



**M'Mwirabua v Msalam & another (Environment & Land Case  
36 of 2016) [2022] KEELC 13805 (KLR) (26 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13805 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 36 OF 2016  
NA MATHEKA, J  
OCTOBER 26, 2022**

**BETWEEN**

**JACOB KALIUNGA M'MWIRABUA ..... APPLICANT**

**AND**

**WARDA SAID ABUD MSALAM ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MOMBASA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application is dated April 8, 2022 and is brought under section 7 of the [Appellate Jurisdiction](#), section 1A, 1B and 3A of the [Civil Procedure Act](#), order 22 rules 10 rules 11 and order 40 of the [Civil Procedure Rule](#), 9 sections 13 and 19 of the [Environment and Land Court Act](#) seeking the following orders;
  1. That the application herein be certified as urgent and service of the same be dispensed with in the first instance.
  2. That there be stay of execution of the judgment of this honourable court delivered on December 3, 2021 pending hearing and determination of this application.
  3. That this honourable court to grant leave for extension of time to file a notice of appeal and the notice of appeal filed on March 1, 2022 be deemed to have been filed within time.
  4. That the costs of this application be provided for.
2. It is supported by the affidavit of Warda Said Abud Msalam and on grounds that the applicant did not know of the delivery of the judgment since she was not given a notice to that effect. That the applicant instructed the firm of Odhiambo S E to represent her which firm filed a notice of appointment of advocates and submissions but the same were not put in the court file. That the applicant knew of the judgment sometime in February, 2021 through her advocates who after filed the notice of appeal. That



the plaintiff has filed an application in the Court of Appeal to have the notice of appeal struck out. That it is in the interest of justice that the application be heard on priority basis and orders be granted. That the respondent will not be prejudiced in any way.

3. That the respondent stated that an order was extracted before the Hon Lady Justice Nelly A Matheka on October 6, 2021. The order indicated that the court file (MSA ELC No 36 of 2016) was to be sent to Hon. Justice Mr C Yano for delivery of judgement and that that judgment would be delivered on notice a copy of the order of court dated October 6, 2021 marked A. That the said order was served upon the 1<sup>st</sup> defendant via her whatsapp number 0703xxxx on October 7, 2021, a copy of the whatsapp message having sent the order of court of 6.1002021 is marked B.
4. That the ELC Court at Chuka sent a notice for the delivery of judgment on November 24, 2021 via email informing parties of the date of delivery of judgment. The email was sent from Chuka Environment and Land Court because the judge Hon Mr Justice C Yano had been transferred to the said court. Matters that had been concluded were taken to him for the delivery of judgment. The email sent included the email address of the former advocate of the 1<sup>st</sup> defendant since they were last on record. That the 1<sup>st</sup> defendant did not inform the court of her new address when she appeared in court in person on October 6, 2021 a copy of the notice dated November 24, 2021 marked C.
5. That a notice of appointment of advocates dated October 1, 2021 and filed on October 5, 2021 was served on the plaintiff on October 9, 2021 after the order of court of October 6, 2021 had already been served on the 1<sup>st</sup> defendant. This is an indication that the 1<sup>st</sup> defendant already had an advocate on record when the court gave the directions for the delivery of judgment a copy of the notice of appointment of advocates dated October 1, 2021 marked D. That the 1<sup>st</sup> defendant wrote a letter to the Deputy Registrar requesting for proceedings on November 16, 2021. That the same letter was served on the plaintiff on December 6, 2021 after the judgment of court had already been delivered on December 3, 2021. The letter purported that the 1<sup>st</sup> defendant wanted copies of proceedings, however the letter lacked a court stamp to show when it was received by the court a copy of the letter dated November 16, 2021 without the court stamp marked E. That 1<sup>st</sup> defendant knew of the delivery of judgment and chose not to file her submissions on time.
6. 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.”

7. 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 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.”

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 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.....”

9. 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 .....”



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. From the grounds, in the that the applicant did not know of the delivery of the judgment since she was not given a notice to that effect. That the applicant instructed the firm of Odhiambo S E to represent her which firm filed a notice of appointment of advocates and submissions but the same were not put in the court file. That the applicant knew of the judgment sometime in February, 2021 through her advocates who after filed the notice of appeal. That the plaintiff has filed an application in the Court of Appeal to have the notice of appeal struck out. 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 *functus officio* on the issue of stay pending appeal and the applicant ought to pursue the same at the Court of Appeal as they have already filed an application there. I find this application has no merit and I dismiss it with costs.

12. It is so ordered.

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

**N.A. MATHEKA**

**JUDGE**

