



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT MOMBASA**

**ELC CASE NO. 299 OF 2018**

**PETER MWEBI**

**SALIM SAID BISHER**

**MAIMUNA MOHAMMED SALIM**

**FLORA ADMEBA OYAYA**

**CORRINE MUENI MUSINGA**

**STEPHEN MUANGE MUTUA**

**CARALINE NYAKIO KARIMI**

**PHILIP MWITI OLERO**

**AMBASSADORS CHAPEL**

**BRIAN MWACHIO**

**JABALI CHONDO KAVU.....PLAINTIFFS/RESPONDENTS**

**VERSUS**

**JAMES SAFARI KOMBE**

**ALI KENGA MWAKAMSHA**

**SAMSON KALUME**

**HASHIM LOMA MAKAZI**

**ALI HAMISI**

**MATANO KENGA**

**NZAI KOMBE**

**KIPONDA CHOME**

**JAFFERSON CHARO**

**JUMA SAID KENGA**

**RAJAB KENGA NYONDO MAKANGA**

**ELFAS KARISA.....DEFENDANTS/APPLICANTS**

## RULING

The first application is dated 3<sup>rd</sup> June 2021 and is brought under Order 22 Rule 18, 42 Rule 6 of the Civil Procedure Rules and Section 1A, IB, 3 and 3A of the Civil Procedure Act seeking the following orders;

1. THAT this application be certified as urgent and service first instance.
2. THAT a temporary stay of execution of the decree herein be issued staying execution of the decree herein pending the hearing and determination of this application inter-partes.
3. THAT upon inter-parte hearing, there be a stay of execution of the Decree herein pending the hearing lodging of record of appeal and subsequent hearing of the Defendant/ Applicant's appeal in the Court of Appeal.
4. THAT costs to this application be provided for.

It is based on the grounds that this Court delivered its ruling on the 3<sup>rd</sup> day of June, 2021 whereupon the Defendant/ Applicant's application was dismissed. That prior to the dismissal of the said application, the Court had issued an order of stay of execution of the decree herein. That the effect of said dismissal is that the Plaintiff/Respondent are now at liberty to execute the decree herein by demolishing the Defendant/Applicants' houses. That the Defendant/ Applicants have already filed their Notice of Appeal and requested for certified copies of proceedings. That the Defendant/Respondents have got a good appeal with high chances of success. That this application has been presented without any inordinate delay. That there is urgent need to preserve the subject matter pending the determination of the Defendant/ Applicant's appeal. That the orders sought herein above do not prejudice Plaintiff/Respondents in any manner whatsoever.

The respondent submitted that from the onset there is no evidence produced before this Honourable Court that the Applicant or Applicants have any houses on the suit Property and or Plot No. 502/I/MN and that the said Plot No. 502/I/MN is the same as the Plaintiffs Plots which are clearly identified with their respective Title Deeds which were produced in evidence. That there is no documentary evidence to show that the alleged houses are duly approved by the County Government of Mombasa otherwise this Honourable Court is being requested to issue stay order to preserve illegal structures and buildings in other persons properties which ought not be allowed or at all. That all the allegations in respect to the alleged history of the property is a creation of the Applicants with no proof at all and there is no single document to proof ownership, occupation, usage, development/construction of any structures and buildings which need to be preserved, this Honourable Court is being asked to issue orders without any legal basis. That all the Plaintiffs herein are in occupation, usage and control of their respective parcels of land and it is totally unlawful, illegal and contravention of the Constitution in respect of protection of private property to expect the title owners to be refused to use their land in favour of professional squatters without any single documentary evidence to support their alleged occupation, usage and or construction of houses. That the Applicants have not offered any security for the orders of stay to be issued pending Appeal and on that ground alone the Applicants should be rejected.

The second application is dated 26<sup>th</sup> July 2021 and is brought under Section 14 of The Environment and Land Court Act, 2011 seeking the following orders;

1. THAT this application be certified as urgent and service be dispensed with in the first instance.
2. THAT the court do give directions to the hearing of this application.
3. THAT the 7<sup>th</sup> Plaintiff/Respondent be committed to Civil Jail and/or fined a sum not exceeding Kshs 20,000,000/= for being in contempt of the Court orders of the 8<sup>th</sup> day of June, 2021
4. THAT costs to the application be provided for.

The grounds are that this court issued orders of stay of execution of the decree herein on the 8<sup>th</sup> day of June, 2021. That the said order was duly served upon the Plaintiff/Respondents. That all the Plaintiff/Respondents have complied with the stay order save the 7<sup>th</sup> Plaintiff/Respondent. That the 7<sup>th</sup> Plaintiff/Respondent has since invaded into some of the Defendant/ Applicant's houses and partially demolished the same. That the 7<sup>th</sup> Plaintiff/Respondent was shown the court orders at the time of such demolition but could not stop and/or obey the same. That the Officer commanding Bamburi Police Station made efforts to enforce the said orders by sending his officers but the 7<sup>th</sup> Plaintiff/Respondent could not be shaken. That the 7<sup>th</sup> plaintiff/Respondent has caused a lot of damage and destruction on the ground which damage he must be held liable. That a court of law does not issue orders in vain and court orders must be obeyed at all times. That it would be fair, just and reasonable that the orders sought herein above are granted for the best interest of justice.

The 7<sup>th</sup> Respondent Maurice Muli Mutua, submitted that he is the Purchaser for value and registered owner of Plots No. 19807 & 19808/I/MN (CR 59673 & CR 59674) respectively. Annexed are self-explanatory documents marked collectively as exhibit "MMM-1". That he was not served by any party any court order for Stay in respect of his two (2) identified plots stopping him from using, accessing and/or developing the said plots. That the decree issued by this Honourable Court on 16<sup>th</sup> October, 2019 was duly executed and he took possession of his plot as per the letter dated 20<sup>th</sup> January, 2021 addressed to the Deputy Registrar. A copy of the letter is marked as exhibit "MMM-2" and copy of the decree is also marked as exhibit "MMM-3". That as at 8<sup>th</sup> June, 2021 there were no execution proceedings which were to be stayed. That he has never disobeyed any court order and that there are absolutely no good reasons and/or basis established to warrant this Honourable Court to issue very drastic orders against him and indeed no basis has been laid for the issuance of Prayer No. 3 of the Application.

This court has carefully considered the first application dated 3<sup>rd</sup> June 2021 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.”*

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.

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) 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.”*

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.....”*

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 .....*”

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.”*

From the grounds, in the application the applicant being aggrieved with the judgment delivered by this court on 23<sup>rd</sup> June, 2020 have filed a notice of appeal. 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 3<sup>rd</sup> June 2021 has no merit and I dismiss it with costs.

On the second application dated 26<sup>th</sup> July 2021 the applicant seeks to have the 7<sup>th</sup> Respondent committed to civil jail for failing to obey the court's interim orders issued on 8<sup>th</sup> June 2021. The Respondent stated that he was not served by any party any court order for stay in respect of his two (2) identified plots stopping him from using, accessing and/or developing the said plots. That the decree issued by this Honourable Court on 16<sup>th</sup> October, 2019 was duly executed and he took possession of his plot as per the letter dated 20<sup>th</sup> January, 2021 addressed to the Deputy Registrar. No evidence has been adduced of service of the said stay order and in any event the same has been overtaken by event as the first application for stay has now been dismissed. I find this application is not merited and I dismiss it with costs to the 7<sup>th</sup> Respondent.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 9<sup>TH</sup> NOVEMBER 2021.**

**N.A. MATHEKA**

**JUDGE**