



REPUBLIC OF KENYA



**Kaikai v Kalasinga (Civil Application E100 of 2024)
[2024] KECA 1839 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KECA 1839 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E100 OF 2024
MSA MAKHANDIA, LK KIMARU & AO MUCHELULE, JJA
DECEMBER 20, 2024**

BETWEEN

JAMES KANYONI KAIKAI APPLICANT

AND

DANIEL LEURU KALASINGA RESPONDENT

(Being an application for an order of the stay of execution and stay of proceedings from the judgment and decree of the High Court at Kilgoris (F. Gikonyo, J.) dated 4th March 2024 in HCCA No. 1 of 2021)

RULING

1. The dispute between James Kayioni Kaikai (the applicant) and Daniel Leurur Kalasinga (the respondent) begun in Kilgoris Senior Principal Magistrate’s Court. Through a plaint dated 22nd March 2016, the applicant sued the respondent for unlawful arrest, detention and malicious prosecution. The suit followed a report that the respondent made to the police that the applicant had forcefully entered his land parcel L.R No. Transmara Olomismis/1329 and begun farming and rearing livestock therein, and had refused to vacate when asked to do so. The incident was investigated and subsequently the applicant was arrested and charged with forcible detainer contrary to section 91 of the Penal Code, illegal grazing contrary to section 5(1) of the Trespass Act and trespass with intent to annoy contrary to section 5(1) of the Penal Code.
2. The applicant was placed on his defence, following the prosecution case during which the respondent and other witnesses testified. The applicant was ultimately acquitted of the charges under section 215 of the Criminal Procedure Code. This is what prompted the applicant to file the civil suit. He sought general damages for unlawful arrest, detention and malicious prosecution, and special damages of Kshs.279,300/=. The trial court in its judgment found that the applicant had proved his case that the arrest, detention and prosecution were without a reasonable and probable cause. The applicant was awarded Kshs.500,000/= in general damages and Kshs.168,530/= in special damages.



3. This decision aggrieved the respondent who appealed to the High Court at Kilgoris. In the meantime, the decretal sum of Kshs.806,925/= together with interest had been ordered by the subordinate court to be deposited into an escrow account held jointly by counsel for the parties to await the outcome of the appeal. The learned Judge F. Gikonyo heard the appeal, which he allowed. It was found that, on the evidence, the applicant's arrest, detention and prosecution were on the basis of a reasonable and probable cause and was not actuated by malice. The decision was rendered on 4th March 2024.
4. The applicant was not satisfied, and on 8th March 2024 filed a notice of appeal intending to challenge the decision of the superior court in this court. Following the notice, on 30th July 2024 he filed the present notice of motion essentially under Rule 5(2)(b) of this Court's Rules seeking the stay of execution of the judgment of the superior court and stay of the proceedings before the subordinate court in relation to the release of the decretal sum that had been deposited in the escrow account by the advocates for the parties.
5. We have seen that through the replying affidavit by the respondent, that the subordinate court already issued an order dated 8th October 2024 ordering the release of the decretal sum to respondent's advocates within 60 days. It means that the prayer for stay of proceedings in relation to the release of the decretal sum has already been overtaken by events. But more important, this Court would not have jurisdiction to stay the orders of the subordinate court as the intended appeal is in regard to the judgment and decree of the superior court. Our jurisdiction to intervene in this matter is derived from the notice of appeal which challenged the decision of the superior court.
6. On the question of stay of the judgment and decree of the superior court, there has to be demonstration that the intended appeal has arguable grounds and that, unless stay is granted, the intended appeal, if successful, will be rendered nugatory (see [Trust Bank Ltd & Another -vs- Investech Bank Ltd & 3 Others](#) [2000]eKLR).
7. An applicant can show that he has an arguable appeal if he has annexed a draft memorandum of appeal, where the appeal has not yet been filed. Or arguable grounds can be deciphered from the application or supporting affidavit. In this case, we have not seen any draft memorandum of appeal and neither are we able to discern any basis for the appeal from the application and supporting affidavit. Arguability has therefore not been demonstrated.
8. The respondent deponed that he has the means to make good the decretal sum in the event that the intended appeal is successful. There was no contrary averment, and the fact that he was able to deposit the decretal sum when ordered by the trial court should count in his favour. The intended appeal will therefore not be rendered nugatory.
9. The result is that the application lacks merits, and is dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER 2024

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE



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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

