



**Mantel Limited v Tindika t/a Tindika & Company Advocates (Environment & Land Case 200 of 2020) [2022] KEELC 15030 (KLR) (22 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15030 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 200 OF 2020  
NA MATHEKA, J  
NOVEMBER 22, 2022**

**BETWEEN**

**MANTEL LIMITED ..... PLAINTIFF**

**AND**

**RANDOLPH M TINDIKA T/A TINDIKA & COMPANY  
ADVOCATES ..... DEFENDANT**

**RULING**

1. The application is dated June 28, 2022 and is brought under sections 1A, 1B and 3A of the [Civil Procedure Act](#), order 42 rule 6 of the [Civil Procedure Rules](#) seeking the following orders;
  1. That this application be certified as urgent and service of the same be dispensed with at the first instance.
  2. That this honourable court be pleased to issue an order stay of execution of the orders made on the January 24, 2022 pending the hearing of this application *inter-partes* and the *status quo* with regard to the suit property, to wit, title number Mombasa/Block/XXVI/144 be maintained.
  3. That this honourable court be pleased to issue an order stay of execution of the orders made on the January 24, 2022 pending the hearing and determination of this appeal herein and the *status quo* with regard to the suit property, to wit, title number Mombasa/Block/XXVI/144 be maintained.
  4. That costs of this application be provided for.
2. It is based on the grounds that the parties herein recorded a consent on the January 24, 2022 by the terms of which the matter herein was settled on the conditions therein. Both parties did not comply with the respective terms of the said consent in terms of the payment and preparation of the agreement for sale. The applicant then filed the notice of motion application dated the March 3, 2022 seeking



the extension of the time within which compliance ought to be done and by ruling delivered on the June 28, 2022, the honourable court dismissed the said application. Aggrieved by the decision in the said ruling, the applicant has lodged an appeal to the Court of Appeal. The defendant/applicant is apprehensive that despite the foregoing, the plaintiff/respondent may proceed with execution, since the filing of an appeal is not tantamount to getting a stay of execution, without an application to that effect. The defendant/appellant has a strong appeal against the ruling and orders of this honourable court and in the event the orders sought herein are not granted, the plaintiff/respondent will proceed with execution, in which event, the defendant/appellant will suffer irreparable and/or substantial loss and damage. The application herein has been filed without any delay. The applicant is ready and willing to comply with any conditions which this honourable court will require as a condition for the grant of the orders sought herein. The applicant will be greatly prejudiced if the orders herein sought are not granted and will suffer irreparable loss and damage.

3. The plaintiff/respondent states that there is no competent appeal filed in the Court of Appeal as alleged because the notice of appeal dated June 28, 2022 (annexure marked RMT 1) has not been served upon their firm as required by the Appellate Jurisdiction Rules. The applicant has no arguable appeal capable of being canvassed in the superior court. The applicant is in contempt of court and the orders sought are intended to perpetrate breach of court orders recorded by consent. This honourable court has already pronounced itself on the issue of a stay of execution therefore the application is *res judicata in rem*. That even if the applicant had a competent appeal, he is still in occupation of the suit property rent free having refused to vacate therefrom, therefore he has failed to demonstrate that he will suffer substantial loss if the stay sought is denied. That the applicant is not being candid on the averments that he wishes to appeal against the ruling delivered on June 28, 2022 because he has nothing to protect by a stay or in an appeal having failed to raise the deposit of the purchase price as agreed between the parties. That the consent orders recorded on January 24, 2022 amounted to a contract between the parties whose terms were clear and unambiguous and having failed to comply with the same, he is engaged in time wasting court proceedings which this honourable court should not condone. That the application has no merit/ it is vexatious and an abuse of the court process. They pray that the same be dismissed with costs and the applicant be ordered to vacate from the suit property forthwith.
4. This court has carefully considered the application and the submissions herein. The applicant filed the application dated March 3, 2022 in which the applicant sought an order of stay of execution and or enforcement of the consent orders recorded on the January 24, 2022. This honourable court heard the application and delivered a ruling on the same dated June 28, 2022. This is the ruling sought to be appealed from. 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) 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.”
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 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.....”
8. In the case of *Mobamed 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 .....”



9. 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.”

10. That the plaintiff/respondent submitted that the application seeks stay of execution of the consent orders dated January 24, 2022 from which no appeal has been preferred hence the same is incompetent. That the stay of execution and or enforcement of the consent orders dated January 24, 2022 is *res judicata*. That the applicant is in breach of the consent orders dated January 24, 2022 which he seeks to stay therefore the application is contrary to public policy as it seeks to subvert the course of justice. That the application is a sham and a scheme designed to facilitate the applicant's free occupation of the suit property rent free in breach of the consent orders. That the application does not meet the requirements of order 42 rule 6. That the application seeks to interfere, infringe and curtail the defendant's right to occupy its property and is an abuse of the court process. From the grounds, in the application the applicants being aggrieved with the ruling delivered by the court June 28, 2022 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. Be that as it may, this court is again 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 June 28, 2022 has no merit I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**N.A. MATHEKA**

**JUDGE**

