



**Mursai & 3 others v Abdi (Civil Application E276 of 2024)
[2024] KECA 1773 (KLR) (6 December 2024) (Ruling)**

Neutral citation: [2024] KECA 1773 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E276 OF 2024
PO KIAGE, LA ACHODE & WK KORIR, JJA
DECEMBER 6, 2024**

BETWEEN

**HABIBA ALI MURSAI 1ST APPLICANT
ABDIAZIZ MOHAMED & ASHA MOHAMUD ADHAWA (SUING AS
ADMINISTRATORS OF THE ESTATE OF AMANI SHEIKH AHMED -
DECEASEDESTATE OF AMANI SHEIKH AHMED - DECEASED) ... 2ND
APPLICANT MUHUBA SHEIKH OMAR 2ND APPLICANT
MUHUBA SHEIKH OMAR 3RD APPLICANT
MAY LUN AHMED AMIR 4TH APPLICANT**

AND

MARIAM NOOR ABDI RESPONDENT

*(An application for stay of execution pending the hearing of an appeal
from the ruling of the Environment and Land Court at Nairobi (Oguttu
Mboya, J.) delivered on 17th March 2022 in E&LC Cause No. 126 of 2019)*

RULING

1. The application before us is founded on sections 3A and 3B of the *Appellate Jurisdiction Act*, rules 5 (2) (b) and 42 of the *Court of Appeal Rules, 2022*. Through the application, the applicants seek to stay execution of the ruling delivered on 17th March 2022 and further proceedings in Milimani E&LC No 126 of 2019 - Habiba Ali Mursal & 4 others v Mariam Noor Abdi. The application is supported by the grounds on its face and those found in the affidavit sworn by the 1st applicant on 4th June 2024 in support of the application.
2. A brief history of the dispute as gleaned from the supporting affidavit sworn by the 1st applicant is that on 29th October 2018, the respondent evicted the applicants from LR No 36/11/17, situated



in Eastleigh Estate within Nairobi County. The applicants contend that the eviction was illegal and offended a subsisting court order. Aggrieved by the eviction, the applicants filed Milimani E&LC 126 of 2019 - Habiba Ali Mursal & 4 others v Mariam Noor Abdi. The respondent then raised a preliminary objection dated 2nd March 2022 in respect to the competency of the applicants' pleadings and on 17th March 2022, Oguttu Mboya, J. of the Environment and Land Court upheld the preliminary objection thus striking out the applicants' suit.

3. It is the applicants' case that the suit was slated for hearing in their absence on 5th June 2024. According to them, they have an arguable appeal as averred in the supporting affidavit and the annexed draft memorandum of appeal. They aver that they will suffer irreparably and the appeal will be rendered nugatory if the orders sought are not granted. Finally, the applicants depose that the delay in filing the appeal is attributable to the fact that they are yet to obtain, despite request, copies of typed proceedings.
4. The respondent swore an affidavit in opposition to the application asserting that the intended appeal is not arguable. She prays that the motion be dismissed with costs. It is her deposition that the case before the trial court has not taken off on account of the unavailability of the applicants' advocate and that the present application seeks to advance that delay through a stay order. It is also her averment that after the impugned ruling was delivered, the applicants filed E&LC Suit No E236 of 2022 but the same was struck out. According to the respondent, the suit against her is currently proceeding with one plaintiff, namely, Kali Mohamed Hassan Omar, and as the applicants are not part of the case, an order of stay of proceedings should not be issued.
5. When this application came up for hearing on 5th November 2024, learned counsel, Mr. Amenya appeared for the applicants while learned counsel, Ms. Mugasia appeared holding brief for Mr. Wandago for the respondent. Counsel made brief oral highlights of their respective written submissions.
6. In the submissions dated 16th September 2024, learned counsel for the applicants pointed out that upon dismissal of the applicants' suit, the respondent had initiated execution proceedings through a notice to show cause slated for 3rd October 2024. Counsel submitted that because the suit is currently proceeding before the trial court with one plaintiff, the applicants would suffer substantial injustice if an order staying the proceedings is not issued. Counsel while appreciating the draconian nature of an order staying proceedings as observed in *Halsbury's Laws of England*, 4th Ed., Vol. 37 at page 330, nevertheless submitted that the applicants have satisfied the conditions set out in *William Odhiambo Ramogi & 2 others v Honourable Attorney General & 3 others* [2019] eKLR, for the issuance of an order staying the proceedings. Counsel cited the High Court decision in *Turbo Highway Eldoret Ltd v Muniu* [2022] KEHC 10197 (KLR), on the need to weigh the pros and cons of staying proceedings and submitted that in this matter the conditions for staying proceedings have been met as the applicants' right to fair hearing was at stake, there is an arguable appeal and that the applicants will suffer substantial loss if the orders sought are not granted. In the end, counsel urged us to allow the application.
7. Learned counsel, Ms. Mugasia opposed the application through the submissions dated 13th September 2024. According to counsel, the intended appeal is not arguable. Further, the impugned ruling resulted in a negative order and there is therefore nothing to stay. Reliance was placed on the decision in *Luka & 3 others v Chairman Land Adjudication Committee, Lesbuta Land Adjudication Section & 6 others* [2023] KECA 1232 (KLR), for the proposition that even if the appeal were to succeed, the applicants will have an opportunity to prosecute their case upon reinstatement. Ms. Mugasia thus urged the Court to dismiss the application with costs.



8. In considering this application, we are called upon to exercise the discretionary power donated by rule 5 (2) (b) of this *Court's Rules*. It is well-established that for an application under the rule to succeed, an applicant must demonstrate the existence of an arguable appeal and that the appeal will be rendered nugatory if the application is declined. In that regard, it was held in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike; Lantech Ltd* [2006] KECA 333 (KLR) that:

“What falls for consideration by the Court under Rule 5 (2) b) is:-

- a. Whether the appeal or the intended appeal, as the case may be, is an arguable and not a frivolous one; and
- b. Whether if the stay or injunction sought is not granted and the appeal or the intended appeal were to eventually succeed, such success would have been rendered nugatory by the earlier refusal to grant the stay or the injunction.”

9. The applicants additionally, seek an order staying proceedings. In that case, we must take into consideration additional requirements as set out in *Waitbaka v Tribunal appointed to investigate the conduct of the Honourable Lady Justice Lucy Njoki Waitbaka & another; Kenya Magistrates & Judges Association (Interested Party)* [2020] KECA 571 (KLR) that:

“We note that stay of proceedings is a serious, grave and fundamental judicial action which interferes with the right of any party to conduct litigation. (See: *Francis N. Gitthari v Njama Limited* [2006] eKLR). It impinges on the right of access to justice, right to be heard without delay and the right to a fair trial. While addressing the issue of stay of proceedings in the persuasive case of *Global Tours & Travels Limited* (supra), Ringera, J. (as he then was) stated thus:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice ... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal in the sense of whether or not the intended appeal will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

10. The applicable principles were similarly expressed in *Co-operative Bank of Kenya Limited v Mwangi* [2023] KECA 590 (KLR) as follows:

“The main prayer in this application is for stay of proceedings in ELRC Cause No 1480 of 2018- *Kennedy Wanjohi Mwangi v The Co-operative Bank of Kenya Limited*. Whilst this Court has unfettered jurisdiction to issue an order of stay of proceedings, it must be satisfied that there are genuine and compelling grounds to justify such an order, whose effect may be to undermine one of the fundamental constitutional principles, namely that justice shall not be delayed ...

And as was observed in the case of *David Morton Silverstein v Atsango Chesoni* (supra), in exercising its discretion to stay proceedings, each case must be considered on its own merit.



The grant of stay of proceedings before this Court must be considered within the parameters of rule 5(2) (b) of this Court’s Rules.”

11. Arising from the cited authorities, it becomes apparent that an applicant seeking to stay proceedings should apart from satisfying the twin conditions for grant of an order of stay pending appeal, additionally demonstrate the existence of exceptional circumstances that warrant the issuance of such an order. As it were, the Court in considering whether to stay proceedings or not, is required to weigh the effect of such an order on the rights of the respondent against the prejudice that will be suffered by the applicant should the proceedings be allowed to continue. One of the factors to be considered is whether the grievance of the applicant can be addressed through an appeal in case the proceedings sought to be stayed eventually result in a decision that is prejudicial to the applicant. We also bear in mind the caution in *Co-operative Bank of Kenya Limited v Mwangi* (*supra*) that:

“...stay of proceedings is a drastic judicial action that should be sparingly and rarely invoked as it may impede the right of access to justice, and should only be issued in the clearest of cases.”

12. On the question as to whether the applicants have an arguable appeal, we associate ourselves with the holding in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike; Lantech Ltd* (*supra*) that:

“It is to be remembered that in an application such as this the grounds are not to be argued; all an applicant is required to do is to point out to the Court the ground or grounds which he believes are arguable and leave it to the Court to decide on the issue of whether or not the matters raised are arguable.”

13. We also appreciate that in determining whether an applicant has an arguable appeal, the existence of a single arguable point is sufficient. In the instant application, the applicant annexed a draft memorandum of appeal. Some of the issues raised in the grounds of appeal are in respect to the right to a fair hearing and whether the preliminary objection met the requisite threshold. These, without saying more, are in our view arguable points deserving a determination by the Court.

14. Turning to the issue as to whether the appeal will be rendered nugatory if the orders sought are not granted, we refer to *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] KECA 378 (KLR) as to what it means for an appeal to be rendered nugatory. In that case, it was held that:

“ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.

x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

15. From the applicants’ submissions, it is discernable that their argument is that, were the case before the trial court to proceed, their right to a fair hearing will be sacrificed. On the other hand, apart from contending that the intended appeal is not arguable, the respondent asserts that the order the applicants seek to stay is negative in nature and such an order cannot be stayed. We are not persuaded by the latter aspect of the respondent’s argument. In determining whether an order is a negative one, the Court should ask itself whether the impugned order required any of the parties to do anything or refrain from doing something. In this case, we find that by allowing the application, the applicants were required to refrain from participating in the suit and that in our view, is a positive order. Moreover,



the argument made would be appropriate to an application for stay of execution but not to one for stay of proceedings.

16. Be that as it may, the question that remains to be answered is whether there is a risk that the intended appeal, were it to succeed, will be rendered nugatory. In our opinion, the applicants have not demonstrated that their intended appeal will be rendered nugatory. If the appeal succeeds, the applicants will have their case restored and heard on merit. The mere fact that there is currently one plaintiff pursuing the original case does not take away the applicants' right to have their dispute heard and determined on merit should the trial Judge be eventually found to have acted in error. The delay which may be occasioned to the applicants can always be cured by an award of costs. In short, we conclude that the applicants have not established the nugatory aspect of their application.
17. As for the question as to whether there are exceptional circumstances that warrant the stay of proceedings, the applicants assert that their right to fair hearing will be violated. However, as we have already stated, in the event that the appeal succeeds, the applicants will have their case heard and determined on merits. Therefore, declining the application will not mean that the doors of justice will forever be shut to the applicants.
18. There is also the question as to whether this application has been filed timeously. The impugned ruling was delivered on 17th March 2022, and the notice of appeal was filed on 25th March 2022. When asked by the Court to explain the delay in bringing the application, learned counsel for the applicants attributed the delay to the failure by the superior court's registry to supply typed proceedings. The reason advanced by counsel is not convincing considering that an application under rule 5 (2) (b) is mountable upon the filing of a notice of appeal, not receipt of proceedings. The explanation for the delay of over 2 years is therefore unsatisfactory, more so when the application was made shortly after the respondent moved to execute for the costs for the ruling sought to be stayed. An unexplained delay of over 2 years is inexcusable and does not sit well with the constitutional requirement for expeditious resolution of disputes. Furthermore, the effect of a stay order will be prejudicial to the plaintiff who is proceeding before the trial court and is not a party to these proceedings. We therefore find and hold that the application was not filed timeously.
19. From the foregoing discussions, it follows that the applicants have not made out a case for the grant of the orders sought. The motion dated 4th June 2024 is thus dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER 2024.

P.O. KIAGE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....v

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed



DEPUTY REGISTRAR

