



**Mwatele v Mwakulomba (Environment and Land Appeal 19 of 2023)  
[2024] KEELC 137 (KLR) (Environment and Land) (23 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 137 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VOI  
ENVIRONMENT AND LAND  
ENVIRONMENT AND LAND APPEAL 19 OF 2023  
NA MATHEKA, J  
JANUARY 23, 2024**

**BETWEEN**

**CASSIAN MWIKAMBA MWATELE ..... APPELLANT**

**AND**

**AGNES MKAMAGHANGA MWAKULOMBA ..... RESPONDENT**

**RULING**

1. The application is dated 15<sup>th</sup> September 2023 and is brought under Section 3A, 75 & 78 of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 42 Rules 6 and Order 51 Rules 1 of the *Civil Procedure Rules* 2010 seeking the following orders;
  1. That this Application be certified as urgent and be heard ex- parte in the first instance
  2. That the Honourable Court be pleased to order a stay of execution of the Judgment and Decree issued in Voi CMCC No. 5 OF 2020 by Hon. T. N. Sinkiyian SRM on 3<sup>rd</sup> October 2022, pending the hearing and determination of this Application.
  3. That the Honourable Court be pleased to order a stay of execution of the Judgment/Decree issued in Voi CMCC No. 5 OF 2020 by Hon. T. N. Sinkiyian, SRM on 3<sup>rd</sup> October 2022 pending the hearing and determination of the appeal
  4. That the Honorable Court be pleased to issue such orders that it deems fit and just to grant in the circumstances of this matter.
  5. That the costs of this Application to abide by the outcome of the Appeal.
2. It is based on the grounds that the Honourable T. N. Sinkiyian, SRM delivered a judgement dismissing the Appellant's suit with costs on 3<sup>rd</sup> October 2022. That the Appellant being aggrieved



and dissatisfied with the judgment of the Court entered on 3<sup>rd</sup> October 2022 filed an appeal herein vide a Memorandum of Appeal on the Court record. That the Appellant has a meritorious and arguable appeal with good prospects of success and if execution of the decree is carried out it will render the appeal nugatory. That should a stay of execution not be granted substantial loss and damage would result to the appellant which may not be recoverable. That the Appellant is ready and willing to abide by any condition and terms as to security as the Court may deem fit to impose. That should the orders sought herein not be granted, the Appellant herein shall greatly be prejudiced as the appeal filed against the impugned decision stands the risk of being rendered nugatory, null and void. That the Respondent herein does not stand to suffer any prejudice should the orders sought hereinabove be granted

3. The Respondent stated that the Honourable Trial Court at Voi Law Courts delivered its judgement on 3<sup>rd</sup> October, 2023, consequently dismissing the Appellant's suit with costs to her. That a party and party Bill of Costs was raised, served upon the Appellant who failed to respond and/or object to it entirely and thus the Honourable Trial Court proceeded to render a ruling on taxation on 15<sup>th</sup> May, 2023 and a Certificate of Costs was issued on 6<sup>th</sup> June, 2023 for the sum of Kshs. 187,900/= . That the said Certificate of Costs together with the Decree were served upon the Appellant electronically via E-mail on 8<sup>th</sup> June, 2023, to which email the Appellant never responded. (Annexed hereto marked AMM-I is as E-mail extract)
4. That between June, 2023 when the Appellant was served and the date when the Appellant filed this Application, is almost four (4) Months. That from the date the judgement was delivered on 3<sup>rd</sup> October, to the date this application was made is almost Eleven (11) Months. That there has been unreasonable delay in filing this application which can only mean that the application is an afterthought merely intended to cause undue hardship upon her. That there is no sufficient explanation rendered whatsoever for the delay in filing this application and the Appellant has not demonstrated what substantial loss he will suffer if execution is not halted.
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.”

6. 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.”



7. 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.

8. 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.”

9. 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.....”

10. 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 ....”

11. 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.”

12. On perusal of the court record I find trial court delivered judgement on 3<sup>rd</sup> October 2022. That the Appellant being aggrieved and dissatisfied with the judgment filed an appeal herein vide a Memorandum of Appeal on the Court record. This application for stay was filed in court on the 18<sup>th</sup> September 2023! The Applicant has been indolent and guilty of laches and the delay is inexcusable. 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 15<sup>th</sup> September 2023 is unmerited and I dismiss it with costs.
13. It is so ordered.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY VIA EMAIL THIS 23<sup>RD</sup> DAY OF JANUARY 2024.**

**N.A. MATHEKA**

**JUDGE**

