



Thoya & another (Suing as the admins of the Estate of Makwangara Kazungu - Deceased) v Ainushamsi Multiple Agencies Ltd & 2 others (Environment and Land Appeal E043 of 2023) [2024] KEELC 1635 (KLR) (20 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1635 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E043 OF 2023
NA MATHEKA, J
MARCH 20, 2024**

BETWEEN

**JAMES KAZUNGU THOYA 1ST APPELLANT
ONESMUS KAHINDI THOYA 2ND APPELLANT
SUING AS THE ADMINS OF THE ESTATE OF MAKWANGARA KAZUNGU -
DECEASED**

AND

**AINUSHAMSI MULTIPLE AGENCIES LTD 1ST RESPONDENT
BENARAD KARISA KATOI T/A BENKA KATOI ENTERPRISES 2ND
RESPONDENT
LAND REGISTRAR 3RD RESPONDENT**

RULING

1. The application is dated 23rd June 2023 and is brought under Article 159 of the *Constitution* of Kenya, 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21, Order 42 Rule 6 (6) of the *Civil Procedure Rules* seeking the following orders:
 1. That this application be certified urgent and to be heard ex-parte in the first instance.
 2. That pending the hearing and determination of this Application inter-parties, an order of injunction pending appeal be issued restraining the 1st Respondent by themselves, their servants, employees and agents from selling, auctioning and/or any manner dealing with the parcel of land known as LR No.28815 Mariakani/Kilifi, C.R 60948 measuring 3.495 HA.



3. That pending the hearing and determination of the appeal an order of injunction pending appeal be issued restraining the 1st Respondent by themselves, their servants, employees and agents from selling, auctioning and/or any manner dealing with the parcel of land known as LR No.28815 Mariakani /Kilifi, C.R 60948 measuring 3.495 HA. Mombasa Environment and Land Court Civil Appeal No. E043 of 2023; James Kazungu Thoya & another (Suing as administrators of the estate of Makwangara Kazungu Gunga) vs Ainushamsi Multiple Agencies Ltd & 2 others- Application for Injunction pending appeal Ainushamsi Multiple Agencies Ltd.
2. It is based on the grounds that by Ruling delivered on 8th June, 2023, the court struck out the Mombasa Chief Magistrate's Court ELC No. E44 of 2021 suit. The Appellants were aggrieved by the whole of that decision and has evidenced their intention to appeal by lodging Memorandum of Appeal dated 23rd June, 2023 herein. As a result of the Chief Magistrate's Court ELC No. E44 of 2021 suit Ruling delivered on 8th June, 2023, there is an imminent threat the subject matter of appeal will be wasted as the 1st Respondent intends to sell the subject property that is parcel of land property known as LR No.28815 Mariakani/Kilifi, C.R 60948 measuring 3.49. Under the law this court has a duty to preserve the subject of the appeal, otherwise this court will be placed in the most awkward situation. Further, the Appellants' right of appeal will be rendered completely useless. Hence this court as a state organ has a legal duty under Article 10 of the Constitution of Kenya, 2010 to uphold the principles of natural justice and rule of law so that the judicial process particularly the right of appeal is not wasted as that would amount to failure to uphold the said national values and principles. The said right will be defeated if the orders sought herein is not granted as the 1st Respondent will sell the subject property, that is, parcel of land property known as LR No.28815 Mariakani/Kilifi, C.R 60948 measuring 3.495 HA. Further, the herein parcel of land is also the subject matter in Mombasa ELC Case No. 241 of 2020 between Jamal Abeid & others vs Ainushamsi Multiple Agencies Ltd.
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 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.”

9. On perusal of the court record I find the Appellant filed an application dated 23rd June 2023 seeking to set aside the ruling. The Honourable Magistrate, on 8th June 2023 struck out the suit as the subject matter of this case is subject to another court case at Mombasa ELC Case No. 241 of 2020. The Appellant has filed this appeal to the said decision. They state that, as a result of the Chief Magistrate’s Court ELC No. E44 of 2021 suit Ruling delivered on 8th June, 2023, there is an imminent threat the subject matter of appeal will be wasted as the 1st Respondent intends to sell the subject property that is parcel of land property known as LR No.28815 Mariakani/Kilifi, C.R 60948 measuring 3.49. it is not disputed that there is a similar matter pending in the ELC. It is also stated that the value of the subject matter is over Kshs.69,000,000/= way above the jurisdiction of the Magistrate’s Court. The memo random of appeal is that the learned magistrate erred in law and fact stating that he had no jurisdiction when there were contested matters. This court cannot make orders in this case against the suit land which is the subject matter in a different pending case. 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 23rd June 2023 is unmerited and I dismiss it with costs.
10. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 20TH DAY OF MARCH 2024.

N.A. MATHEKA

JUDGE

