filed its Notice of Appeal filed the Notice of Appeal dated 21st June 2023 intending to appeal to the Court of Appeal against the Ruling of Hon. N. Matheka delivered on 21st June 2023 That the Appeal will be rendered nugatory in the event that the orders sought herein are not granted and the proceedings continue and Judgement is delivered because the Applicant's right to



heard by a Court of competent jurisdiction will be unjustly denied. That in the event that the dispute is decided in favour of the Appellant in No. I of 2023, the Appeal before the Court of Appeal will be rendered nugatory because the effect of the Appeal in No. 1 of 2023 is to set aside the Judgment delivered on 7th December 2018 in CMCC No. 1 104 of 2010 and substitute it with an order allowing the Appellant's suit as prayed in the Plaint.

3. The Respondent stated that the primary suit was filed before the Trial Court on 28th April 2020 where after judgment was entered on 7th December 2018 in favour of the Respondent. That on 11th January 2019 the Appellant filed the Appeal herein where after the same was transferred to the Environment and Land Court by the High Court. That on 11th May 2022 both Advocates for the respective parties appeared before the Court and sought directions to have the Appeal canvassed by way of Written Submissions. That on 29th September 2022 the High Court directed that Judgment in the Appeal was to be delivered on 17th November 2022. That on 14th December 2022 the High Court dismissed the Respondent's Preliminary Objection dated 9th December 2022 challenging the Order for transfer of the Appeal to this Honourable Court.
4. That on 23rd January 2023, the Respondent filed another Application dated 25th January 2023 challenging the Court's power to transfer the Appeal from the High Court to the Environment & Land Court which Application was dismissed on 21st June 2023 thereby allowing the court to write and/or deliver Judgment. That there are no further proceedings pending before Court to warrant any Stay of Proceedings Orders since all that is let is for this Honorable Court to retire and write its Judgment. That the prejudice will be occasioned to the Respondent if this Honourable Court is allowed to write and deliver its judgment on the Appeal where after the Respondent may Appeal to the Court of Appeal if he is dissatisfied. That the Application for Stay of Proceedings Orders is part of the Respondents delaying tactics to ensure that the Appellant is denied its right of use and enjoyment of the suit property which it purchased for valuable consideration way back in 2007.
5. 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.”



6. 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.

7. 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.”

8. 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....”

9. In the case of *Mobamed 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”

10. 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.”

11. On perusal of the court record I find that ruling 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. The Applicant had filed an application dated 23rd January 2023 seeking that the Court strike out the Memorandum of Appeal dated 10th January 2019 and the entire Record of Appeal because the Appeal is a nullity and not transferable to this Court from the High Court. On 21st June 2023 after carefully considering the law and the facts this court delivered it's ruling dismissing that Application with costs. 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 22nd September 2023 is unmerited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 13TH DAY OF DECEMBER 2023.

N.A. MATHEKA

JUDGE

