



Mumira v Malombo & another (Environment and Land Appeal E044 of 2023) [2024] KEELC 4626 (KLR) (11 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4626 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E044 OF 2023
NA MATHEKA, J
JUNE 11, 2024**

BETWEEN

VERONICA MWIHAKI MUMIRA APPELLANT

AND

ROBINSON O. MALOMBO 1ST RESPONDENT

EVA NYAWIRA MUTERO 2ND RESPONDENT

RULING

1. The application is dated 24th January 2024 and is brought under Section IA, 1B, SBA, 6.3(e), Of the [Civil Procedure Act](#), Order 22 Rule 22, Order 42 Rule 6 and Order 51 Rule 1 of the [Civil Procedure Rules 2010](#) seeking the following orders;
 1. Spent.
 2. There be a stay of execution of the Ruling/Orders given herein against the Appellant on 08th December, 2023 in MSA ELC no. E105 of 2023 pending the hearing and determination of this application herein;
 3. There be a stay of execution of the Ruling/Orders given herein against the appellant on 08th December, 2023 in MSA ELC No. E105 of 2023 pending hearing and determination of the appellant’s appeal being MSA ELC Appeal No. E044 of 2023 herein;
 4. The court be pleased to issue stay orders of the proceedings in MSA ELC No.E105 of2023 pending the hearing and determination of the Appeal herein.
 5. The costs of this application be provided.
2. The application was based on the grounds that the Hon. Magistrate dismissed similar prayers of stay through its ruling dated 18th January 2024. The appellant had made an application similar to the



instant one seeking stay against the ruling of the trial court in ELCC E105 of 2023 dated 8th December 2023. The ruling was for orders of temporary injunction against the appellant where she was stopped from carrying out bed and breakfast business popularly known as airbnb on the apartments known as Georgia Luxury Apartments on L.R 6993/I/MN pending the hearing and determination of the trial suit above mentioned.

3. There was no reply by the respondents although there is a letter from the 1st respondent claiming that he has not responded for the reason that the appellant has failed to serve a notice of appeal and that he does not recognize this appeal. However, he filed submissions which in itself is an acknowledgement of the instant appeal. Counsel for the appellant filed their submissions and reiterated the facts in the instant application and relied on Order 42 (6) of the *civil procedure rules*. They argued that the appellant will suffer immense loss of Kshs. 1,500,000 per month if the same does not conduct her airbnb business and relied on *Mukoma v Abuoga* [1988] KLR which explained what substantial loss is.
4. Furthermore, counsel argued that the apprehensions by the respondents that the said business will diminish the ambience and serenity enjoyed on the suit property was not superior to the interests of the appellant. Counsel also argued that the application was brought without delay and emphasized on the need to grant stay orders while relying on *Absalom Dova v Tarbo Transporters* [2013] eKLR.
5. Counsel for the respondents argued that the application is an abuse of the process of the court process as it had previously been determined in the trial court and relied on *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR. Furthermore, counsel argued that the correct step for the appellant would have been a review or an appeal of the ruling dated 18th January 2024 and relied on *Isolux Ingeniera, SA v Kenya Electricity Transmission Company Limited & 5 others* [2018] eKLR. Counsel submitted that the appellant failed to satisfy the principles of a stay pending appeal and relied on a plethora of cases such as *Butt v Rent Restriction Tribunal* [1979] eKLR, *Madhupaper International Ltd. v Kerr* [1985] eKLR. Counsel argued that she was denied access to the suit property but was only prevented from conducting airbnb business. Counsel also attempted to explain why they did not file a replying affidavit and reiterated the fact that they were not served with a record or memorandum of appeal.
6. I have read and considered the application and the submissions herein. The issue for determination is whether this court can grant a temporary injunction. The appropriate provision for stay pending appeal can be found in order 42 (6) (1) of the *civil procedure rules* which states as follows:

“No appeal or 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 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.”

Sub rule 2 says as follows:

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.”

7. 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) v 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.”

8. Substantial loss was described in *Jason Ngumba Kagu & 2 Others v Intra Africa Assurance Co. Limited* [2014] eKLR where it was held that;

“The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.”

9. In *Samvir Trustee Limited v Guardian Bank Limited Nairobi* (Milimani) HCCC 795 of 1997 the court observed that;

“...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...”

10. The appellant did not support her arguments of losing Kshs. 1,500,000 per month with any evidence. In fact, the appellant did not mention the above figure in her application, it was only mentioned in the submissions which makes the court infer that the figure of Kshs. 1,500,000 was an afterthought.



Warsame, J (as he then was) held as follows in *Samvir Trustee Limited case* as follows:

“...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. ...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

11. The arguments by counsel for the appellant are unsatisfactory in the court’s opinion, however as the learned judge above said “...yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement...” and I find that substantial loss has not been proved. The court finds from the ruling that the appellant is the developer of the suit property and carries out air bnb business on the unsold apartments on the suit property and that the injunction prevents her from earning a living. There is an issue yet to be determined by evidence whether these premises are residential or commercial. I am not persuaded that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the applicant has not fulfilled the above grounds mentioned to enable me grant the stay. I find the application dated 24th January 2024 is unmerited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 11TH DAY OF JUNE 2024.

N.A. MATHEKA

JUDGE

