



Rukaria & 15 others v Matumaini Ventures Limited & 6 others (Environment & Land Case 58 of 2008) [2025] KEELC 831 (KLR) (26 February 2025) (Ruling)

Neutral citation: [2025] KEELC 831 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 58 OF 2008**

**NA MATHEKA, J
FEBRUARY 26, 2025**

BETWEEN

GERALD KIJOGI RUKARIA & 15 OTHERS & 15 OTHERS & 15 OTHERS & 15 OTHERS & 15 OTHERS & 15 OTHERS PLAINTIFF

AND

**MATUMAINI VENTURES LIMITED 1ST DEFENDANT
KENYA COMMERCIAL BANK LTD 2ND DEFENDANT
GACHIRI KARIUKI & KIAI ADVOCATES 3RD DEFENDANT
NINJAH ENTERPRISES 4TH DEFENDANT
BMW PRECAST HOUSING DEVELOPMENT LTD 5TH DEFENDANT
REGISTRAR OF TITLES NAIROBI 6TH DEFENDANT
JAMII BORA LIMITED 7TH DEFENDANT**

RULING

1. The first application is dated 11th September 2024 and is brought under Order 9 Rule 9 and Order 42 Rule 6 of the [Civil Procedure Rules](#) seeking the following orders;
 1. This Application be certified urgent and service be dispensed with in the first instance.
 2. Pending hearing and determination of this Application inter partes, this Honourable Court be pleased to issue the following orders:
 - a. The firm of Ndegwa & Sitonik Advocates LLP be granted leave to come on record for the 16th Plaintiff in place of the firm J.W. Madahana & Co. Advocates.



- b. An order of stay to stay further proceedings and the taxation of the Bill of Costs dated 26th August, 2024 and scheduled for taxation on 23rd October, 2024.
 - c. An order of injunction to restrain the 1st – 7th Defendants be themselves, their servants and or agents or whatsoever from selling, charging mortgaging and or in any way interfering with disposal and alienation of L.R. No. 15324.
 3. Pending hearing and determination of the Appeal in Nairobi Court of Appeal Civil Appeal No. E648 of 2024: *Reuben Njuguna Waweru vs Matumaini Ventures Limited & 21 others*, this Honourable Court be pleased to issue the following orders;
 - a. An order of stay to stay further proceedings and or further taxation including taxation of the Bill of Costs dated 26th August, 2024 or any other Bill of Costs that may be filed by any of the Defendants herein pursuant to the Judgment dated 28th September, 2023.
 - b. An order of injunction to restrain the 1st-7th Defendants by themselves, their servants and or agents or whatsoever from selling, charging, mortgaging and or in any way interfering with disposal and alienation of LR. No. 15324 and or in any way interfering with the Appellant’s possession of the said property.
 4. Costs of this application be provided for.
2. The Application is based on the following grounds that the 16th Plaintiff has now appealed against the Judgment delivered in this suit on 28th September, 2023 in Nairobi Court of Appeal Civil Appeal No. E648 of 2024: *Reuben Njuguna Waweru vs Matumaini Ventures Limited & 21 others*. The aforesaid appeal has very high chances of success as shown by the grounds pleaded in the Memorandum of Appeal filed in the Court of Appeal case and in all likelihood, the said appeal will set aside the said Judgment of 28th September, 2023 because reasons inter alia that:- The transaction giving rise to the case of the 16th Plaintiff against the Defendants herein was distinct and entirely different from the transactions that gave rise to the case of the 1st - 15th Plaintiffs against the said Defendants. In the Judgment of 28th September, 2023, the court failed to appreciate the aforesaid fact and addressed the case of the 16th Plaintiff case as if the same was based on the same transactions and evidence that was relied on by the 1st-15th Plaintiffs in the case against the said Defendants herein. In the circumstances, the case of the 16th Plaintiff was never addressed and or considered on merits in the Judgment of 28th September, 2023 and at the very least, the Court of Appeal will have no option other than to refer the case of the 16th Plaintiff back to this Court for hearing on merits. The 16th Plaintiff will therefore suffer substantial loss if the registered ownership, possession or the current status of the suit property is interfered with pending the hearing aforesaid appeal as this will remove the property from the reach of the 16th Plaintiff and render the appeal in the Court of Appeal nugatory and an academic exercise to the detriment of the 16th Plaintiff.
3. The 16th Plaintiff will also suffer substantial loss if the taxation of the Bill of Costs scheduled for taxation 23rd October, 2024 is allowed to proceed and the 16th Plaintiff is ultimately condemned to pay costs which is likelihood will be reversed on appeal. There was no delay in filing this application from 28th August,2024 when the 16th Plaintiff lodged the Appeal and 29th August, 2024 when the 16th Plaintiff received the message from the Court informing of the date of taxation. The initial delay from 28th September, 2023 when the Judgment was delivered was caused by the mistake of the Plaintiff’s erstwhile Counsel for the 16th Plaintiff who had failed to file an application for injunction pending appeal despite being instructed and paid by the 16th Plaintiff to file an appeal and an application for stay by the 16th Plaintiff.



4. The second application is dated 16th October 2024 and is brought under Section 3 of the *Civil Procedure Act* and Order 52 Rule 1 of the *Civil Procedure Rules* seeking the following orders;
 - a. That there be a stay of proceedings in this suit pending the hearing and determination of Civil Appeal (Nrb. No. 753 of 2024) arising out of the Judgment given on 28th September, 2023 in this suit.
 - b. That costs be in the cause.
5. The Application is premised on the grounds that the Judgment was rendered in this suit on the 28th September, 2023 and which granted costs to the Defendants. An Appeal has been filed being Nairobi Civil Appeal No. 753 of 2024. The 5th Defendant has filed a Bill of Costs dated 26th August, 2024 and to be taxed on 23rd October, 2024. The Appeal will dispose the issue of costs and therefore proceeding with taxation will be negating the said appeal. The stay of proceedings will not prejudice the Defendant and will be prejudicial to the Applicant should the Appeal succeed. It is in the interest of justice that this application be granted.
6. This court has considered the applications and the submissions therein. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the *Civil Procedure Rules* as follows;

“No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”
7. Order 42, rule 6 states:

“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 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.”
8. The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:
 1. Substantial loss may result to the applicant unless the order is made.
 2. The application has been made without unreasonable delay, and
 3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.
9. The principles governing the exercise of the court’s jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicant must show that they have



an arguable appeal and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of *Reliance Bank Ltd (In Liquidation) vs Norlake Investments Ltd* – Civil Appl. No. Nai. 93/02 (UR), thus;

Hitherto, this Court has consistently maintained that for an application under rule 5(2)(b) to succeed, the applicant must satisfy the court on two matters, namely:-

1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,
2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”

10. The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in *Chris Munga N. Bichange vs Richard Nyagaka Tongi & 2 Others* eKLR where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus;

..... . The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

11. In the case of *Mohamed Salim T/A Choice Butchery vs Nasserpuria Memon Jamat* (2013) eKLR, the court stated that;

That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right

12. We are further guided by the court’s decision in *Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others* Civil Appeal No. 291 of 1997, at Page 4 as follows:

. . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . . the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

13. On perusal of the court record I find the Appellants filed the applications dated 11th September 2024 and 16th October 2024 seeking to set aside the Judgment by the Honourable Magistrate of 28th September, 2023. The 16th Plaintiff has now appealed against the Judgment delivered in this suit on 28th September, 2023 in Nairobi Court of Appeal Civil Appeal No. E648 of 2024: *Reuben Njuguna Waweru vs Matumaini Ventures Limited & 21 others*. The initial delay from 28th September, 2023 when the Judgment was delivered was caused by the mistake of the Plaintiff’s erstwhile Counsel for the 16th Plaintiff who had failed to file an application for injunction pending appeal despite being instructed and paid by the 16th Plaintiff. In the Judgment of 28th September, 2023, the court failed to appreciate the aforesaid fact and addressed his case as if the same was based on the same transactions and evidence that was relied on by the 1st-15th Plaintiffs in the case against the said Defendants herein. In the circumstances, his case was never addressed and or considered on merits in the Judgment of 28th



September, 2023 and at the very least, the Court of Appeal will have no option other than to refer his case back to this Court for hearing on merits.

14. The 1st to 15th plaintiffs/applicants in their application state that the Judgment was rendered in this suit on the 28th September, 2023 and which granted costs to the Defendants. That an Appeal has been filed being Nairobi Civil Appeal No. 753 of 2024. That the 5th Defendant has filed a Bill of Costs dated 26th August, 2024 and to be taxed on 23rd October, 2024. That it will be prejudicial should the taxation be done before the hearing and determination of the said Appeal.
15. As mentioned earlier the appellants filed these applications dated 11th September 2024 and 16th October 2024 seeking to set aside the Judgement by the Honourable Magistrate of 28th September, 2023. This is about one year later. I find that there is inordinate delay and the excuse given is not acceptable. It is also in evidence that at the time of sale the suit property was still registered in the name of the 2nd defendant who was not a party to the sale agreement. I concur with the respondent's submissions that the court has no jurisdiction to interfere with the taxing masters duties unless a reference has been filed. Further, I am not persuaded that if the applications are not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the applicants have not fulfilled the above grounds mentioned to enable me grant the stay. I find that both applications are unmerited and I dismiss them with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 26TH DAY OF FEBRUARY 2025.

N.A. MATHEKA

JUDGE

