



REPUBLIC OF KENYA



KENYA LAW
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**Mbanda & another v Mbanda & 3 others (Environment & Land Case
171 of 2017) [2020] KEELC 879 (KLR) (26 October 2020) (Ruling)**

Bonventure Oundo Mbanda & another v John Owundo Mbanda & 4 others [2020] eKLR

Neutral citation: [2020] KEELC 879 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

ENVIRONMENT & LAND CASE 171 OF 2017

NA MATHEKA, J

OCTOBER 26, 2020

BETWEEN

**BONVENTURE OUNDO MBANDA 1ST PLAINTIFF
KENNEDY OUNDO 2ND PLAINTIFF**

AND

**JOHN OWUNDO MBANDA 1ST DEFENDANT
PETER MWANZA ALIAS PETER OUNDO KANUTI 2ND DEFENDANT
WINDRICK OPARANYA WAMUKOYA 3RD DEFENDANT
SIMON OKWAKO 4TH DEFENDANT**

RULING

1. The application is dated 3rd July 2020 and is brought under section 1A, 1B and 3A of the [Civil Procedure Act](#) and order 22 rule 52, order 42 rule 6 (1) of the Civil Procedure Rules seeking the following orders;
 1. That this application be certified as urgent and heard ex parte in the first instance.
 2. That upon (1) above, the honourable court be pleased to issue an ex parte temporary order of stay of execution of the decree herein issued on 17th December, 2019 pending inter parties hearing of the application herein.
 3. That upon inter parties hearing thereof, the honourable court be pleased to issue an order of stay of the decree herein issued on 17/12/2019 pending filing and hearing of the intended appeal.



4. That the damage caused to the defendant's tree plantation be assessed by the forester and the same be preserved until the hearing of this application.
 5. That this honourable court do interpret the judgment delivered on 17th December, 2019 more so order No. 3 of its final orders.
 6. That costs of this application be provided for.
2. It is based on the affidavit of Windrick Oparanya Wamukoya and the grounds that this honourable court delivered judgment on 17th December, 2019 in favour of the plaintiff/respondent. That pursuant thereto the 1st plaintiff/respondent has begun cutting the 3rd defendants/applicant trees on a portion of land parcel No. S. Wanga/Lureko/2513. That the orders of this honourable court made on 17th December, 2019 did not grant the 1st plaintiff/applicant permission to evict, destroy any crop or developments on the suit land. That the 3rd defendant/applicant has complied with the orders issued by this honourable court on 17th December, 2019. That the 3rd defendant/applicant is aggrieved by the judgment of the honourable court issued on 17th December, 2019 and has intentions to appeal. That if the orders sought are not granted, the 3rd defendant/applicant shall suffer irreparable loss occasioned by the acts of the 1st plaintiff/applicant. That the 1st plaintiff/applicant has already cut down the 3rd defendant/applicants tree plantation on almost one (1) acre of the suit land. That the 3rd defendant/applicant has a good appeal with high chances of success. That the 3rd defendant had developed his portion on the suit land. That the 3rd defendant/applicant has complied with the orders issued by this honourable court. That no orders of eviction were given by the honourable court but the plaintiff has proceeded evicting the 3rd defendant/applicant. That if the orders sought are not granted, the appeal will be rendered nugatory and the 3rd defendant shall suffer irreparable damage. That the 1st plaintiff/respondent will not suffer undue prejudice as he will be given an opportunity to present his case. That it is in the interest of justice that the prayers sought be granted.
3. This court has carefully considered the application 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.”
4. 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.

5. 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.”
5. 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.....”

6. 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”

7. 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.”

8. From the grounds, that the 3rd defendant/applicant is aggrieved by the judgment of the honourable court issued on 17th December, 2019 and has intentions to appeal. That if the orders sought are not granted, the 3rd defendant/applicant shall suffer irreparable loss occasioned by the acts of the 1st plaintiff. That the 1st plaintiff has already cut down the 3rd defendant/applicants tree plantation on almost one (1) acre of the suit land. That the 3rd defendant/applicant has a good appeal with high chances of success. 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. On the issue of interpreting the judgment delivered on 17th December, 2019 that is, order No. 3 of its final orders, I find that the order is clear as it is a permanent injunction. The issue as to whether the decision was sound or not can only be determined on appeal. I find this application has no merit and I dismiss it with costs.
9. It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 26TH OCTOBER 2020.

N.A. MATHEKA

JUDGE

