



REPUBLIC OF KENYA



Aboo & 3 others v Ramesh & another (Environment & Land Case 274 of 2016) [2022] KEELC 3780 (KLR) (28 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3780 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 274 OF 2016
NA MATHEKA, J
JUNE 28, 2022

BETWEEN

FATMA ESSACK ABOO 1ST PLAINTIFF
SHAMIM ESSACK ABOO 2ND PLAINTIFF
NASEEM ESSACK ABOO 3RD PLAINTIFF
ABDULHAMID ESSACK ABOO 4TH PLAINTIFF

AND

RAJU RAMESH 1ST DEFENDANT
PWANI OIL PRODUCTS LIMITED 2ND DEFENDANT

RULING

1. The application is dated January 21, 2022 and is brought under Order 2 Rule 6 of the [Civil Procedure Rules 2020](#) section 3 A of the [Civil Procedure Act](#) Cap 21 seeking the following orders;
 1. This Application be certified urgent and be heard Exparte at the first instance.
 2. That a temporary stay of execution be issued of the judgment delivered on January 19, 2022 by Honourable N A Matheka pending the Interpartes hearing and determination of this Application.
 3. That there be stay of execution of the judgment of Honourable N.A Matheka delivered on January 19, 2022 pending the hearing and determination of an intended Appeal to the Court of Appeal
 4. Costs of the Application
 5. Any other relief deemed just and fair to grant by the Honourable court.



2. It is based on the grounds that the plaintiffs sued the defendants for declaration that the house standing on Plot No. 678/VI/MN belongs to the Plaintiffs and a temporary injunction order was filed by consent on March 15, 2018. That on January 19, 2022, the court dismissed the plaintiff's suit and therefore, the plaintiffs are at a risk of eviction from the suit property any time and the defendants have already threatened to evict the plaintiffs. The plaintiffs are aggrieved by the judgment and have lodged an Appeal to the Court of Appeal. That if stay of executions is not issued, the defendants shall evict the plaintiffs from the suit property before the hearing and determination
3. The defendants submitted that there is no dispute. That the 2nd defendant is the registered owner of all that parcel of land situate at Jomvu - Changamwe District in the Mombasa Area of the Republic of Kenya containing by measurement ten-point three nought (10.30) acres or thereabouts and known as Plot Number 678/VI/MN. That it is also not in dispute the 2nd defendant at its own behest, put up a dwelling house on the said property which the plaintiffs currently occupy. That the plaintiffs moved to court to have the house declared as theirs but the said case was dismissed by a judgement delivered by this court on January 19, 2022. That even though the plaintiffs have sought an Appeal on the said Judgment before the Superior Court and filed this Application for stay before this honorable court, the prayers sought by the plaintiffs in their Application are incapable of being granted since there is nothing in the judgement to be stayed as the judgement dismissed their suit. That the Appeal has no chance of success because the court correctly held that. That the 2nd defendant has the right to enjoy quiet possession of its property and the fruits of its Judgement. That the house in question has stopped the 2nd defendant from developing a 3 acre portion in the said piece of land for the past 7 years this matter has been pending in court. The said portion of land where the house stands is valued at Kshs. 123,000,000. Annexed and marked "RRM1" is a copy of the valuation report of the said Plot 678/VI/MN dated 5th February 2021. That the 2nd defendant continues to be set back economically since it began a project that has since stalled due to the plaintiffs adamance and refusal to vacate. That no prejudice will be suffered by the plaintiffs if they vacate the said house since the land and the house do not belong to them and they continue to stay there out of the 2nd defendant's goodwill. That this Application is bad in law, misconceived and ill advised, calculated to frustrate the 2nd defendant and to arm twist it into letting the plaintiffs to continue to occupy the house indefinitely and illegally. That should this honorable court, in any event, be persuaded to grant the orders sought in the Application, then the plaintiffs should be ordered to deposit security amounting to Kshs. 123,000,000 for the due performance of the decree of the court in an escrow account.
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, the plaintiffs sued the defendants for declaration that the house standing on Plot No. 678/VI/MN belongs to the Plaintiffs and a temporary injunction order was filed by consent on March 15, 2018. That on January 19, 2022, the court dismissed the plaintiffs suit and therefore, the plaintiffs are at a risk of eviction from the suit property any time and the defendants have already threatened to evict the plaintiffs. The plaintiffs are aggrieved by the judgment and have lodged an Appeal to the Court of Appeal. 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 the Application dated January 21, 2022 has no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF JUNE 2022.

N.A. MATHEKA

JUDGE

