



Cliffton Bay Limited v Chivatsi (Suing as the Administrator of the Estate of Jefwa Kalama Lewa - Deceased) & 2 others (Environment and Land Appeal E001 of 2024) [2024] KEELC 13544 (KLR) (4 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13544 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E001 OF 2024
FM NJOROGE, J
DECEMBER 4, 2024**

BETWEEN

CLIFFTON BAY LIMITED APPELLANT

AND

DAMA NGUWA CHIVATSI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF JEFWA KALAMA LEWA - DECEASED) 1ST RESPONDENT

LANDS REGISTRAR – KILIFI 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

RULING

1 The application for determination is dated 3/6/2024. The Appellant sought the following orders:

1. Spent.
2. Spent.
3. There be an order staying execution of the judgment and decree delivered on 6/3/2024 in Malindi CMELC Case No. 154 of 2021 and all consequential orders flowing from the said judgment pending the hearing and final determination of the appeal herein.
4. The costs of and incidental to this application be provided for.

2 The basis of the application is the grounds listed on the face of the motion and also contained in the supporting affidavit sworn on the even date by Minal Vohra, the Appellant's director. He deposed that judgment was delivered by the lower court on 6/3/2024 in favour of the 1st Respondent. He explained that the suit before the lower court was filed by the 1st Respondent claiming co-ownership of



the suit property Kilifi/Madeteni/423 measuring approximately 3.2 hectares. The lower court directed *inter alia*, cancellation of the title held by the Appellant to the extent of the 4 acres claimed by the 1st Respondent, a rectification of the register, a permanent injunction restraining the Appellant from dealing with the 4 acres to be hived from the suit property, and for the Appellant to hand over to the 1st Respondent, vacant possession of the 4 acres.

- 3 The Appellant has now filed the present appeal challenging the said judgment, and is apprehensive that the 1st Respondent may initiate execution upon the lapse of the stay granted by the trial court. The deponent stated that should execution proceed; the Appellant stands to lose 4 acres of his property and the appeal shall be rendered nugatory.
- 4 The 1st Respondent sought a dismissal of the application. She filed a replying affidavit dated 24/6/2024, wherein she deposed that the deponent of the supporting affidavit lacks the Appellant's authority to do so hence the same should be expunged from the record. She asserted that the Appellant has not met the threshold for granting the orders sought and that the application is the Appellant's attempt to delay the matter.
- 5 The application was canvassed by way of written submissions.

Appellant's Submissions

- 6 Messrs. Gikera & Vadgama Advocates filed submissions dated 24/7/2024 on behalf of the Appellant. Counsel submitted that the guiding principles in granting stay of execution are provided under Order 42 Rule 6 of the Civil Procedure Rules and were discussed in the case of Antoine Ndiaye v African Virtual University [2015] eKLR; Chris Munga N Bichage v Richard Nyagaka Tongi & 2 others [2013] eKLR; Ena Investment Limited v Benard Ochau Mose & 2 Others [2022] eKLR and Robert Mwisani Lumadede & another v Philemon Omwenga Aroni [2022] eKLR; that an applicant must establish an arguable appeal, substantial loss, security and that the application was filed without unreasonable delay.
- 7 In relation to whether the Appellant has an arguable appeal, counsel was of the view that the memorandum of appeal presented demonstrates that the Appellant has an arguable appeal. He cited the case of Manyara v Manyara & another (Civil Appeal (Application) E145 OF 2021) [2023] KECA 1245 (KLR) and Kamindi Self Fridges Supermarkets Limited v Kiambu Murutani Company Limited (Civil Application E360 of 2022) [2024] KECA 10 (KLR).
- 8 Counsel submitted that the effect of the impugned judgment is that the Appellant faces the risk of being wrongly and irreversibly evicted from the suit property and losing 4 acres. He added that the judgment also allows the 1st Respondent to deal with the property as she deems fit including dispossession and alienation. To counsel, this would amount to substantial loss considering that the Appellant is in possession thereof. To support this, counsel relied on the case of Gathua v Narogo & 2 others [2024] KLR.
- 9 Counsel further submitted that the subject matter being land, it is sufficient security on its own, however, the Appellant was willing to comply with any directions given as to security for the ultimate performance of the decree. Counsel stated that the application should be allowed as it was filed timeously.

The 1st Respondent's Submissions

- 10 The firm of Messrs. Angeline Omollo & Associates presented submissions dated 19/8/2024 on behalf of the 1st Respondent. Counsel identified two issues for determination, namely: whether the



supporting affidavit dated 3/6/2024 sworn by Minal Vohra is of any probative value; and whether the Appellant should be granted an order for stay of execution.

- 11 Relying on Order 4 rule 1 (4) of the Civil Procedure Rules, and the cases of Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd Nairobi [2000] eKLR, and Spire Bank Limited v Land Registrar & 2 others [2019] eKLR, counsel argued that the deponent Minal Vohra did not furnish the court with a resolution authorizing him to swear the supporting affidavit on behalf of the Appellant, as such his affidavit is of no probative value. To counsel, this exclusion cannot be cured by Article 159 of the Constitution.
- 12 Counsel further submitted that the Appellant has failed to demonstrate and clearly state what loss it stands to suffer should the orders for stay fail to be granted. To her, the application is based on mere assumptions and should fail. She relied on the case of Machira t/a Machira & Company Advocates v East Africa Standard [2022] eKLR to support this argument.
- 13 She added that in the event that the court grants an order for stay of execution, the same should be conditional on furnishing security for costs. To this end, counsel relied on the case of Nganga Kabae v Kahunyo Kimani [2005] eKLR.
- 14 Counsel further submitted that the Appellant must demonstrate that it has an arguable appeal in order to obtain the orders sought as was held in Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 others [2013] eKLR and UAP Insurance Company v Michael John Beckett [2004] eKLR. To counsel, the Appellant has failed to demonstrate that it has an arguable appeal. Counsel added that the decision on whether or not to grant stay is discretionary as it was enunciated in RWW v EKW [2019] eKLR. She urged the court to exercise that discretion reasonably and judiciously.

Analysis and Determination

- 15 I will first address the preliminary issue raised by the 1st Respondent, that is whether the supporting affidavit should be disregarded and expunged from the record. While I agree with the submissions advanced by counsel for the 1st Respondent, that the deponent ought to have obtained a board resolution from the Appellant authorizing him to swear the affidavit on behalf of the Appellant, the same is not reason enough to entirely disregard the affidavit. I find guidance in the Court of Appeal case of Arthi Highway Developers Limited v West End Butchery Limited & Others, Nairobi Civil Appeal No.246 of 2013 (2015) eKLR. The Court of Appeal *inter alia* stated as follows: -

44. The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; Bugerere Coffee Growers Ltd v Sebaduka & Anor (1970) 1 EA 147. The court in that case held:-

“When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors’ meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action.”

45. To their credit, the appellant’s Advocates have cited another authority from the Supreme Court of Uganda decided in April 2002, confirming that the principle enunciated in the Bugerere case has since been overruled by the Uganda Supreme court. The authority is Tatu Naiga & Emporium v Virjee Brothers Ltd Civil Appeal No 8 of 2000.



The Uganda Supreme Court endorsed the decision of the Court of Appeal that the decision in the Bugerere case was no longer good law as it had been overturned in the case of United Assurance Co. Ltd v Attorney General: SCCA NO.1 of 1998. The latter case restated the law as follows: -

.... it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.”

The decision has since been applied in Kenyan courts, for example, in Fubeco China Fushun v Naiposha Company Limited & 11 others [2014] eKLR.”

- 16 Having said that, I will now turn to the main issue in this matter, and that is whether the order for stay of execution pending appeal should issue.
- 17 The relevant law governing applications for stay of execution pending appeal is Order 42 Rule 6 1(2) of the Civil Procedure Rules which states as follows: -
- (2) No order for stay of execution shall be made under subrule (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.”
- 18 In Vishram Ravji Halai v Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 42 rule 6 of the Civil Procedure Rules is fettered by three conditions namely: - establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.
- 19 It is also trite that the authority to grant an order of stay of execution is a discretionary one. However, in exercising it, the Court must act judiciously, within the confines of the law and not capriciously. This means that the court should endeavor to balance the interests of the successful party in litigation so as not to unnecessarily bar him from enjoying the fruits of judgment and those of the Appellant whose appeal may succeed and be rendered nugatory if stay of execution is not granted.
- 20 In the instant application, judgment was delivered by the lower court on 6/3/2024 and stayed for 30 days. On 2/4/2024, the Appellant filed a similar application before the trial court and a memorandum of appeal to this court on 3/4/2024. On 17/4/2024 interim orders were granted staying the judgment for a further 21 days. The record reveals that the said orders were extended on several occasions and finally on 22/5/2025 when they were extended for 14 days. On the same date, the trial court ordered the Appellant to file their application for stay before this court. The Appellant then filed the present application on 4/6/2024. Thus, the Appellant came to this court within the time allowed to file an appeal and lodged the present application within time, considering the interim stay that had been granted by the trial court was yet to lapse. The application was therefore filed without any unreasonable delay.
- 21 I have perused through the Memorandum of Appeal and it is my considered opinion that whether or not it raises arguable issues does not guarantee the issuance of the orders of stay of execution by this court. that is a consideration by an appellate court when it is handling a stay application. In any event



the law in Order 42 Rule 6(1) of the Civil Procedure Rules, provides for establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security as the grounds to be considered by this court.

- 22 I will therefore consider whether the Appellant satisfied the conditions for the grant of stay of execution pending appeal. Substantial loss is the cornerstone for granting an order for stay of execution pending appeal. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:
- 23 No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
- 24 The Appellant stated that it has been in quiet, peaceful possession of the suit property for over 12 years and was apprehensive that if execution was to proceed, it would lose 4 acres of its property thus rendering the appeal nugatory. For that, the Appellant stated that it would suffer substantial loss if the execution was not stayed. It can not be known to what use the respondent would put the land if granted. Though the Appellant does not state in its application that it is in actual occupation of the entire suit property I find that a great risk may lie in allowing possession of a portion of the suit property to flow into the respondent’s hands before the determination of the appeal. subdivision and transfer and registration in the respondent’s name are also bound to consume time and effort for the parties which would rendered to have been a waste perchance this court eventually finds that the whole parcel is rightfully the appellant’s. In this court’s view there is risk of substantial loss that can be averted by the grant of a stay of execution.
- 25 In the light of the foregoing, I find that there are good grounds upon which to exercise discretion in favour of the Appellant. The application dated 3/6/2024 is therefore allowed as prayed in prayer no 3 thereof on condition that the applicant shall file and serve the record of appeal on the respondents within 45 days of this order in default of which the stay of execution orders hereby granted shall automatically lapse and the 1st respondent shall in that event be entitled to proceed to execution. The costs of the application abide the outcome of the appeal.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 4TH DAY OF DECEMBER 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

