



Chief Nakuruto Location & 2 others v Nzungula (Environment and Land Appeal 18 of 2023) [2024] KEELC 122 (KLR) (Environment and Land) (23 January 2024) (Ruling)

Neutral citation: [2024] KEELC 122 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL 18 OF 2023
NA MATHEKA, J
JANUARY 23, 2024**

BETWEEN

**CHIEF NAKURUTO LOCATION 1ST APPELLANT
DISTRICT LAND ADJUDICATION OFFICER 2ND APPELLANT
THE HON ATTORNEY GENERAL 3RD APPELLANT**

AND

MARTINA KALUMU NZUNGULA RESPONDENT

RULING

1. The application is dated October 5, 2022 and is brought under order 42 Rule 6, 51 Rule 1 of the [Civil Procedure Rules](#) 2010, sections IA, 1B, 3, 3A and section 63 (e) of the [Civil Procedure Act](#) Cap 21 seeking the following orders;
 - a. That the application be certified as urgent and be heard ex-parte in the first instance and thereafter on priority basis in view of its urgent nature and that service be dispensed with in the first instance.
 - b. That pending the inter partes hearing of this Application, this Honourable court be pleased to stay execution of the ruling delivered on September 29, 2022 and all consequent proceedings, subsequent execution proceedings thereto, together with all consequential orders.
 - c. That this Honourable Court be pleased to stay execution of the ruling delivered on September 29, 2022 and all consequent proceedings and subsequent execution proceedings thereto together with all consequential orders pending the hearing and determination of the intended appeal.



- d. That the costs of the application be provided for.
2. It is based upon the following grounds that the Principal Magistrate's Court at Taveta delivered a ruling in respect to the Plaintiff's application dated June 20, 2022 on September 29, 2022. The applicant intends to exercise its right to appeal against the ruling delivered on September 29, 2022 which ruling is the subject matter of this Application. The applicant has already filed a memorandum of appeal and applied certified copies of the proceedings in respect of the suit to enable it mount the Appeal. Unless the orders herein are granted and the execution proceedings which is the subject matter of this application stayed the applicant's appeal shall be rendered nugatory and consequently unduly interfere with the applicant's right of appeal. That the right of appeal is a constitutional right that actualizes the right to access to justice, protection and benefit of the law whose essential substance encapsulates that the appeal should not be rendered nugatory, for anything that renders the appeal nugatory impugns on the very right of appeal. That unless the orders sought herein are granted the applicant is likely to suffer irreparable harm/ or loss.
 3. The respondent stated that on September 14, 2020, the honourable Trial Court made an order of temporary injunction against the Respondent together with their agents and/or workers from entering, encroaching, doing construction and interfering with a portion of the suit measuring approximately 2 acres pending the determination of the suit in Taveta ELC 8 of 2020 (Annexed and marked IWW-I is a copy of the order). That the orders were served upon all the Respondents and as a consequence of continued breach of the terms of the order dated September 14, 2020, he made an application to cite the 1st appellant herein for contempt of court as he had since moved into the suit property. That upon hearing his application for contempt dated June 20, 2022, the trial court delivered a ruling on September 29, 2022 finding the 1st appellant guilty of contempt of court. That in the spirit of goodwill and in recognizing that the 1st appellant was a state officer, the court in its wisdom allowed the 1st appellant 7 days stay and granted him an opportunity to purge the contempt. The matter was when then set down for mention on October 6, 2022. That on October 13, 2022, the appellant appeared and personally sought the trial courts indulgence to purge the contempt by vacating the premises. That it is therefore not entirely true that the 1st appellant is at risk of being committed to Civil Jail and or pay a fine as the trial court has granted him time upon his request to purge the contempt. That furthermore and by the request made by the appellant in court on October 13, 2022 to purge the contempt, his application dated October 5, 2022 has since been overtaken by events.
 4. That there has been no imminent risk of committal to civil jail or to occasion the 1st appellant irreparable harm and as such no prejudice is to be suffered by the appellant. That the 1st appellant has not offered security for costs as is required by the law. That it is therefore in the greater interests of justice that the 1st appellants application be dismissed as it is driven by bad faith and amounts to an abuse of this honourable court's process.
 5. 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.”

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 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 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

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.”

10. On perusal of the court record I find trial court delivered a ruling on 29th September 2022 finding the 1st appellant guilty of contempt of court. The respondent submitted that on October 13, 2022, the appellant appeared and personally sought the trial courts indulgence to purge the contempt by vacating the premises. That it is therefore not entirely true that the 1st appellant is at risk of being committed to Civil Jail and or pay a fine as the trial court has granted him time upon his request to purge the contempt. That on October 27, 2022 the 1st appellant and his counsel confirmed to the court that the 1st appellant had vacated the disputed portion and hence had purged the contempt. I find that this application has been overtaken by events. Be that as it may, I also find that the intended appeal is not arguable and is frivolous. Court orders must be obeyed. 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 October 5, 2022 is unmerited and I dismiss it with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED ELECTRONICALLY VIA EMAIL THIS 23RD DAY OF JANUARY 2024.

N.A. MATHEKA

JUDGE

