



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwadziwe & another v Aluha & another (Environment & Land Case  
232 of 2011) [2022] KEELC 3463 (KLR) (26 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3463 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 232 OF 2011**

**NA MATHEKA, J**

**JULY 26, 2022**

**BETWEEN**

**JOSEPHINE NYEVI MWADZIWE ..... 1<sup>ST</sup> PLAINTIFF**

**RAYMOND GONZI MWADZIWE ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**FRANCIS MUJUMBA ALUHA ..... 1<sup>ST</sup> DEFENDANT**

**WYCLIFFE JIRONGO MUHANGANI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1 The application is dated 4<sup>th</sup> April 2022 and is brought under Sections 1 A, 1B and 63 of the *Civil Procedure Act* Order 42 Rules 6 (1) & (2) and Order 51 Rule 1 of the *Civil Procedure Rules* seeking the following orders;

1. This Application be certified as urgent and service thereof be dispensed with and the same be heard ex-parte in the first instance.
2. That there be an order for stay of execution of the judgment delivered by this Honourable Court on 18<sup>th</sup> January 2022 and all subsequent orders, pending the hearing and determination of this application.
3. That there be an order for stay of execution of the judgment delivered by this Honourable Court on 18<sup>th</sup> January 2022 and all subsequent orders pending the hearing and determination of the Applicants' Intended appeal.
4. Costs of this application be provided for.

2 It is premised on the following grounds that the Honourable Lady Justice N.A. Matheka on 18<sup>th</sup> January 2022, allowed the Plaintiffs/Respondents claim by giving the following orders that the



Defendants are to vacate the suit property plot Block No.96/19 and give vacant possession within the next 90 (Ninety) days from the date of this judgment. An order to issue lifting and/or removing the caution placed on Plot No. Block 96/19 after 90 (ninety) days from the date of this judgment and costs to the Plaintiffs.

- 3 That the judgment of the Honourable Court was not conclusive in that there were no findings of the prayers sought in Nairobi High Court Civil Case No.806 of 1996, which was consolidated with the present matter vide an order given by the Honourable Court on 24<sup>th</sup> October 2019. The Applicants, being aggrieved and dissatisfied with the Honourable Court's finding, wish to appeal the said judgment. It is eminent that the Respondents will move swiftly, any time from now to execute the judgment of this Honourable Court and or Decree arising therefrom. That the Applicants have a meritorious and arguable Appeal with high chances of success and it's only fair and just it be granted an opportunity to ventilate the issues thereof. That this being a Decree ordering vacant possession of the suit premises and removal of the caution placed by the Applicants, the Respondents will move fast to evict the Applicants from the only home they have known and likely transfer the suit property to third parties, rendering the Applicant's intended Appeal now pending before the Court of Appeal nugatory.
- 4 That if the Respondents are not stopped from proceeding with the execution, the Applicants will suffer great prejudice, immense loss and hardship which will also destroy the substratum of the Applicants intended Appeal. The Applicants do not intend to delay the fruits of judgment due to the Respondents and will diligently prosecute the Appeal. The application has been made without inordinate delay. That the Applicants are ready and willing to comply with all conditions (if any) that may be laid down by the Court including an order for security for the due performance of any decree that may ultimately become binding in it, including holding the decretal amount by both the advocates of the Applicants and Respondents in an interest earning bank account.
- 5 The Plaintiffs/Respondents raised a Preliminary Objection on points of law that;
  1. There is no appeal pending to warrant issuance of a stay of execution of the orders of this court.
  2. That an appeal against a judgement of this court can only be commenced as provided for under rule 75 of the Court of Appeal Rules, there is no evidence that a Notice of Appeal has been filed in compliance with that rule.
  3. A stay of execution cannot be granted without evidence of filing of Notice of appeal such that the application and the subsequent stay is an abuse of the process of the court.
  4. The Memorandum of Appeal annexed is not competent since the first document to be filed is a Notice of Appeal which has not been done to that extent the application is lacking in merit and an abuse of the process of the court and should be dismissed with costs.
- 6 This court has considered the preliminary objection and submissions therein. The Plaintiffs/ Respondent state that a stay of execution cannot be granted without evidence of filing of Notice of appeal such that the application and the subsequent stay is an abuse of the process of the court. I find that this is a matter of fact and not law and can be argued in the application and not as a preliminary objection. I find that objection is not merited and I overrule the same and proceed to consider the application.



7 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.”

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.

8 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.”



9 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.....”

10 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 .....

11 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.”

12 From the grounds, that the Judgment of the Honourable Court was not conclusive in that there were no findings of the prayers sought in Nairobi High Court Civil Case No.806 of 1996, which was consolidated with the present matter vide an order given by the Honourable Court on 24<sup>th</sup> October 2019. The Applicants, being aggrieved and dissatisfied with the Honourable Court’s finding, wish to appeal the said judgment. I have perused the said judgement and find that the court did consider the consolidated case of Nairobi High Court Civil Case No.806 of 1996 and found that the Applicants were in breach of contract hence the orders were given to vacate. 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 4<sup>th</sup> April 2022 has no merit and an abuse of the court process and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26<sup>TH</sup> DAY OF JULY 2022.**

**N.A. MATHEKA**

**JUDGE**

