



REPUBLIC OF KENYA



**Nkya v Awadh & another (Environment & Land Case 145 of 2016)
[2022] KEELC 14927 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14927 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 145 OF 2016
NA MATHEKA, J
NOVEMBER 23, 2022**

BETWEEN

SHABAN SWEDI NKYA PLAINTIFF

AND

MOHAMED MAHFUDH AWADH 1ST DEFENDANT

HUSSEIN KABILA 2ND DEFENDANT

RULING

1. The application is dated July 20, 2022 and is brought under section 1A, 1B, 3 & 3A of the [Civil Procedure Act](#), order 42 rule 6(1) & (2) [Civil Procedure Rules](#), seeking the following orders;
 1. That this application be certified as urgent and service of the same be in the first instance dispensed with.
 2. That pending the hearing of this application interpartes, this honourable court, be pleased to grant a temporary stay of execution of the judgment delivered on May 17, 2022 and the decree issued therefrom.
 3. That the honourable court be pleased to stay the execution of the judgment delivered on May 17, 2022, together with the decree issued therefrom, pending the hearing and final determination of applicants' appeal to the Court of Appeal.
 4. That costs of this application to await the outcome of the appeal to the Court of Appeal
2. It is based on the grounds that this honourable court delivered a judgment on May 17, 2022 compelling the defendants to give vacant possession to the plaintiff. That the 1st defendant/applicant was dissatisfied with that decision and has since lodged a notice of appeal of his intention to appeal to the Court of Appeal as of the law required. That for matters averred to in the supporting affidavit herein, the 1st defendant/applicant will suffer substantial loss should this judgment be executed before



the intended appeal is heard. That it is in the interest of justice that the execution of this judgment be stayed.

3. The plaintiff/respondent stated that the said application is vexatious, frivolous, unmerited and total abuse of this court's process. That the application comes later in the day when the plaintiff is already in the process of executing and thus the motion is aimed derailing and delaying justice to frustrate the plaintiff further. That judgement was delivered May 17, 2022 and to date, the 1st defendant has not filed any appeal, not even a memorandum of appeal nor record of appeal filed and as it stands there is no appeal pending other than the notice of appeal that was served upon the plaintiff. That the application is caught up in laches, the grace period in which to file and prepare for the prosecution of an appeal has since lapsed.
4. That in granting such stay, a party has to offer and or propose security for costs as procedurally required. The 1st defendant has not offered, proposed nor indicated anywhere that he is willing to deposit/ provide security for costs. That the 1st defendant is an indolent litigator since serving a notice of appeal, he has not taken any step further towards even filing a memorandum of appeal. That the 1st defendant has not bothered to even put forth any reasonable explanation why he needs stay nor imperatively explain the reasons for the delay or failure to regularize and put his house in order towards dealing with the intended appeal. That the 1st defendant has not explained as required by law to explain the substantial loss other than stating that he risks substantial loss as a consequence of a valid judgment.
5. 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.”
6. 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 v Richard Nyagaka Tongi & 2 others* [2013] 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. This application is based on the grounds that this honourable court delivered a judgment on May 17, 2022 compelling the defendants to give vacant possession to the plaintiff. That the 1st defendant/ applicant was dissatisfied with that decision and has since lodged a notice of appeal of his intention to appeal to the Court of Appeal as of the law required. That for matters averred to in the supporting affidavit herein, the 1st defendant/ applicant will suffer substantial loss should this judgment be executed before the intended appeal is heard. 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 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 July 20, 2022 has no merit I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD DAY OF NOVEMBER 2022.

NA MATHEKA

JUDGE

