



**Karisa Ngari Kombe v Esther Nzingo Kalume & 2 others (Environment & Land Case 246 of 2018) [2022] KEELC 3895 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3895 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 246 OF 2018**

**NA MATHEKA, J  
JUNE 30, 2022**

**BETWEEN**

**KARISA NGARI KOMBE ..... APPLICANT**

**AND**

**ESTHER NZINGO KALUME ..... 1<sup>ST</sup> RESPONDENT**

**BENARD OCHIENG OLUOCH ..... 2<sup>ND</sup> RESPONDENT**

**POLA KALUME KITSAUMBI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The application is dated March 28, 2022 and is brought under 51 rules 1 and 3, order 42 rule 6 of the [Civil Procedure Rules](#), 2010 section 1, 71, 3, 3A of the [Civil Procedure Act](#) seeking the following orders;
  1. That this application be certified as urgent and be heard *ex-parte* and service be dispensed within the first instance.
  2. This honourable court be pleased to order the stay of execution of this honourable court judgement delivered by the Hon Justice NA Matheka on the March 22, 2022 pending the hearing and determination of the application.
  3. That there be stay of execution of this honourable court Judgement delivered on March 22, 2022 pending the hearing and determination of the plaintiffs intended Appeal.
  4. The costs of this application be provided for.
  5. Such other and/or further orders as the honourable court may deem expedient and fit to grant.
2. It is based on the grounds that this honourable court delivered judgement as against the plaintiff/ applicant on the March 22, 2022 and the court directed that the plaintiff/ applicant suit was dismissed with costs to the 1<sup>st</sup> defendant a consequence of which the 1<sup>st</sup> defendant can take possession of the



suit land to the detriment of the plaintiff and hence is exposed to loss of die investment by continued construction and demolish. The plaintiff intends to appeal the judgement of this honourable court and whose grounds have high chances of success and has already filed a notice of appeal on within the requisite period. It is in the interest of justice to preserve the plaintiff/applicant's right to appeal by granting a stay of execution of the decree so that the appeal is not rendered nugatory.

3. The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the application stating that the learned judge's order dismissing the plaintiff's suit is a negative order incapable of execution. As such, an order of stay of execution is unavailable to the plaintiff. At any rate, no substantial loss has been pleaded or demonstrated seeing that the plaintiff perfunctorily states that he is exposed to loss of investment without more and the plaintiff by his own admission, is a licensee of the defendants on the subject parcel of land. No security has been offered or suggested by the plaintiff for the performance of any order as may ultimately be binding on him. Noticeably, the intended appeal is doubtlessly unarguable. The plaintiff is manifestly making a fresh case on appeal. The 3<sup>rd</sup> respondent stated that the plaintiff's suit having been dismissed there is no reason why judgement and decree of the court should be stayed. That the applicant has failed to show that he will suffer substantial loss if the decree and judgement are not stayed.
4. This court has carefully considered the application and the submissions herein. 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 applicants 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. From the grounds of the application, the applicant stated that on the March 22, 2022 and the court directed that the plaintiff/applicant suit was dismissed with costs to the 1<sup>st</sup> defendant a consequence of which the 1<sup>st</sup> defendant can take possession of the suit land to the detriment of the plaintiff and hence is exposed to loss of die investment by continued construction and demolish. The plaintiff intends to appeal the judgement of this honourable court and whose grounds have high chances of success and has already filed a notice of appeal on within the requisite period. 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. The suit was dismissed and there is nothing to stay. 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 March 28, 2022 has no merit and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 30<sup>TH</sup> JUNE 2022.**

**NA MATHEKA**

**JUDGE**

