



**Sasenyi Multipurpose Co-operative Society Limited v Rukinga Ranching Company Limited
(Environment & Land Case 168 of 2021) [2023] KEELC 17291 (KLR) (10 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17291 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 168 OF 2021**

NA MATHEKA, J

MAY 10, 2023

BETWEEN

SASENYI MULTIPURPOSE CO-OPERATIVE SOCIETY LIMITED .. PLAINTIFF

AND

RUKINGA RANCHING COMPANY LIMITED DEFENDANT

RULING

1. The Application is dated 9th November 2022 and is brought under sections I(A), I(B), 3(A), 63 (e) and orders 42 rules 6 and order 51 of the [civil procedure act](#) and rules respectively cap 21, and article 159 of [the Constitution](#) of Kenya 2010 seeking the following orders;
 1. That this application be certified urgent and be heard ex-parte in the first instance.
 2. That there be a stay of execution of the Orders of this Honourable Court issued on 7th December 2021 pending the hearing and determination of this application.
 3. That there be a stay of execution of the Orders of this Honourable Court issued on 7th December 2021 pending the hearing and determination of the Mombasa Court of Appeal Civil Appeal No. E 10 of 2022.
 4. That costs of this application be provided for.
2. It is supported by the affidavit of Richard Fabian Tolle and on the grounds that on 7th December 2021 the Honourable Court delivered a Ruling allowing the Defendant's Preliminary Objection dated 13th September 2021 striking out this suit with costs for being sub judice to Mombasa Environment and Land Case No. 202 of 2016. The Plaintiff being aggrieved by the said orders of 7th December 2021 lodged an appeal at the Court of Appeal at Mombasa, being Civil Appeal No. E 10 of 2022, which appeal is pending issuance of directions. The said Appeal has high chances of success and will be rendered nugatory and a mere academic exercise if the order of this court issued on 7th December



2021 is acted upon. The Plaintiff moved with speed without inordinate delay and filed the Notice of Appeal on 14th December 2021, being just one week after delivery of the Ruling. There is a danger that the execution of the orders of 7th December 2021 will affect the appeal that has already been filed and is pending issuance of directions, and more so if the Plaintiff succeeds in the Appeal. That interest of justice requires that this court considers this application positively and allows the interim prayers sought, by granting stay of execution pending hearing and determination of this application, and subsequently grants stay pending hearing and determination of the Appeal.

3. The Defendant opposed the Plaintiff's notice of motion application dated 9th November 2022 and stated that the application is belated, ill-conceived and misinformed for the reason that it seeks orders that are untenable in the circumstances of this case. It is vexatious and does not meet the threshold requirements for grant of the orders sought. That the application is therefore grossly incompetent, fatally defective, frivolous, vexatious, wholly unmerited and ought to be struck out ab initio for being an abuse of the court process.
4. This court has considered the application and the submissions therein. On 7th December 2021 this Court delivered a ruling allowing the Defendant's Preliminary Objection dated 13th September 2021 striking out this suit with costs for being sub judice to Mombasa Environment and Land Case No. 202 of 2016. The Plaintiff being aggrieved by the said orders of 7th December 2021 lodged an appeal at the Court of Appeal at Mombasa, being Civil Appeal No. E 10 of 2022, which appeal is pending issuance of directions. That if the order for stay is not given the appeal will be rendered nugatory and that the Defendant/Respondent has proceeded to file a party and party bill of costs. 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 applicant 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 *Mohamed 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. On perusal of the court record I find that the ruling appealed against was delivered on the 7th December 2021. This application for stay was filed on the 9th November 2022! This is nearly one year later. I find that the Applicant is guilty of inordinate delay. Furthermore this suit was struck out as there is a similar suit concerning the same parties and the same subject matter. How then will the Appeal be rendered nugatory if there is an existing suit which is similar? I find that the intended appeal is not arguable



and is 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 the above mentioned grounds to enable me grant the stay. I find the application dated 9th November 2022 is unmerited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 10TH DAY OF MAY 2023.

N.A. MATHEKA

JUDGE

