



**Mwalambe & another v Freedom Limited (Environment & Land Case  
132 of 2018) [2024] KEELC 279 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 279 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 132 OF 2018  
FM NJOROGE, J  
JANUARY 31, 2024**

**BETWEEN**

**CHAI LWAMBI MWALAMBE ..... 1<sup>ST</sup> PLAINTIFF**

**THOMAS LWAMBI MWALAMBE ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**FREEDOM LIMITED ..... DEFENDANT**

**RULING**

1. The Applicants filed a Notice of Motion brought under Order 42 Rule and Order 53 of the Civil Procedure Rules seeking the following orders:
  - a. Spent
  - b. Spent
  - c. That this honourable court be pleased to issue stay of execution of the Consent Order dated 21<sup>st</sup> August 2020 pending the hearing and determination of Appeal.
  - d. That costs of this application be in the cause.
2. The grounds are as set out on the face of the Application and the supporting affidavit of Chai Lwambi Mwalambe who deponed that on 21<sup>st</sup> August 2020 he and the Defendant entered into an alleged consent which terms were that the Defendant would get 8 acres whereas he would retain 3 acres. He averred that sometime in October 2014, a survey was conducted confirming the actual measurements of the said parcel of land being Kilifi/ Mgumopatsa/Mazeras/953 to be 17 acres and not 11 acres as indicated. Consequently, the Registrar was to amend the Title deed to reflect the same. It was also stated that the Defendant is in the process of enforcing an erroneous Order of eviction that will likely cause him irreparable damage from the other unaccounted land despite the Plaintiff initiating an appeal. Further, it is urged that if the order for stay is not granted, the appeal will be rendered nugatory.



3. In response, the Defendant filed a replying affidavit sworn by Harji Govind Ruda, the Defendant's director who deponed that the instant application is a replica of the applications dated 21<sup>st</sup> March 2022 and 1<sup>st</sup> December 2022, and that a ruling was delivered on 10<sup>th</sup> November 2022 in respect of the application dated 21<sup>st</sup> March 2022 dismissing the same. He further deponed that the Plaintiff herein has also filed another matter on the same cause of action at the Principal Magistrate's court at Kaloleni involving same parties herein.

### **Analysis and determination**

4. The application was disposed of by way of written submissions. I have considered the submissions by the parties as well as the authorities relied upon. The issue for determination is whether the prayer for stay of execution pending appeal is merited.
5. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:

“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.
6. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that an appeal exists; (b) that substantial loss may result to the applicant unless the order is made, (c) that the application has been made without unreasonable delay, and (d) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. (See *Antoine Ndiaye v African Virtual University* [2015] eKLR.)
  7. Regarding whether there is an appeal filed I have examined the court record and found that a copy of a memorandum of appeal in C.A. NO. 22 of 2023 has been attached to the application and that annexure settles the question. This is more so for the reason that this court finds the issue not controverted by the respondent throughout its response.
  8. As to whether risk of substantial loss has been established, this court notes that the claim by the applicant is that the respondent is in the process of enforcing an erroneous order that may occasion him irreparable damage. I have noted that as per its clause 1. the consent suggests that the aggregate acreage of the portions shared between the consenters and which form the whole suit parcel is 11 acres.
  9. It was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of



substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

10. In the instant Application, the Plaintiffs aver that they stand to suffer irreparable loss should the consent be enforced as 6 (six) acres of land will be unaccounted for. They further submitted that they have built permanent structures on the 6 acres of land being a family house among other structures. The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

11. In the instant Application, I am satisfied that the Applicants have demonstrated that they are likely to suffer substantial loss of the six unaccounted acres of land. If not granted the stay of execution, the substratum of the suit shall not be preserved and the appeal shall be rendered nugatory. Additionally, there is no prejudice to be suffered by the Defendant that cannot be compensated by way of costs if the orders sought issue.
12. Regarding if the application has been brought expeditiously, the respondent avers that the consent was recorded in January 2020 and that the delay in bringing the application has not been explained. However, the application itself was filed on 16/10/2023, and it is the ruling of Makori J dated 31/5/2023, at least as per the memorandum of appeal that I have referred to herein above, that is being appealed against. That ruling is obviously of a much later date than the consent or the endorsement thereof. What matters therefore is the period between the date of that ruling and that of the present application, a period of about four and a half months. Considering the circumstances of the present litigation, and it has had a long history, I find that there has not been any inordinate delay in the filing of the application.
13. The outcome is that the Notice of Motion dated 16<sup>th</sup> October 2023 is hereby allowed with no orders as to costs on condition that the applicant shall if he has not so already, file and serve the record of appeal on the respondent within 30 days of this order in default of which condition the orders of stay granted herein shall automatically lapse. The costs of the application shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC MALINDI.**

