



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mukami v Amollo & another (Environment & Land Case  
361 of 2016) [2022] KEELC 3779 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3779 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 361 OF 2016  
NA MATHEKA, J  
JUNE 30, 2022**

**BETWEEN**

**HELLEN MUKAMI ..... PLAINTIFF**

**AND**

**DORINA ATIENO AMOLLO ..... 1<sup>ST</sup> DEFENDANT**

**HAMISI BUHIRI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

- 1 The application is dated 10<sup>th</sup> November 2021 and is brought under Order 42 Rule 6 and Order 51 Rule 1 of the [Civil Procedure Rules](#), Section 1 A, 1B, 3A, 3B, of the [Civil Procedure Act](#) Cap 21 seeking the following orders;
  1. That this this Application be certified Urgent and be heard ex parte in the first instance.
  2. That this Honourable Court be pleased to order a stay of execution of the judgment issued by the Honourable Trial Court on the 29<sup>th</sup> Day of April 2019 pending the hearing and determination of this Application.
  3. That this Honourable Court be pleased to order a stay of execution of the judgment issued by the Honourable Trial Court on the 29<sup>th</sup> Day of April 2019 pending the hearing and determination of the appeal
  4. That the costs of this Application abide the outcome of the Appeal.
- 2 It is based on the grounds that the Honourable Court delivered its judgment in default against the defendants on the 29<sup>th</sup> Day of April 2019. That the matter had proceeded ex parte and the defendants were never served with summons to enter appearance. That the second Defendant moved the trial Court to set aside the ex-parte Judgment so that she could exercise her right to be heard. That the court delivered its ruling on the 26<sup>th</sup> Day of October 2021. The Appellant is aggrieved by the ruling of the



trial Court and seeks to Appeal the said ruling delivered on 26<sup>th</sup> October 2021. That the Appellant has already filed an Appeal. That the intended Appeal raises pertinent legal and factual issues and has a high chance of success. The Appeal will be rendered nugatory if stay of execution of the judgment of the Trial Court is not granted. This Application will not occasion any prejudice to the Respondents. This Application has been done without any unreasonable delay. That it is in the interest of justice that the application be allowed.

3 The Respondent stated that the Applicant did not convince the court that indeed she was not served that is why application was dismissed with costs. That the draft Memorandum of Appeal has not raised any issue which could warrant the departure of the ruling by the Learned Judge in the Superior Court by the Court of Appeal. That the application does not merit a stay since she has always known about the judgment but decided to act with impunity as if she is above the law.

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.”

9 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.”

10 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.

11 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) 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.”

12 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.....”

13 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 .....

14 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.”

15 From the grounds, in the application the applicants being aggrieved with the ruling delivered by the Court on 26<sup>th</sup> October 2021 have filed a notice of appeal. That the appeal, if successful will be rendered nugatory and substantial loss will be suffered if the stay of execution pending appeal is not granted. They had filed a similar application dated 31<sup>st</sup> March 2021 and my reasoning in dismissing that application applies mutatis mutandi. 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. This court is now funtus officio on the issue of stay pending appeal and the applicant ought to pursue the same at the court of appeal. I find this application dated 10<sup>th</sup> November 2021 has no merit and an abuse of the court process and I dismiss it with costs.



16 It is so ordered.

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

**N.A. MATHEKA**

**JUDGE**

