



**Munir Kassamali Karmali (aka) Munir Jagani t/a Roshina Timber Mart v Omar  
(Environment & Land Case 12 of 2023) [2024] KEELC 4259 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4259 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 12 OF 2023**

**EK MAKORI, J**

**MAY 15, 2024**

**BETWEEN**

**MUNIR KASSAMALI KARMALI (AKA) MUNIR JAGANI T/A ROSHINA  
TIMBER MART ..... APPELLANT**

**AND**

**SALIM SHEIKH OMAR ..... RESPONDENT**

**RULING**

1. An application dated 12<sup>th</sup> April 2023 seeks, among other reliefs significantly:
  - a. Pending the hearing and determination of this application, this Court would be pleased to stay the judgment entered on 27<sup>th</sup> September 2022 in the Chief Magistrates Court at Malindi in Land Case No. E03 of 2020 – Salim Sheikh Omar v Munir Kassamali Karmali AKA Munir Jagani T/A Roshina Timber Mart and any other subsequent proceedings and orders that may be issued pursuant thereto pending the hearing of the appeal.
  - b. The Court extends the time for filing and service of the Memorandum of Appeal and the Memorandum of Appeal lodged on the 30<sup>th</sup> of March 2023 to be deemed properly served.
  - c. That costs be provided.
2. in opposition to the application, the respondent filed a replying affidavit on 15 November 2023, stating that the appellant filed Misc. Application No. 18 of 2023 for an extension of time but did not apply for a stay of execution. This sets the stage for the arguments presented by both parties.
3. The Court, in its commitment to fairness, directed both parties to file written submissions, which they did. The arguments by both parties have been given equal weight and consideration.



4. After considering the materials and submissions placed before me, I have framed the single issue for this Court's determination as to whether to grant a stay of execution pending appeal with the attendant costs.
5. Mr. Mkan, for the appellant, contends that the Magistrate failed to appreciate the issue of jurisdiction and left it to the Superior Court to deal with. For those reasons, the Superior Court is left to deal with the issue of jurisdiction that the Magistrate failed to consider.
6. He states that the appeal raises triable issues worth consideration and that the appeal is arguable, particularly on the issue of jurisdiction.
7. He proceeds further to assert that the appellant is ready to abide by any conditions that this Court may set, as the circumstances of the case may demand.
8. He cites various authorities enunciating the purpose of stay as preserving the appeal's substratum. See *Nicholas Stephen Okaka & Another v Alfred Waga Wesonga* [2022] eKLR, *Michael Ntouchi Mitheu v Abraham Kivindo Musau* [2021] eKLR and *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR.
9. Mr. Kimani, for the respondent, avers that a stay of execution cannot be granted since the substratum of the suit, being business premises, has long changed hands to third parties. The appellant failed to apply for a stay when seeking enlargement of time in Misc.—application No. 18 of 2023. The horse has long bolted. There will be nothing to stay. The appellant was long evicted. There is a warrant in return to show the eviction. There are no premises to let to the appellant. The Court cannot act in vain.
10. He states that the first application for a stay came 13 months after the judgment and decree of the Lower Court dated 27 September 2022. The stock in trade was attached in executing the lawful decree emanating from the trial Court. The premises were vacant from November 2022 to March 2023.
11. He believes the current application was inordinately late and offends the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*. See also the decision in *Dharam Singh v Kishen Singh* [1883]12 C.I.R. 532 cited with approval by Mulla on page. 1188.
12. The factors to consider before a stay is granted are as held in the case of *Antoine Ndiaye v African Virtual University* [2015] eKLR. The Court's decision will be based solely on these factors:
  - a. The application is brought without undue delay;
  - b. The court is satisfied that substantial loss may result to the Appellant 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 Appellant.”



13. From the averments I have, the current application was brought inordinately late. The record shows the application was filed on 12 April 2023. It was reckoned by the Duty Judge (Odeny J.) on 13 April 2023. As can be seen from the record, she ordered service of the same for an inter partes hearing on 2 May 2023. It seems the current appeal was filed before the enlargement of time, and this file was running concurrently with Misc. Application No. 18 of 2023. That is where a stay should have been sought. As it stands, the substratum of the suit property has long changed. Due to the delay in seeking stay orders, the shop to be demised to the appellant has been let to a third party.
14. Regarding substantial loss, this is a matter dealing with a shop as the foundation of the suit and the appeal. 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 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.”
15. The appellant may have an arguable appeal, but the shop has long been released to a third party. Granting a stay at this stage would essentially mean reversing the situation, which has long changed, as submitted by Mr. Kimani for the respondent – the stable is being closed long after the steed has bolted. The pendulum cannot be reversed via this application.
16. Application dated 12 April 2024 dismissed with costs.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 15<sup>TH</sup> DAY OF MAY 2024.**

**E. K. MAKORI**

**JUDGE**

**In the Presence of:**

Mr. Mkan, for the Appellant

Mr. Kimani, for the Respondent

Court Assistant: Happy

