



Lakeview Investment Limited v Ndege & 2 others (Environment and Land Case 211 of 2011 & 156 of 2018 (Consolidated)) [2025] KEELC 5674 (KLR) (29 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5674 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE 211 OF 2011 & 156 OF 2018 (CONSOLIDATED)
NA MATHEKA, J
JULY 29, 2025

BETWEEN

LAKEVIEW INVESTMENT LIMITED PLAINTIFF

AND

JENNIFER WAITHIRA NDEGE 1ST DEFENDANT

MANWAH BWOSIEMO MAGARA 2ND DEFENDANT

AL RUHIA ESTATES LIMITED 3RD DEFENDANT

RULING

1. The application is dated 31st March 2025 and is brought under Article 50 and 159 of *the Constitution* of Kenya, 2010, Order 42 Rule 6 and Order 51 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act* seeking the following orders;
 1. That this Application be certified urgent, service thereof be dispensed with and the same do proceed and interim orders of status-quo be issued ex-parte in the first instance.
 2. That the Honourable Court be pleased to stay the execution of the Judgment/Decree of the Machakos ELC Court delivered on 27th March, 2025 in ELC. No. 211 of 2011 (as consolidated with ELC No. 156 of 2018) together with all consequential orders issued thereto pending the hearing and determination of the application inter-partes.
 3. That the Honourable Court be pleased to stay the execution of the Judgment/Decree of the Machakos ELC Court delivered on 27th March, 2025 in ELC. No. 211 of 2011 (As consolidated with ELC No. 156 of 2018) together with all consequential orders issued thereto pending the hearing and determination of the intended Appeal in the Court of Appeal.
 4. That costs of this Application be provided for.



2. It is based on the grounds that the Applicant purchased the suit property, being L.R No. 25692 measuring approximately seven (7) acres for valuable consideration from the 1st and 2nd Defendants vide an Agreement for Sale dated 22nd January, 2010. That the interest sold was the unexpired residue of the 1st Defendant's leasehold estate of 99 years from 1st April, 1995. That the completion period was 180 days from the date of the execution of the Sale Agreement or such earlier or subsequent date as may be agreed upon by the parties. That at the time of the execution of the said Agreement, the 1st Defendant had not been registered as the proprietor of the suit property. That it was a term of the said Agreement that on the completion date, the 1st Defendant would deliver to the Plaintiff/Applicant all the completion documents as particularized in Clause 4.2.1 to 4.2.7 of the Sale Agreement including the original Certificate of Title. That it was a term of the said Agreement that the Plaintiff/Applicant would take vacant possession of the suit property upon payment of the balance of the purchase price but was at liberty to fence-off the suit property upon payment of the agreed deposit of the purchase price.
2. That despite failing to supply the Plaintiff/Applicant with the completion documents in terms of Clause 4 of the Sale Agreement, they endeavored to pay the 1st and 2nd Defendants the entire purchase price of the suit property and subsequently took possession of the suit property. That despite having obtained the original Certificate of Title in her name and having received the entire purchase price of the suit property, the 1st Defendant reneged on the terms of the Sale Agreement and instead transferred her interest in the suit property to the 3rd Defendant while the Sale Agreement dated 22nd January, 2010 was still subsisting. That being a land-buying Company, the Plaintiff/Applicant had upon taking possession of the suit property informally sub-divided the suit property into several sub-plots and sold the same to third parties.
3. That the third parties who purchased the sub-plots from the Plaintiff/Applicant have since invested heavily on their respective sub-plots and constructed permanent dwelling homes where they currently reside with their families and have been in possession for over seven (7) years.
4. That the Plaintiff/Applicant instituted the suit herein against the Defendants seeking inter-alia specific performance of the terms of the Sale Agreement dated 22nd January, 2010 and for the cancellation of the 3rd Defendant's title. That in its Judgment delivered on 27th March, 2025, the court dismissed inter-alia the Plaintiff/Applicant's claim for specific performance and proceeded to issue the following orders as against the Plaintiff:
 - a. An injunction restraining the Plaintiff and/or its agents from trespassing, entering, remaining, fencing, selling, offering for sale, transferring, charging and/or in any way whatsoever interfering with the 3rd Defendant's quiet enjoyment of the suit property.
 - b. An eviction order to issue against the Plaintiff and/or its agents including demolition of the illegal structures in the suit property.
 - c. The Plaintiff to refund the 3rd Defendant a sum of Kshs. 2,650,000/= it had received from the 3rd Defendant as deposit of the purchase price of portions of the suit property.
 - d. The OCS Mlolongo Police Station to enforce the eviction order.
5. That the aforesaid drastic orders are going to affect third parties who had genuinely purchased sub-plots from the Plaintiff/Applicant without notice of any defect in either the 1st Defendant's title and/or the Plaintiff's right of interest in the suit property. That the Plaintiff/Applicant is bound to incur substantial losses in lieu of compensation that may be sought against it by third parties who had genuinely purchased the sub-plots and erected permanent dwellings structures thereon in the event



an order of staying the execution of the Judgment/Decree is not granted. That the Applicant has a constitutional right of appeal and it is only fair and in the interest of justice to allow the Applicant to ventilate its grievances before the Court of Appeal without the risk of the suit property being adversely interfered with by way of eviction and destruction of property worth millions of shillings thus rendering the intended Appeal vacuous and nugatory. That it is just for this Honourable Court to hear and determine expeditiously the instant Application pending the lodging and determination of the intended Appeal to obviate the Applicant's intended Appeal being rendered nugatory. That the Applicant has a merited Appeal as is exemplified in the draft Memorandum of Appeal attached to this Application. That it is only fair and in the interest of justice that an order of stay of execution be issued restraining the enforcement of the orders given pursuant to the Judgment delivered on 27th March, 2025 pending the hearing of the instant Application and the intended Appeal. That the Applicant has already applied for certified typed copies of the Proceedings, Decree and Judgment.

6. This court has considered the application and the submissions therein. 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.

7. 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.”

8. 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.....”

9. 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

10. We are further guided by the 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.”

11. The Respondent stated that from the amended plaint and judgement there is no occupation by the Applicant or Third Parties. That they have failed to establish that substantial loss will be suffered and have failed to provide security for costs. That the draft grounds of appeal are based on matters of fact and not law.

12. I find that the Applicant is not guilty of laches as judgement was delivered on 27th March 2025 and this application was filed on 31st March 2025. The Plaintiff/Applicant submitted that it is bound to incur substantial losses in lieu of compensation that may be sought against it by third parties who had genuinely purchased the sub-plots and erected permeant dwellings structures thereon in the event an order of staying the execution of the Judgment/Decree is not granted. No evidence has been adduced to show the extent of this occupation. The Applicant testified that they took possession, subdivided



and sold on the strength of an allotment letter and before the completion of the sale agreement! Indeed, the evidence on record is that the 3rd Defendant is in possession. Secondly the draft memorandum attached to the application on the grounds of appeal does not raise an arguable appeal and I do not find 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 failed to fulfil the above grounds mentioned to enable me grant the stay. I find that the application is not merited and is dismissed with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF JULY 2025.

N.A. MATHEKA

JUDGE

