



Mwadumbo v Said Bin Seif Properties Limited (Environment and Land Appeal E018 of 2023) [2024] KEELC 283 (KLR) (30 January 2024) (Ruling)

Neutral citation: [2024] KEELC 283 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E018 OF 2023
NA MATHEKA, J
JANUARY 30, 2024**

BETWEEN

SALIM ALI MWADUMBO APPELLANT

AND

SAID BIN SEIF PROPERTIES LIMITED RESPONDENT

RULING

1. The application is dated August 14, 2023 and is brought under order 42 rule 6 of the [Civil Procedure Rules](#), sections IA, 1B, 3A and 63(e) of the [Civil Procedure Act](#), article 159 of [the Constitution](#) seeking the following orders;
 1. That this application be heard ex-parte and service be dispensed with in the first instance on account of its urgency.
 2. That the Honourable court be pleased to grant a stay of execution pending the hearing and determination of the Application.
 3. That the Honourable court be pleased to grant a stay of execution pending the hearing and determination of this appeal.
 4. That costs of this application be provided for
2. It is application is brought based upon the following grounds that the Appellant filed an application dated 8th March 2023 seeking to set aside the interlocutory judgment. The Honourable Magistrate, on 11th August 2023, dismissed the said application and declined to give a stay of execution thus allowing the Respondents to proceed with execution. The Appellant has filed an appeal to the said decision which appeal has a high chance of success. Since there is an imminent risk of execution, unless urgent orders for stay are granted herein the applicant stands to suffer substantial loss as execution will issue, he will lose his property and his appeal herein will be rendered nugatory. If this matter is not



heard forthwith and orders granted the Appellant will be exposed to losing his hard-earned property which situation can be circumvented by this honourable court exercising its discretion in favour of the Appellant. The Appellant is ready and willing to comply with any conditions given by this honourable court once the orders herein are granted. This application has been made without undue delay.

3. The Respondent states that the said applications are fatally defective, badly constituted, an afterthought, spurious and an abuse of this Honorable Court's process. In making the said applications, the appellant has withheld material facts and is guilty of non-disclosure of the said material facts by failing to inform the Honourable Court that they have been forum shopping and filed a similar application for stay of execution in the High Court under HCCA/E215/2023 wherein the Hon Judge (Kizito J) directed that the High Court does not have jurisdiction to hear a land dispute and ordered that the entire file be transferred to the Environment and land Court. The appellant is further guilty of forum shopping and abusing this courts process by filing a similar application in the trial court for stay of execution of the trial court's ruling on 18.8.23 two days after being denied interim relief by this honourable court on 16.08.23. The defendant is accordingly abusing the court's process by filing similar applications in different fora in a bid to secure interim orders and a different outcome. The appellant's motion for stay of execution is pending in the trial court and is scheduled for a mention for submissions on November 27, 2023. This honorable court in entertaining the said application risks being called into disrepute and being exposed to ridicule and embarrassment in issuing contradictory orders with the trial court. The said applications have been overtaken by events since the respondent acting on the trial courts orders dated 24th August 2023 (which have not been set aside) evicted the appellant from the premises on 7th September 2023. Accordingly, the orders being sought for by the appellant are incapable of enforcement at this stage. The trial court in its directions dated 22nd September 2023 held clearly that the status quo prevails meaning that the appellant having been evicted ought not be reinstated to the premises. It is also trite that any orders for stay of execution are subject to the appellant issuing security for costs for the decree issued by the trial court. The appellant has failed to undertake in the said applications his willingness to pay the decretal amounts ordered by the trial court in its decree dated 24th February 2023. The appellant has accordingly approached this honourable court with unclean hands demanding equity, and it is for the forgoing reasons that we urge this Honorable Court to peremptorily strike out the said application with costs.
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.”

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.
6. 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.”
7. 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.....”

8. 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”



9. 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."

10. On perusal of the court record I find the Appellant filed an application dated 8th March 2023 seeking to set aside the interlocutory judgment. The Honourable Magistrate, on 11th August 2023, dismissed the said application and declined to give a stay of execution thus allowing the Respondents to proceed with execution. The Appellant has filed this appeal to the said decision. The Respondent submitted that the said applications have been overtaken by events since the respondent acting on the trial courts orders dated 24th August 2023 (which have not been set aside) evicted the Appellant from the premises on 7th September 2023. Accordingly, the orders being sought for by the appellant are incapable of enforcement at this stage. The trial court in its directions dated 22nd September 2023 held clearly that the status quo prevails. I find that this application is not only subjudice but an abuse of the court process. I concur that the Appellant is forum shopping by filing multiple applications. 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 the above grounds mentioned to enable me grant the stay. I find the application dated 14th August 2023 is unmerited and I dismiss it with costs.

11. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 30TH DAY OF JANUARY 2024.

N.A. MATHEKA

JUDGE

