



**Maalim v Musila (Environment and Land Appeal 31 of 2023)  
[2024] KEELC 3265 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3265 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND APPEAL 31 OF 2023  
EK MAKORI, J  
APRIL 11, 2024**

**BETWEEN**

**BATHIA NUNOW MAALIM ..... APPELLANT**

**AND**

**NICHOLAS MUSILA ..... RESPONDENT**

**RULING**

1. Notice of Motion dated 9<sup>th</sup> August 2023 seeks:
  - a. Spent.
  - b. Spent.
  - c. Pending the determination of the Appeal herein, an order of stay of execution be issued in respect of the judgment and decree delivered on 14<sup>th</sup> June 2023 in Kilifi Senior Principal Magistrate Court ELC No. E93 of 2021, Nicholas Musila v Bathia Nunow Maalim.
  - d. That costs of this application to abide by the outcome of the intended appeal.
2. The application is supported by the affidavit sworn on 9<sup>th</sup> August 2023 by Bathia Nunow Maalim, the applicant/appellant herein.
3. The respondent opposed the same vide a replying affidavit sworn on 31<sup>st</sup> August 2023 by Nicholas Musila the respondent herein.
4. The Court directed that the application be canvassed through written submissions.
5. Having reviewed the materials and averments before me, the main issue for the determination of this Court is whether to grant a stay pending appeal.



6. From the record, the Lower Court ordered that the applicant/appellant herein compensate the respondent a sum of Kshs 500,000/- for unlawful constructive eviction with a 45-day stay of execution and attendant costs and interest.
7. The appellant brought this application on 9<sup>th</sup> August 2023 after the lapse of 45 days contending that the applicant stands to suffer irreparable damages if the decree arising from the findings of the Lower Court is allowed to hold. The applicant is an old widow with meagre resources and she may be committed to civil jail or whatever little she has stands to be auctioned. On the issue of security for the due performance of such decree or order that may bind on the applicant shortly, or if the intended appeal is to fail, the applicant is of the view that any other form of security can be provided and not necessarily the deposit of the entire decretal sum. The other issues raised on the constructive eviction can be addressed during the hearing of the appeal itself.
8. The respondent aver that this application was brought late well after the 45 days had lapsed. The applicant is a person of means with land valued over 14,800,000/-, with other inheritance from her late husband running to millions of shillings.
9. The respondent contends that the appellant has not provided security for the due performance of the decree or order as may finally be binding on the appellant as provided under Order 42 Rule 6(2) of the Civil Procedure Rules. Besides the respondent maintains that there is no arguable appeal disclosed and that if the orders sought herein will not be granted, the appeal may be rendered nugatory. The decision highlighting that position that is Kenya Tea Growers Association & Another v Kenya Plantation and Agriculture Workers Union [2012] eKLR, was cited.
10. The factors to consider before a stay is granted pending appeal are as held in the case of Antoine Ndiaye v African Virtual University [2015] eKLR:

“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:

  - a. The application is brought without undue delay;
  - b. The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and
  - c. 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.”
11. The current application was brought immediately after the window of 45 days had lapsed as can be seen from the record. The trial Court delivered its judgment on 14th June 2023, the current application was filed on 9<sup>th</sup> August 2023. But I can see a Memorandum of Appeal had been filed by the 23<sup>rd</sup> of June 2023. The appeal was brought on time and therefore the 1<sup>st</sup> test has been achieved.



12. On the issue of substantial loss, in matters dealing with land as the substratum of the suit, In the case of *RWW v EKW [2019]* eKLR, the Court stated as follows:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter 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 this 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 costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

13. Looking at the reliefs granted by the trial Court, what is to form the substratum of the appeal is a monetary decree as opposed to land – Kshs 500,000/- General damages for constructive eviction. The applicant has not shown the efforts made to raise that money as security. There is only an averment that she is not a person of means. I cannot determine that based on the material I have.

14. The respondent has no reservations if the money was to be deposited in Court or any other joint earning account until the appeal is heard and determined.

15. Exercising my discretion, I will order the applicant/appellant to deposit with the Court a substantial amount of the decretal sum that is Kshs 350,000/- within a month hereof as security. Failure to do so, the current application and the intended appeal will stand dismissed.

16. Costs in the intended appeal.

**Dated, signed, and delivered at Malindi virtually on this 11<sup>th</sup> day of April 2024.**

**E. K. MAKORI**

**JUDGE**

**In the Presence of:**

**Mr.Odongo for the Appellant.**

**Respondent – in person.**

**Court Clerk. Happy.**

2

ELC NO 31 OF 2023 RULING

