



REPUBLIC OF KENYA



**Katana & 7 others v Tayabal & 4 others (Environment & Land Case
201 of 2015) [2024] KEELC 6340 (KLR) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6340 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 201 OF 2015
FM NJOROGE, J
SEPTEMBER 30, 2024**

BETWEEN

**BENJAMIN KAHINDI KATANA 1ST PLAINTIFF
KARISA CHAI MAINGI 2ND PLAINTIFF
KATANA CHAI MAINGI 3RD PLAINTIFF
NGUMBAO MWATETE 4TH PLAINTIFF
SAFARI NGUMBAO 5TH PLAINTIFF
KESI NGUMBAO 6TH PLAINTIFF
KAHINDI NGUMAO 7TH PLAINTIFF
JOSEPH NGUMBAO MWATETE 8TH PLAINTIFF**

AND

**MURTAZA SHABBIR TAYABAL 1ST DEFENDANT
QUIBUDDIN SHABBIR TAYABAL 2ND DEFENDANT
MABETE PROPERTIES LIMITED 3RD DEFENDANT
LABAN NJENGA KAGIMBI 4TH DEFENDANT
FERDINARD NDUNDI MWAMBIRE 5TH DEFENDANT**

RULING

1. The plaintiff/applicant filed a Notice of Motion application dated 29/11/2023 seeking orders that: -
 - a. Spent.



- b. The Honourable Court be pleased to order the stay of execution of this Honourable Court’s judgment delivered by Honourable Lady Justice M.A Odeny on the 22nd day of November 2023 pending the hearing and the determination of the Application.
 - c. There be stay of execution of this Honourable Court Judgment delivered on 22nd November 2023 pending the hearing and determination of the Plaintiff’s intended appeal.
 - d. The costs of this application be provided for.
 - e. Such other and/or further orders as the Honourable Court may deem expedient and fit to grant.
2. The application is grounded upon the grounds that judgment was delivered on 22nd November 2023; that the Applicant has already filed an appeal in the Court of Appeal -Malindi Civil Appeal No. E024 of 2024 Benjamin Kahindi Katana & 7 Others Vs Murtaza Shabbir & Others which is still pending hence the need for a stay of execution pending its hearing and determination; that the appeal has a high chances of success and that the respondents have initiated the process of execution. The Applicant relies on the annexed affidavit of Benjamin Kahindi Katana sworn on the 29th November 2023.
 3. The defendants/respondents filed their Replying Affidavit sworn by Luke Bruno Mwatsuma on the 6th May 2024. The deponent stated that he is the director of the 3rd defendant/respondent. He further stated that the application is a mere afterthought; that the notice of appeal was not served on time and no order enlarging time for such service has been obtained and that there is thus no appeal in existence. It is also stated that the appeal is not arguable.
 4. In response to the replying affidavit the applicants filed a supplementary affidavit sworn by the 1st applicant to which he attached documents showing that a record of appeal in the concerned, Civil Appeal No E024 of 2024 has already been filed and that issues relating to the validity or otherwise of the notice of appeal raised by the respondents ought to be dealt with not by this court but by the appellate court.
 5. Stay of execution is governed by the provisions of Order 42 Rule 6 of the CPR. The provisions therein are as follows:
 - 6 (1) “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.”
 - (2) 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.”
 6. In brief, the principles governing an application for stay of execution are therefore as follows:
 - a. Whether there is an appeal in place;



- b. Whether the applicant may sustain substantial loss if the orders of stay are not granted;
 - c. Whether the application has been brought without inordinate delay;
 - d. Whether security has been availed.
7. In the present motion I have noted that a notice of appeal as filed. I agree with the applicants that the validity of the notice of appeal is a matter not for the determination of this court but for the appellate court.
 8. Regarding the second issue as to risk of substantial loss, this court finds no evidence attached to the application that could in any manner suggest that the applicants would sustain such loss in the event the orders are not granted.
 9. Thirdly I must consider whether the application has been brought without inordinate delay. The judgment was delivered on 22/11/2023 and the application for state was filed on 30/11/2023. Considering the period in between those two dates which is only 9 days, there was no inordinate delay in the filing of the application.
 10. On the fourth issue, courts have discretion to set the conditions as to security if all the other principles for the grant of stay have been met. However, in the present case as the applicants have failed to establish by evidence that they stand risk of substantial loss if the orders are not granted, the notice of motion application dated 29/11/2023 must fail and it is hereby dismissed with costs.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 30TH DAY OF SEPTEMBER, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

