



Mohamed & 3 others (Suing as Administrators of the Estate of Peter Rashid Abdallah Mboty) v Kazungu & another (Environment and Land Appeal E017 of 2023) [2024] KEELC 736 (KLR) (14 February 2024) (Ruling)

Neutral citation: [2024] KEELC 736 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E017 OF 2023
EK MAKORI, J
FEBRUARY 14, 2024**

BETWEEN

NOORHER MOHAMED APPELLANT

AND

**SUING AS ADMINISTRATORS OF THE ESTATE OF PETER RASHID
ABDALLAH MBOTY APPLICANT**

AND

HADIJA NANZALA RASHID 1ST APPELLANT

FATUMA MARUI RASHID 2ND APPELLANT

**SUING AS ADMINISTRATORS OF THE ESTATE OF PETER RASHID
ABDALLAH MBOTY**

AND

JOYCE KAZUNGU 1ST RESPONDENT

JOYCE KAZUNGU 2ND RESPONDENT

RULING

1. Notice of Motion dated 5th May 2023 seeks:
 - a. Spent.
 - b. Spent.



- c. Pending the determination of the Appeal herein, an order of stay of execution be issued in respect of the judgment and decree delivered on 5th April 2023 Malindi Chief Magistrate Court ELC No. 21 of 2018, *Noorher Mohammed & Others v Joyce Kazungu*.
 - d. That costs of this application be provided.
2. The application is supported by the affidavit sworn by Fatuma Maruti Rashid sworn on 5th May 2023.
 3. The respondent opposed the same vide a replying affidavit sworn on 25th May 2023 by Joyce Kazungu the respondent herein.
 4. On the 10th of May 2023 the Court ordered a status quo order, pending the hearing and determination of the current application.
 5. The Court directed that the application be canvassed through written submissions.
 6. Having reviewed the materials and averments before me, the main issue for the determination of this Court is whether to grant a stay pending appeal.
 7. From the record, the Lower Court made orders that the title document Timboni/Watamu/25 be surveyed and registered in the name of the respondent herein. The Court found that the respondent had acquired equitable and beneficial interest over the land by occupation for over 12 years under the doctrine of adverse possession.
 8. In the intended appeal, the appellant disputes the duration of uninterrupted stay and is of the view that an accumulative 12 years had not been achieved.
 9. The factors to consider before a stay is granted are as held in the case of *Antoine Ndiaye v African Virtual University* [2015] eKLR:
 - a. The application is brought without undue delay;
 - b. The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and
 - c. 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.”
 10. The current application was brought timeously as can be seen from the record. The trial Court delivered its ruling on 5th April 2023 and by 2nd of May 2023, the current application had been filed. The 1st test was achieved.



11. On the issue of substantial loss, this is a matter dealing with land as the substratum of the suit. In the case of *RWW v EKW* [2019] eKLR, the Court stated as follows:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

12. Balancing the interests of the parties in this appeal, the appellants are the beneficial owners of the suit property while the respondent seeks to be registered and extinguish the rights of ownership over the property by the appellants. It will be in the interest of justice to grant the stay orders pending appeal by ordering that the land in question remain registered in the appellants' favour pending appeal to preserve the substratum of the appeal.

13. Costs in the intended appeal.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 14TH DAY OF FEBRUARY 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Onyango for the Appellant

Court Clerk. Happy

In the absence of:

Mr. Komora for the Respondent

