



**Gumba & 6 others v Abdallah (Environment and Land Appeal
E027 of 2023) [2024] KEELC 295 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 295 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E027 OF 2023
NA MATHEKA, J
JANUARY 31, 2024**

BETWEEN

**JOSHUA OSIMBO GUMBA 1ST APPELLANT
DANIEL KAPANGA SIMIYU 2ND APPELLANT
PHILIP MUNYONYI MAKANDE 3RD APPELLANT
MBEYU RAMBI CHONGA 4TH APPELLANT
PILI TSUMA CHIBOYI 5TH APPELLANT
JUMA KARISA KENGA 6TH APPELLANT
JOSEPH WAINAINA KIARIE 7TH APPELLANT**

AND

MASJID RASHID ABDALLAH RESPONDENT

RULING

1. The application is dated 19th September 2023 and is brought pursuant to Section IA, 1B, 3A of the [Civil Procedure Act](#), Order 42 Rule 6 Order 51 Rule 1 of the *Civil Procedure Rules* 2010 and under Article 159 of [the Constitution](#) of Kenya seeking the following orders;
 1. That the Application herein be certified urgent and service be dispensed with in the first instance.
 2. That the Honorable court be pleased to issue an order for Stay of Execution of the Judgement and Decree delivered on 29th August, 2023 pending hearing and determination of the said Appeal.



3. That Prayer 2 above be issued *ex parte* in the first instance pending hearing and determination of the Application.
2. It is premised on the following grounds that the Respondent had filed Civil suit MSA MCCC No. 2198 of 2018 against the Appellants/Applicants in 2018 for trespass and eviction from Plot No. Mombasa/4800, 4801, 4802 and 4803 Section 111/MN. Both parties were heard and Judgement was delivered by Hon. J. B. Kalo on the 29th August, 2023 in favour of the Respondent herein. The Appellants aggrieved by the said decision have proffered this Appeal against the whole Judgement of the Hon. J.B. Kalo Chief Magistrate. The trial Magistrate erred in law and fact when he failed to make a finding that the Appellants having been on the land from 1989 had acquired rights to the suit property by 24th October 2018 when the Respondent filed the suit against them. That the Appellant/Applicants have been residing on the suit property for over 37 built permanent structures thereon. The Application has been filed without inordinate delay and has high chances of success. If the orders sought are not granted the more than 50 traders and families risk imminent eviction from the land. The Appellant/Applicants stand to suffer irreparable loss unless the orders sought herein are granted. It is in the interest of justice the application herein be allowed.
3. The Respondent states that he is the registered owner of all the suit properties, after he bought the same empty with no structures on them ("MRA-I" copies of the Title Deeds and Deed Plans). That after full trial the Court proceeded to give orders for eviction of the Appellants. That the Appellants' Appeal herein have very limited chance of success since the Appellants are professional squatters with no permanent structures of the suit property (a copy of the Surveyor's Report dated 15th October 2018 was produced and marked 'MRA-I'). That there is absolutely no trade or market being conducted in the suit properties by the Appellants, since the same has not been approved by the County Government of Mombasa and no evidence of the market or business premises have been produced. That he is entitled to possession of his properties as of right the Appellants' Application should be dismissed.
4. 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.”
5. 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.”



6. 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) v 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 v 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 v 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 v 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. On perusal of the court record I find trial court delivered judgement on the 29th August, 2023 in favour of the Respondent herein. The Appellants aggrieved by the said decision have proffered this Appeal against the whole Judgement. They argue that the trial Magistrate erred in law and fact when he failed to make a finding that the Appellants having been on the land from 1989 had acquired rights to the suit property by 24th October 2018 when the Respondent filed the suit against them. That they are over 37 built permanent structures with more than 50 traders and families risking imminent eviction from the land. I find that the intended appeal and this application has been made without unreasonable delay. Secondly, I am persuaded that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory as the Appellants would have been evicted. I find that the applicant has fulfilled the above grounds mentioned to enable me grant the stay. I find the application dated 19th September 2023 is merited and I grant prayer 2 thereof. Costs to be in the cause.
12. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 31ST DAY OF JANUARY 2024.

N.A. MATHEKA

JUDGE

