



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwaluma v Ashok Kumar Anand (Civil Application  
E082 of 2021) [2023] KECA 5 (KLR) (20 January 2023) (Ruling)**

Neutral citation: [2023] KECA 5 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E082 OF 2021  
SG KAIRU, JW LESSIT & GV ODUNGA, JJA  
JANUARY 20, 2023**

**BETWEEN**

**PATREMY MWAKWEKA MWALUMA ..... APPLICANT**

**AND**

**ASHOK KUMAR ANAND ..... RESPONDENT**

*(Being an application for stay of execution and injunction pending appeal against the judgment of the Environment and Land Court at Mombasa delivered by Munyao Sila J on 10th March 2020 in ELC Case 70 of 2015 as consolidated with ELC 252 of 2012 (O.S))*

**RULING**

1. The application before us is a notice of motion dated November 5, 2021 brought pursuant to rule 5 (2) (b) of the *Court of Appeal Rules* (Rules). Order 1 and 2 are moot. In order 3 the applicant seeks that pending hearing and determination of the appeal from the judgment of the ELC (Munyao Sila, J) in ELC Case 70 of 2015 as consolidated with ELC 252 of 2012 (OS) there be stay of execution and injunction, restraining the respondent from executing the judgement and orders of the aforesaid cases and in particular from developing or selling the land plot No 1956/337 CR No 35001, in Voi Municipality.
2. The background to the application arises from a dispute over plot No 1956/337 CR No 35001, in Voi Municipality. The applicant claimed to be entitled to the suit land by way of adverse possession in the case he filed, ELC 252 of 2012 (OS) as against the respondent. The respondent on his part filed Msa ELC case No 70 of 2015 seeking vacant possession of the suit land from the applicant, general damages and an injunction. The two cases were consolidated and heard together. The court dismissed the applicant's claim and granted the respondent's claim, and ordered the applicant to compensate the respondent in the sum of Kshs 1,000,000/= in general damages.



3. The applicant was dissatisfied with the decision rendered by the ELC and filed a notice of appeal on the March 16, 2020. The applicant also filed an application dated April 28, 2020 in the ELC where he sought and was granted stay of execution orders, conditional upon his deposit of Kshs 1, 250, 000/= within 30 days, and costs taxed by the taxing master within 30 days from the date of taxation.
4. It was also revealed that the applicant was evicted from the suit land and his premises demolished on 1<sup>st</sup> and November 4, 2021; that execution for taxed costs is imminent as the respondent has obtained an order to the court bailiff to execute the decree for the taxed costs; and that the respondent intends to develop and/or sell the suit land which will render the appeal nugatory.
5. The application is supported by the applicant's affidavit dated November 5, 2021, and a supplementary affidavit sworn by Samuel Odhiambo Eliakim, advocate on record acting for the applicant dated November 4, 2022. The gist of the two affidavits confirms deposit of the sum awarded as general damages as ordered by the ELC, and the fact the taxed costs have not been deposited as the applicant has since filed a reference, challenging the taxed costs by the taxing master. In the latter affidavit, a draft memorandum of appeal is annexed as 'SOE 1'.
6. The application is opposed. There is a replying affidavit sworn by Ashok Kumar 2October 5, 2022, with annexures thereto.
7. The application was heard virtually on the December 13, 2022, present was learned counsel Mr Odhiambo for the applicant and learned counsel Ms Waihenya for the respondent. Mr Odhiambo relied on his filed written submissions dated October 25, 2022, as well as the supplementary affidavit dated November 4, 2022. Counsel reiterated what is stated in the two affidavits which we do not wish to rehash. Counsel urged that the respondent had not put up any building on the land since demolishing the applicant's structures. Further that he relied on the draft memorandum of appeal to show that the appeal is arguable.
8. Ms Waihenya for the respondent relied on the replying affidavit sworn by the respondent dated October 25, 2022, the written submissions dated October 31, 2022 together with the case digest of even date. Counsel cited *Trust Bank Ltd & another v Investech Bank Ltd & 3 others* Civil Application NAI 258 of 1999 (UR) on the twin principles that apply to applications of this nature. Counsel urged that the applicant had flouted the orders of the ELC and was undeserving of the orders sought, that the deposit made as averred in the supplementary affidavit did not include the taxed costs. For that proposition counsel relied on *Antoine Ndinye v African Virtual University* [2015] eKLR. Ms Waihenya urged that the current status of the suit land was that the respondent was in possession and had secured it by putting up a fence around the property.
9. We have considered this application, affidavits by both parties and the rival submissions by counsel to the parties. The principles applicable in an application for stay pending appeal are two: whether the applicant herein has an arguable appeal with good prospects of success; and, whether the appeal will be rendered nugatory if the orders of stay are not granted and the appeal succeeds. See *Stanley Kangethe Kinyanjui v Tony Ketter and 5 others* [2013] eKLR and *Githunguri v Jimba Corporation Limited* [1988] KLR 838.
10. The applicant was evicted from the suit property in execution of the judgment and the decree of the ELC. He seeks a stay of execution for taxed costs on the basis that he has filed a reference challenging the ruling of the taxing master, and on the basis that execution for the same was imminent. Having considered the rival arguments, and bearing in mind that an arguable appeal is not one that will necessarily succeed but one that is worth of the court's consideration, and mindful also that a single



arguable point suffices, we are persuaded that the applicant is deserving of being heard on the reference. The appeal is not frivolous. It is arguable.

11. As to whether the appeal will be rendered nugatory if the orders sought are not granted and the appeal ultimately succeeds, we bear in mind the pronouncement by the court in *Stanley Kangethe Kinyanjui v Tony Ketter & others, supra* that

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

12. What the applicant seeks is to prevent execution for taxed costs in order to give him a chance to be heard on his reference. We think that he deserves to be heard.

13. In light of the conclusions we have reached in this application, the order that commends itself to us is as follows:

- i) That pending the hearing and determination of the intended appeal, there be a stay of execution for taxed costs.
- ii) Costs shall await the results of the appeal.

**DATED AND DELIVERED AT MOMBASA THIS 20<sup>TH</sup> DAY OF JANUARY, 2023.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

**G.V. ODUNGA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

