



**Kilemba v Mwachofi (Environment and Land Appeal
E006 of 2023) [2024] KEELC 3711 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3711 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND APPEAL E006 OF 2023**

EK WABWOTO, J

MAY 9, 2024

BETWEEN

LUCAS KILEMBA APPELLANT

AND

REUBINSON MWASHIGHADI MWACHOFI RESPONDENT

RULING

*****ARGUMENTS**

1. This Ruling is in respect to the Appellants application dated 15th December 2023 which application seeks stay of execution of the judgment in Voi CM ELC Case No. E003 of 2021 pending the hearing and determination of this appeal.
2. The application is premised inter alia on the grounds that an appeal has already been filed against the judgment of Voi CM ELC Case No. E003 of 2021 delivered on 29th November 2023, the Appellant has owned the property since the year 2007 and has been operating a school known as St. Rose Kilemba Academy, there is an imminent danger of execution and loss of livelihood since the teachers and subordinate staff depend on the school, the application was filed without delay and that the appeal is arguable and has good prospect of success.
3. The application was supported by the affidavit sworn by Lucas Kilemba on 15th December 2023. The deponent averred that he has invested heavily in setting up the school within the suit property, the trial before the lower court placed heavy reliance on the survey report and made a finding that the Appellant had proved his case and ordered the Appellant to vacate the suit premises on the basis that the Appellant had encroached the same. It was averred that the lower court ought to have ordered for a fresh survey to be done and not order for an eviction. It was also averred that the intended eviction would lead to losses and damage which are irreparable and not capable of compensation by way of damages. It was also averred that the intended appeal is arguable.



4. The application was opposed. The Respondent filed a Replying Affidavit sworn by Reubinson Mwashighadi Mwachofi on 20th December 2023. It was averred that the application does not meet the threshold for grant of the orders sought. It was also averred that there is no immediate threat for eviction and thus this application lacks merit.
5. The application was canvassed by way of written submissions pursuant to the directions issued by this court. The Appellant filed written submissions dated 22nd April 2024 while the Respondent filed written submissions dated 20th March 2024.
6. The Appellant submitted that he had filed a Memorandum of Appeal which had raised several grounds of appeal and that the same raises triable issues hence the application ought to be allowed. It was also submitted that the Appellant shall suffer substantial loss if the orders sought are not granted since there is a blanket order of eviction that was issued by the lower court. The Appellant also submitted that there was no undue delay in lodging the appeal. The following cases which the court has considered were cited by the Appellant in support of his application; *David Omwenga vs John Teleio*, Kisii HCCC No. 149 of 2010 (eKLR), *Halal & Another vs Thornten & Turpil* (1963) Ltd, *R.W.W vs E.K.W*(2019) eKLR and *New Soita Ltd vs Naivasha South Lake Sacco Ltd* (2022) eKLR.
7. The Respondent submitted on the following issues; whether the order sought can be granted and who is to bear costs of this application. It was submitted that the Applicant has not demonstrated proper and sufficient grounds to warrant the grant of the orders sought. Relying on the case of *Jamii Bora Limited vs Samuel Wambugu Ndirangu* (2022)eKLR, it was submitted that the principles which the court ought to consider in granting an application for stay was already enumerated in the case of *Butt vs Rent Restriction Tribunal* (1979) eKLR.
8. It was also submitted that the Respondent has not even attempted to evict the Appellant, there is no threat for eviction and as such the orders sought cannot be granted.
9. The Respondent urged the court to dismiss the application with costs as the said application lacks merit.
10. Having considered all the relevant pleadings, the sole issue that arises for determination is whether the Appellant has satisfactorily discharged the conditions warranting the grant of stay of execution pending appeal.
11. The law governing the grant of stay of execution pending appeal is Order 42 Rule 6 of the *Civil Procedure Rules*, the relevant part of which states as follows:
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 order set aside.
 - (2) No order for stay of execution shall be made under subrule (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.

12. It is apparent from the above provisions of the law that the Appellant is required to satisfy all the requirements set out therein to be entitled to orders of stay of execution. The requirements as per the above provision are threefold: whether there is sufficient cause; whether there is likelihood of substantial loss and whether security for the due performance of the decree has been provided.

13. The Court of Appeal in *Butt vs Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how a court should exercise its discretion when determining whether or not to grant a stay of execution. It stated thus;

- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
- 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

14. The Appellant contends that he will suffer substantial loss as the Respondent will in execution of the decree evict him from the suit property which currently has a school known as St. Rose Kilemba Academy.

15. What amounts to substantial loss What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma vs Abuoga* (1988) KLR 645 where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

14. The evidence adduced before the court shows that vide the judgment delivered on 29th November 2023, the lower court directed the Appellant to deliver vacant possession within 30 days from 29th



November 2023. From the proceedings before the trial court there is no dispute that the Appellant is in possession of the suit property which currently has a school. In this instance, the court is persuaded that if eviction is effected the Appellant would suffer substantial loss which may also render the appeal nugatory.

15. It is also apparent that the Appellant filed the application for stay pending appeal without unreasonable delay. Judgment was delivered on 29th November 2023 and the application was filed on 15th December 2023.
16. On whether the Appellant has provided security for due performance of the decree should his appeal ultimately fail, this court has considered that the suit land will be there even after the appeal has been heard and determined and, in those circumstances, the court is of the view that due performance at the decree is not necessary.
17. In conclusion, the application dated 15th December 2023 is hereby allowed as follows: -
 - a. An order staying the execution of the judgment and decree of Voi C.M ELC Case No. E003 of 2021 delivered on 29th November 2023 be and is hereby granted pending the hearing and determination of the appeal.
 - b. Costs to abide the determination of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY IN VOI THIS 9TH DAY OF MAY, 2024.

E. K. WABWOTO

JUDGE

In the presence of :-

Mr. Kiwinga for the Appellant.

Mr. Mwandoto for the Respondent.

Court Assistant; Mary Ngoira.

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