



**Mbarak v Kalolo Kibaoni Bayamagonzi Upgrading Project (sued through its chairman) & another
(Miscellaneous Application 36 of 2022) [2023] KEELC 18503 (KLR) (3 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18503 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
MISCELLANEOUS APPLICATION 36 OF 2022**

MAO ODENY, J

JULY 3, 2023

BETWEEN

ABDULKADIR ABDALLA MBARAK APPELLANT

AND

**KALOLO KIBAONI BAYAMAGONZI UPGRADING PROJECT (SUED
THROUGH ITS CHAIRMAN) 1ST RESPONDENT**

PAUL MWAMUYE 2ND RESPONDENT

RULING

1. This ruling is in respect of a Notice of Motion August 4, 2022 by the Appellant/Applicant seeking the following orders:
 - a. Spent
 - b. That this Honorable Court be pleased to grant leave to the Applicant to file an out of time.
 - c. That this Honorable court be pleased to grant orders of stay of execution of Judgment delivered on May 25, 2022 in Kilifi ELC Case No, 308 of 2019 Abdulkadir Abdalla Mbarak vs KKB Upgrading Project And Paul Mwamuye and all consequential orders issued pursuant thereto pending hearing and determination of this application.
 - d. That this Honorable court be pleased to grant orders of stay of execution of Judgment delivered on May 25, 2022 in Kilifi ELC Case no, 308 of 2019 Abdulkadir Abdalla Mbarak vs KKB Upgrading Project And Paul Mwamuye and all consequential orders issued pursuant thereto pending hearing and determination of the intended appeal.



- e. That the Memorandum of Appeal annexed herein be deemed as properly filed upon payment of the requisite filing fees.
2. The application was supported by the affidavit of Abdulkadir Abdalla Mbarak who deponed that he was the Plaintiff in Kilifi ELC case No 308 of 2019 where he sought to have *inter alia* an injunction restraining the Defendants from interfering with his peaceful enjoyment of Plot No 480, PDP No 117 (Kibaoni), a declaration that the suit property belongs to the Plaintiff and eviction orders against the 2nd Defendant who is the 2nd Respondent herein. That the suit was heard and determined whereby the same was dismissed.
 3. The Applicant also deponed that the file was taken for typing in the typing pool and that the advocate applied for the proceedings, but meanwhile the time was running out for filing the appeal.
 4. He urged the court to grant stay of execution of the Judgment pending the hearing and determination of the intended appeal.
 5. Counsel submitted on the issue of stay of execution and relied on the provisions of Order 42 Rule 6(2) together with the cases of *Charles Kariuki Njuri v Francis Kimaru Rwara (suing as Administrator of Estate of Rwara Kimaru alias Benson Rwara Kimaru (Deceased)* [2020] eKLR where the court relying on the case of *Consolidated Marine vs Nampijja & Another*, Civil App No 93 of 1989 (Nairobi), and held that the purpose of the application for stay of execution pending appeal is to preserve the subject matter in the dispute.
 6. Counsel further submitted that the Applicant has met the threshold for stay of execution pending appeal. On the issue of substantial loss counsel relied on the case of *Antoine Ndiaye v African Virtual University* [2015] eKLR where the court held that substantial loss refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or loss that is merely nominal.
 7. It was counsel's further submission that the subject matter of the suit is land and in the event a stay of execution is not granted the subject matter could cease to exist as the suit property being Plot No 480, PDP No 117 (Kibaoni) would be split into two and if this happens, the right of appeal will not be exercisable.
 8. Counsel also submitted that the application was made without unreasonable delay as the judgment was delivered on May 25, 2022 and that due to a delay of the court file in the typing pool the certified copy was sent to the advocates on record via email on July 20, 2022. That upon receipt of the certified copy the application for stay of execution dated August 4, 2022 was prepared and filed instantly and relied on the case of *John Kamangu & 2 others v Annah Njeri Kamau; Registrar for Lands Uasin Gishu County & another (Interested Parties)* [2020] eKLR the court expounded on unreasonable delay as follows:

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay being dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.”
 9. On the issue of security, counsel submitted that the court has unfettered discretion in determining whether or not security should be deposited and what security should be deposited and relied on the case of *Simba Coach Limited v Kiriya Merchants Auctioneers* [2019] eKLR



Analysis and Determination

10. This application was brought under Certificate of Urgency under the Vacation rules where leave was granted to file an appeal out of time and a temporary stay of execution. The application was canvassed vide written submission whereby the Applicant filed his submissions and at the time of writing the ruling the Respondent had not filed any.
10. The issue for determination is whether the Plaintiff has met the threshold as provided under Order 42 Rule 6(2) of the *Civil Procedure Rules* which empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the Rule 6(2) as follows:
 - "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."
10. An application for stay of execution is also at the discretion of the court but the same must be exercised judiciously. The exercise of judicial discretion was enunciated in the Court of Appeal case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 and gave guidance on how a court should exercise discretion and held that:
 - "1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."
10. Having given the background of the case on what transpired in the lower court and the processes that Applicant went through to obtain the proceedings to enable him file an appeal. I find that he has met the threshold for grant of stay of execution which had earlier been granted on a temporary basis. I now



confirm the stay of execution pending the hearing and determination of the appeal. Note that this application was undefended.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF JULY 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

