



**Musa (Suing as the next friend of Khatija Issak Musa) v Musa & 6 others (Environment & Land Case 6 of 2020) [2024] KEELC 3900 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3900 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND CASE 6 OF 2020**

**CG MBOGO, J**

**APRIL 30, 2024**

**BETWEEN**

**FARID ISSAK MUSA (SUING AS THE NEXT FRIEND OF KHATIJA ISSAK MUSA) ..... PLAINTIFF**

**AND**

**NAIM ISSAK MUSA ..... 1<sup>ST</sup> DEFENDANT  
PARSALOI OLE KESHE ..... 2<sup>ND</sup> DEFENDANT  
DISTRICT LAND REGISTRAR, NAROK ..... 3<sup>RD</sup> DEFENDANT  
THE HON ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT  
NTAJIRI ENOLE KES ..... 5<sup>TH</sup> DEFENDANT  
NATAANA ENOLE K ..... 6<sup>TH</sup> DEFENDANT  
DANIEL ATETI KESH ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

1. Before the court is the Notice of Motion Application dated 28<sup>th</sup> December, 2023 filed by the plaintiff, and it is expressed to be brought under Order 42 Rule 6 (1), (2), (3) and Order 50 Rule 6 of the [Civil Procedure Rules](#), Section 79G and Sections 1A,1B, 3 and 3A of the [Civil Procedure Act](#) seeking the following orders: -
  1. **Spent.**
  2. **Spent.**



3. That there be a stay of execution of the decree arising from the judgment of the Honorable Charles G. Mbogo, Judge, ELC at Narok delivered on 31<sup>st</sup> day of October 2023 pending the hearing and determination of the plaintiff/applicant's appeal herein.
4. That this honourable court issues such orders including directions on security for the due performance of the decree as may be fair under the circumstance of this case.
5. **That costs of this to abide the outcome of the appeal.**
2. The application is premised on the grounds inter alia that judgment was delivered in this matter on 31<sup>st</sup> October, 2023 in favour of the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants/ respondents and that the plaintiff/ applicant has preferred an appeal against the said judgment.
3. The application is supported by the affidavit of the plaintiff/ applicant sworn on even date. The plaintiff/ applicant deposed that being aggrieved with the judgment delivered by this court on 31<sup>st</sup> October, 2023, and consequential decree, he has filed a notice of appeal and that nothing prevents the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants from initiating the process of execution of the decree. The plaintiff/ applicant further deposed that the intended appeal is not only merited by also raises weighty issues of law and fact, and it would be in the interest of justice that a stay of execution of the decree is issued.
4. The plaintiff/ applicant deposed that unless the prayers sought in this application are granted, the appeal will be rendered nugatory. It was deposed that the appeal is arguable and that she is ready and willing to comply with such orders as to security for the due performance of the decree as the court may direct. It was further deposed that this is a suitable case for the exercise by this court of its wide discretion to stay execution of the decree arising from the judgment.
5. On 15<sup>th</sup> January, 2024, the 2<sup>nd</sup> defendant/respondent filed his replying affidavit sworn on 4<sup>th</sup> January, 2024 in response to the application. The 2<sup>nd</sup> defendant/ respondent deposed to the contents on his own behalf and on behalf of the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants/ respondents. The 2<sup>nd</sup> defendant/ respondent deposed that the said notice of appeal was filed out of time as per Rule 77 of the *Court of Appeal Rules* 2022, hence the application ought to have sought for extension of time to file its notice of appeal out of time.
6. The 2<sup>nd</sup> defendant/respondent deposed that the plaintiff/ applicant is now seeking stay of execution on the mere ground that it has purportedly filed an appeal against the judgment delivered by this court, and that stay of execution cannot be issued in an appeal that is incompetent. It was further deposed that the plaintiff/ applicant has not shown any reason why it should not satisfy the money decree save that it has lodged an appeal.
7. The 2<sup>nd</sup> defendant/respondent deposed that the application is geared towards wasting their time, as well as the court's time by indulging in forum shopping in an effort to stall execution. The 2<sup>nd</sup> defendant/respondent went on to depose that there is no evidence of substantial loss and the annexed memorandum of appeal does not raise any arguable or triable issues with high chances of success. In conclusion, the 2<sup>nd</sup> defendant/respondent deposed that if the court is inclined to grant the orders, the plaintiff/ applicant should be ordered to deposit the full decretal sum in an interest earning account as security.
8. The plaintiff/ applicant filed a further affidavit sworn on 2<sup>nd</sup> February, 2024 in response thereto. The plaintiff/ applicant deposed that having demonstrated during trial that there was no privity of contract between her and the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants/ respondents, there was no justification to compel her to pay them a sum of Kshs. 38,473,500/-. Further, that the one-day delay in filing the notice of



- appeal as well as the letter requesting for the proceedings in this matter was occasioned by internet challenges, which is from time to time experienced here in court. The plaintiff/applicant deposed that the delay is not long or inordinate.
9. The plaintiff/applicant further deposed that the extension of time is discretionary and she has instructed the counsel to seek leave to have the time extended so as to have the notice of appeal, and the letter requesting for the proceedings as well as the appeal, admitted out of time. She deposed that the objections raised by the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants/ respondents do not raise any arguable issues to her application.
  10. The plaintiff/applicant further deposed that since the amount claimed by the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants is liquidated, and in any event payable by interest, they will not suffer prejudice if the orders sought are granted.
  11. The application was canvassed by way of written submissions. On the 6<sup>th</sup> February, 2024 the plaintiff/applicant filed her written submissions dated 5<sup>th</sup> February, 2024, where she raised two issues for determination as listed below: -
    1. Whether the plaintiff/applicant has demonstrated that the orders of stay of execution pending the appeal are merited.
    2. Who bears the cost of this application.
  12. On the first issue, the plaintiff/applicant submitted that should the execution of the decree proceed, the appeal will be rendered nugatory and expose her to irreparable loss and damage as the 2<sup>nd</sup> defendant/ respondent being a man of straw, and having not filed an affidavit of means, would be incapable of effecting a refund thereof. She submitted that it is in the interest of justice that the orders are granted and that failure will amount to denying her the opportunity to exhaust legal remedies. She went on to submit that the plaintiff/ applicant was not a party to the sale agreement involving the suit premises and there being no privity of contract, it would be unfair to compel her to pay the sum of KShs. 38, 473,500/-. The plaintiff/ applicant relied on the case of *James Wangalwa & Another versus Agnes Naliaka Cheseto* [2012] eKLR.
  13. The plaintiff/ applicant further submitted that the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants/ respondents have not given any material as to her ability to repay the decretal sum in case the appeal succeeds and this implies substantial loss on her part if stay is not granted. Reliance was placed in the case of *RWW versus EKW* [2019] eKLR.
  14. The plaintiff/ applicant also submitted that there is a sum of Kshs. 9,712,000/- held in the court's deposit account and such deposit can suffice as security for costs. The plaintiff/ applicant relied on the case of *Jayesh Hasmukh Shah versus Narir Haira & Another* [2015] eKLR and submitted that security for costs should be given in a way which is least disadvantageous to the party giving that security.
  15. On 26<sup>th</sup> February, 2024, the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants/ respondents filed their written submissions dated 19<sup>th</sup> February, 2024 where they raised the following issues for determination: -
    - i. Whether the application dated 28<sup>th</sup> October, 2023 filed in this court is competent.
    - ii. Whether the notice of appeal and the memorandum of appeal constitute a valid appeal.



iii. Who should meet the costs of this application.

16. On the first issue, the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants/ respondents submitted that the notice of appeal was manifestly filed in total abuse of the law and procedure as it was filed out of time and there exists no evidence of an application seeking leave to file the notice of appeal out of time. They relied on the case of *Emily Jeptoo versus Hellen Jeruto & 3 Others* Civil Appeal No. 99 of 2012 and the provisions of Rule 77 (1) and (2) of the *Court of Appeal Rules, 2022*.
17. The 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants/respondents further submitted that the plaintiff/ applicant has failed to meet the principles for stay of execution pending appeal as it was held in the case of John *Mugambi & Another versus Dr. Kiama Wangai Civil Appeal No. 597 of 2012*.
18. On the second and third issues, the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants/ respondents submitted that the appeal is not valid since it is anchored on a defective notice of appeal. It was also submitted it will be pointless for this court to grant stay pending appeal when in fact there is no proper notice of appeal. Reliance was placed on the case of *Mubu Holdings Limited & 2 Others versus Achina Nangomo & 2 Others* [2019] eKLR. The defendants/respondents added that the application ought to be dismissed with costs.
19. I have considered the application, the replies thereof and the written submissions filed as well as the authorities cited. In my view, the issue for determination is whether the plaintiff/ applicant is entitled to the orders of stay of execution pending appeal.
20. Order 42 Rule (6) of the *Civil Procedure Rules* provides as follows: -

“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 orders set aside.

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 1<sup>st</sup> 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.”
21. In the case of *Masisi Mwita versus Damaris Wanjiku Njeri* [2016] eKLR, the Court of Appeal held that: -

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of “Halal & Another –VS- Thornton & Turpin Ltd. where the Court of Appeal Gicheru J.A., Chesoni & Coker AG 1A) held that: “The High Court’s discretion to order stay of execution of its order or Decree is fettered by three (3) conditions namely:- Sufficient Cause, substantial loss would ensue from a refusal to grant stay the Applicant must furnish security, the application may be made without unreasonable delay. In addition



the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakolo –VS- Straman E.A. Ltd.[2013] as follows:-

“In addition the Appellant must prove that if the orders sought are not granted and his Appeal eventually succeeded them the same shall have been rendered nugatory”. These twin principles go hand in hand and failure to prove one dislodges the other. The court notes with great humility the Plaintiff/Applicant agrees with it by citing the case of Vishram Rouji Halal –VS- Thrornton & Turpour Civil Appeal No. 15 of [1990] KLR 365,”

22. For the court to order a stay of execution there must be: -

- i. Sufficient cause;
- ii. Substantial loss
- iii. No unreasonable delay.
- iv. Security and the grant of stay is discretionary.

23. The 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants/respondents contested the validity of the instant application on the grounds that the notice of appeal was filed outside the time provided by law. They argued that without an application for leave to file a notice of appeal out time, stay cannot be granted on an incompetent appeal.

24. Rule 77 of the *Court of Appeal Rules* 2022 provides: -

“

“(1) A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.

(2) Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.”

25. In *Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR, the Supreme Court had this to say on this matter:

“A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is one that requires leave or not. It is a jurisdictional prerequisite.”

26. Rule 77(2) of the *Court of Appeal Rules*, 2022 requires that a notice of appeal be lodged within fourteen days of the date of the decision intended to be appealed against. It is common ground that the judgment intended to be appealed from was delivered on 31<sup>st</sup> October, 2023, and the notice of appeal ought to have been filed on or before 14<sup>th</sup> November, 2023. Instead, the notice of appeal was lodged on 17<sup>th</sup> November, 2023.

27. The plaintiff/applicant argued that this court has discretion to entertain the application and one-day delay is not inordinate. She also argued that she has instructed her counsel to seek extension of time albeit through a further affidavit. In fact, the plaintiff/applicant concedes that indeed, she has not sought for leave to file a notice of appeal out of time.



28. Consequently, this court cannot proceed to grant stay of execution or consider the application for stay where a notice of appeal was lodged outside time and where no leave has been sought to lodge the same outside the time provided under Rule 77 (2) of the *Court of Appeal Rules*, 2022.
29. Arising from the above, the notice of motion dated 28<sup>th</sup> December, 2023 is dismissed. Each party to bear own costs. It is so ordered.

**DATED, SIGNED & DELIVERED VIA EMAIL on this 30<sup>TH</sup> day of APRIL, 2024.**

**HON. MBOGO C.G.**

**JUDGE**

**30/04/2024.**

**In the presence of: -**

Mr. Meyoki Pere – C. A

5| Page RULING ELC CASE NO. 6 OF 2020 DELIVERED VIA EMAIL ON 30<sup>TH</sup> APRIL, 2024.

