



**Ali & 4 others v Sheih Zayed Children Welfare Center & 3 others (Environment & Land Case 191 of 2021) [2024] KEELC 973 (KLR) (27 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 973 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 191 OF 2021  
NA MATHEKA, J  
FEBRUARY 27, 2024**

**BETWEEN**

**ALI MOHAMED ALI ..... 1<sup>ST</sup> APPLICANT  
JUMA RASHID MWAMBA ..... 2<sup>ND</sup> APPLICANT  
MOHAMED BAKARI AWADH ..... 3<sup>RD</sup> APPLICANT  
HAMISI MOHAMED OMARI ..... 4<sup>TH</sup> APPLICANT  
NANA HUSSEIN SALIM ..... 5<sup>TH</sup> APPLICANT**

**AND**

**SHEIH ZAYED CHILDREN WELFARE CENTER ..... 1<sup>ST</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT  
LIKONI POLICE STATION ..... 3<sup>RD</sup> RESPONDENT  
COUNTY GOVERNMENT OF MOMBASA ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling appertains to the application dated 20/7/2023 by the plaintiffs and a notice of preliminary objection dated 18/9/2023 by the 4<sup>th</sup> respondent. Judgment was delivered in this matter on 20/6/2023 by this court and the plaintiffs preferred an appeal. The said application prays for the following orders;
  1. Spent.
  2. That pending the hearing and determination of this application, there be a stay of execution of the judgment of the environment and land court delivered on 20<sup>th</sup> June, 2023.
  3. That this Honourable court do grant prayer 2 above on the interim pending the hearing and determination of the application herein.



4. Costs of the application.
2. The notice of preliminary objection raises an objection on a point of law on the following grounds:
  1. That the notice of appeal and memorandum of appeal herein both dated 21<sup>st</sup> July 2023 are invalid and bad in law and as such there is no valid appeal or intended appeal herein.
  2. That the application contravenes the mandatory provision of the law as there is no valid appeal and the application should be dismissed with cost.
3. In reply, Abubakar Hassan Dindia, the director of the 1<sup>st</sup> defendant replied that the suit land is vacant according to the survey report marked “AD 1” hence no prejudice will be occasioned. He also averred that the application is bad in law as there is no substantive prayer and that the prayers for stay pending hearing thereby rendering them spent.
4. All the parties were given an opportunity to submit on the notice of preliminary objection together with the said application. Counsel for the applicants submitted that the notice of appeal and memorandum of appeal was filed on time and that it is not true that the appeal is not valid. With regards to stay of execution of the judgment, counsel submitted that it was brought without delay and relied on the guiding provision of order 42 rule 6 (2) where they explained that if stay is not granted, the respondents may deal with the suit property. Furthermore, counsel submitted that the applicants are willing to commit any deposit.
5. Counsel for the 1<sup>st</sup> respondent submitted that the appeal was lodged after the expiry of the 14 days as required by law without leave. They relied on Municipal Council of *Kitale v Nathan Fedha* [1983] eKLR where the court of appeal dismissed an appeal for filing out of time without seeking an appeal. In respect of the application, counsel relied on the case of *Butt v Rent Restriction Tribunal* where the court held that a stay of execution is intended to preserve the status of the parties and subject matter so that if the appeal is successful, it shall not be rendered nugatory. Counsel submitted that the suit property is vacant save for some shrubs and grass and therefore no prejudice will be suffered
6. I have considered the instant application, reply thereto and submissions tendered in court and the only issue arising is whether the application can be granted or not. Before considering the instant application of 20<sup>th</sup> July 2023 the court has to decide on the notice of preliminary objection and I rely on *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. At page 700 Law JA stated;
 

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701 Sir Charles Newbold, P added:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...”
7. This court dispensed its duty as a court of the first instance and not the appellate stage. Meaning that it had rendered its judgment and the case was closed. There is therefore no preliminary issue to be discussed. The right forum for the preliminary objection would best be discussed in the court of appeal. As a matter of fact, the propriety of form or content of the appeal including the procedure are all within



the jurisdiction of the court of appeal. This is well captured in Part IV the Court of Appeal rules 2010. The said notice of preliminary objection is dismissed with costs to be borne by the 4<sup>th</sup> respondent.

8. Order 42 rule 6 (2) of the *civil procedure rules* states as follows:
- (1) No appeal or 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 application being made, to consider such application and to make such order thereon as may to it seem just, and 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 such order set aside.
  - (2) 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.
  - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
  - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
  - (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.”

9. As to what substantial loss is, 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. The plaintiffs had brought this suit seeking adverse possession and according to their photos and the valuation reports there were no proof of existence of residence. On the suit land there are uncompleted buildings, brick fences with a gate and a complete building operating as a shop. 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 applicants have not fulfilled the above grounds mentioned to enable me grant the stay. I find the application dated 20<sup>th</sup> July 2023 is unmerited and I dismiss it with costs.

It is so ordered.



**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF FEBRUARY 2024.**

**N.A. MATHEKA**

**JUDGE**

