



REPUBLIC OF KENYA



**Mwakaba & another v Kimbio (Environment and Land Appeal
E005 of 2023) [2024] KEELC 123 (KLR) (23 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 123 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND APPEAL E005 OF 2023
NA MATHEKA, J
JANUARY 23, 2024**

BETWEEN

KELVIN MWAKABA 1ST APPLICANT

BETHUEL NGUTA 2ND APPLICANT

AND

THOMAS WANDETO KIMBIO RESPONDENT

RULING

1. The application is dated 10th November 2023 and is brought under Order 51 Rule 1 and Order 42 Rule 6 of the Civil Procedure Rules, 2010 and Sections IA, 1B, 3 and 3A of the [Civil Procedure Act](#), Cap 21 Laws of Kenya seeking the following orders;
 1. That the application be certified urgent and be heard ex parte in the first instance.
 2. That there be a stay of execution of the court's judgment dated 30th October, 2023 and any other consequential orders and/or decree thereto pending the hearing and determination of this application inter-parties.
 3. That there be a stay of execution of the court's judgment dated 30th October, 2023 and any other consequential orders and/or decree thereto pending the hearing and determination of the appeal herein.
 4. That the costs of this Application be in the cause.
2. It is based on the supporting affidavit of the 1st Applicant/Appellant and on the following grounds that the honourable trial court delivered its judgment in Voi MCELC NO. E040 of 2021 (Thomas Wandeto Kimbio vs Kelvin Mwakaba and Bethuel Nguta) on 30th October, 2023 essentially allowing the Respondent's claim. That in its Judgment, the honourable trial court proceeded to issue a permanent injunction as well as an eviction order against the applicants/appellants herein from the suit property



directing that they vacate on or before 30th December, 2023. That upon an application by counsel, the honourable trial court was kind enough to allow a stay of execution for Sixty (60) days up until 30th December, 2023 when the Applicants/Appellants, should have vacated the property willingly. That the stay as granted by the honourable trial court meant that in the intervening period, the applicants/appellants should make arrangements towards vacating and/or granting vacant possession upon the respondent. That upon expiry of the stay period granted by the honourable trial court, it is expected as directed by the court, that the Applicants/Appellants will vacate the suit property and/or be forcefully evicted. That in the event the said eviction is resulted to, the Applicants/Appellants who were dissatisfied by the decision of the honourable trial court, shall suffer irreparable harm as they and their families, shall be rendered destitute and homeless from a place they have called home for years. That the Applicants/Appellant have filed an appeal together herewith challenging the said Judgment delivered on 30th October 2023.

3. 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.”
4. 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.
 5. 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.”

6. 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.....”

7. 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”

8. 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.”

9. On perusal of the court record I find trial court delivered judgement on 30th October, 2023 essentially allowing the Respondent’s claim. In its Judgment, the honourable trial court proceeded to issue a permanent injunction as well as an eviction order against the Applicants/Appellants herein from the suit property directing that they vacate on or before 30th December, 2023. The Appellants have filed an appeal together herewith challenging the said Judgment delivered on 30th October 2023 and state that they will suffer irreparable damage as they have lived there with their families from 2013. 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 10th November is merited and I grant prayer 3. Costs to be in the cause.

10. It is so ordered.

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

N.A. MATHEKA

JUDGE

