



REPUBLIC OF KENYA



KENYA LAW
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**Mutie v Galgalo (Environment and Land Appeal E001 of 2022)
[2024] KEELC 3655 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3655 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E001 OF 2022**

**TW MURIGI, J
APRIL 30, 2024**

BETWEEN

FRANCIS MUTIE APPELLANT

AND

GILBERT GALGALO RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 14th November, 2022 brought under Article 50 of *the Constitution*, Sections 1A, 1B and 3A of the *Civil Procedure Act* in addition to Order 9 Rule 9 and 10 and Order 22 Rule 22 of the Civil Procedure Rules in which the Appellant/Applicant seeks the following orders: -
 - 1) Spent.
 - 2) That this Honourable Court be pleased to grant leave to the firm of M/S Andrew Makundi & Co. Advocates to come on record in place of the firm of C.M. Muthiani & Co. Advocates for the Appellant/Applicant.
 - 3) That this Honourable Court be pleased to grant an order of stay of execution of the judgment delivered by Hon. J.O. Magori SPM on 17/12/2021 and all the consequential orders issued thereafter pending the hearing and determination of the intended appeal.
 - 4) That this Honourable Court be pleased to grant the Applicant/Appellant leave to amend his memorandum of appeal filed on 05/01/2022 upon payment of the requisite court fees.
 - 5) That the Applicant be at liberty to apply for further orders and/or directions as this Honourable Court may deem just and expedient.
 - 6) That costs of this application be provided for.



2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Francis Mutie sworn on even date.

The Applicant's Case

3. The Applicant averred that the court rendered its judgement in Makindu SPMCC No. 10 of 2011 in favour of the Respondent. He further averred that the Respondent has threatened to evict him from the suit property which will cause him irreparable loss.
4. The Applicant further averred that he was not accorded a fair trial contrary to Article 50 of *the Constitution*. According to the Applicant, the amendment of the memorandum of appeal is necessary so as to bring out all the issues in the intended Appeal. He further averred that he had instructed the firm of Andrew Makundi & Co. Advocates to come on record in place of C.M. Muthiani & Co. Advocates.

The Respondent's Case

5. Opposing the application, the Respondent filed a replying affidavit dated 15th January, 2023. According to the Respondent, the application herein has been made in bad faith and is a waste of the Court's judicious time. He averred that the Applicant is not in occupation of the suit property and has no substantive development thereon.
6. He further averred that the application is bad in law as the draft amended memorandum of appeal has not been annexed in the supporting affidavit. He argued that there has been inordinate delay in bringing this application which has not been accounted for. The Respondent urged the Court to dismiss the application with costs.
7. The application was canvassed by way of written submissions.

The Applicant's Submissions

8. The Applicant's submissions were filed on 15/09/2023.
9. On his behalf, Counsel cited the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010 to submit that the law permits a party to change his Advocate after judgment has been entered with the leave of court and after notice to all the parties.
10. Counsel further cited the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules to submit that the Applicant has satisfied the conditions for the grant of stay of execution pending appeal. Counsel argued that the Applicant will suffer irreparable loss if he is evicted from the suit property.
11. While making reference to the provisions of Section 100 of the Civil Procedure Rules, Counsel submitted that the court has absolute discretion to allow an amendment at any stage of the proceedings. Counsel urged the court not to punish the Applicant for the mistakes of his former Advocates, pleading that any prejudice caused by the delay in making the application can be cured by way of costs.
12. To buttress his submissions, Counsel relied on the case of George Gikubu Mbuthia vs Consolidated Bank of Kenya Ltd & Another [2016] eKLR.

The Respondent's Submissions

13. The Respondent's submissions were filed on 13/10/2023. On his behalf, Counsel submitted that the Applicant has not tendered any evidence to substantiate the alleged threats of eviction from the suit property. Counsel urged the court to dismiss the application with costs.



Analysis And Determination

14. Having considered the application, the respective affidavits and the rival submissions, the issue for determination is whether the Applicant is entitled to the orders sought.
15. The Applicant is seeking for leave for the firm of M/S Andrew Makundi & Co. Advocates to come on record in place of M/S C.M. Muthiani & Co. Advocates. Order 9 Rule 9 of the Civil Procedure Rules, 2010 provides as follows: -

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

 - a. Upon an application with notice to all the parties; or
 - b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
16. Having complied with the above provisions, leave is hereby granted to the firm of M/S Andrew Makundi & Co. Advocates to come on record for the Applicant.
17. The next issue for determination is whether the Applicant has satisfied the conditions set out under Order 42 Rule 6 of the Civil Procedure Rules for the grant of stay of execution pending Appeal.
18. Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules outlines the guiding principles to be met for the grant of stay and provides that;
 - i. That substantial loss may result to the Applicant unless the order is made;
 - ii. That the application has been made without unreasonable delay;
 - iii. That security has been given by the Applicant for the due performance of the decree as may ultimately be binding on him.
19. In considering an application for stay of execution, I am guided by the case of Butt Vs Rent Restriction Tribunal (1982) KLR 417 where the Court of Appeal gave the following guidelines:-

“The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicants at the end of the proceedings. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”
20. The grant of an order of stay of execution is a discretionary one. In the case of RWW Vs EKW (2019) eKLR the Court held that:-

“...the purpose of an application for stay of execution pending an appeal is to preserve the subject in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and The appeal if successful is not rendered nugatory. However, in doing so the court should weigh the right against the success of a litigant who should not



be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of damages.”

21. The Court is therefore called upon to balance the rights of the successful party so as not to hinder him from his fruits of judgment and those of the Appellant whose Appeal may succeed and be rendered nugatory if stay of execution is not granted.
22. The purpose of stay of execution is to preserve the substratum of the case. In the case of Consolidated Marine Vs Nampijja & Another Civil App No. 93 of 1989 (Nairobi) the Court held that;

“ The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.”
23. The Applicant is seeking for a stay of execution of the judgment delivered on 17/12/2021 by Hon. J.O. Magori pending the hearing and determination of the appeal.
24. On the first condition of proving that substantial loss may result unless an order of stay is granted, the Applicant should not only state that he is likely to suffer substantial loss, he must prove that he will suffer substantial loss if stay orders are not granted.
25. In so finding, I am persuaded by the holding in the case of Charles Wahome Gethi Vs Angela Wairimu Gethi (2008) eKLR where the Court of Appeal held that:-

“it is not enough for the Applicants to say that they live or reside on the suit land and they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”
26. What amounts to substantial loss was expressed by the Court of Appeal in the case of Mukuma Vs Abuoga (1988) KLR as follows:-

“ Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory”.
27. The Applicant averred that he is apprehensive that the Respondent will evict him from the suit property and demolish the structures thereon. On the basis of the above, the Applicant contended that he will suffer irreparable loss as his appeal would be rendered nugatory if the orders sought are not granted.
28. The Respondents on the other hand argued that the Applicant will not suffer any loss since he is not in occupation of the suit property and has no substantial structures thereon.
29. Based on the material placed before me, I find that the Applicant will suffer substantial loss if he is evicted from the suit property.
30. In an application for stay of execution pending Appeal, an Applicant must also satisfy the Court that the application has been made without unreasonable delay. It is not in dispute that the judgment was delivered on 17th December 2021. The present application was filed on 15th November 2022 by the firm of M/S Andrew Makundi & Co. Advocates as soon as they were instructed to take over from the firm of M/S C.M. Muthiani & Co. Advocates. I find that the application was brought without unreasonable delay.



31. On the last condition as to the provision of security for costs, Order 42 Rule 6 (2) (b) of the Civil Procedure Rules is couched in mandatory terms to the effect that the Applicant must furnish security for the due performance of the order or decree. In the case of *Arun C Sharma Vs Ashana Raikundalia T/A Raikundalia & Co. Advocates and 2 others* (2014) eKLR, the court held that:-

“The purpose of the security under Order 42 is to guarantee due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor....civil process is quite different because in civil process the judgment is like a debt hence the applicant become and are judgment debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the civil procedure rules acts as a security for the performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

32. Although the Applicant has not offered security for costs, he can be directed by the court to do so. In the end I find that the Applicant has satisfied the conditions required for the grant of an order of stay of execution pending appeal.

33. The final issue for determination is whether the Applicant can be granted leave to amend the memorandum of appeal.

34. Section 100 of the [Civil Procedure Act](#) provides as follows: -

‘The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.’

35. The principles that govern the exercise of such discretion were elucidated by the Court of Appeal in [Central Kenya Ltd v Trust Bank Ltd](#) [2000] 2 EA 365 (CAK) where it held as follows: -

“The amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as were necessary for determining the real issue in controversy or avoiding a multiplicity of suits provided (i) there had been no undue delay, (ii) no new or inconsistent cause of action was introduced, (iii) no vested interest or accrued legal right was affected, and (iv) the amendment could be allowed without injustice to the other side. Accordingly, all amendments should be freely allowed at any stage of the proceedings, provided that the amendment or joinder did not result in prejudice or injustice to the other party that could not be properly compensated for in costs; *Beoco Ltd v Alfa Laval Co Ltd* [1994] 4 All ER 464 adopted.”

36. Although a draft amended memorandum of appeal was not annexed to the application, the Applicant is obliged to uphold the principles which govern amendment of pleadings. The Respondent will be at liberty to object to the amended memorandum of appeal in the event that any prejudice or injustice is occasioned.

37. In the end, I find that the Application dated 14th November, 2022 is merited and the same is allowed in the following terms:-



- i. Leave is hereby granted to the firm of M/s Andrew Makundi & Co. Advocates to come on record in place of the firm of M/s C. M. Muthiani & Co. Advocates for the Appellant/Applicant.
- ii. An order of stay of execution of the judgment delivered by Hon. J. O. Magori, SPM on 17th December, 2021 and all the consequential orders issued thereafter is hereby granted pending the hearing and determination of the intended appeal.
- iii. The Applicant shall deposit Kshs. 100.000/= within twenty-one (21) days from the date hereof and in default the stay orders shall automatically lapse.
- iv. Leave is hereby granted to the Appellant/Applicant to amend his memorandum of appeal filed on 5th January, 2022 upon payment of the requisite court fees.
- v. Costs to abide with the outcome of the Appeal.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30TH DAY OF APRIL, 2024.

In The Presence Of:

Court assistant Alfred.

Ms. Nzilani holding brief for Makundi for the Appellant.

