



Center for Litigation on Environment and Government (CLEG) v Tasir & 7 others (Environment & Land Petition E001 of 2024) [2024] KEELC 6123 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6123 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION E001 OF 2024
NA MATHEKA, J
SEPTEMBER 26, 2024**

BETWEEN

**CENTER FOR LITIGATION ON ENVIRONMENT AND GOVERNMENT
(CLEG) APPLICANT**

AND

**HAJI MBARAK TASIR 1ST DEFENDANT
COUNTY GOVERNMENT OF MOMBASA 2ND DEFENDANT
NATIONAL CONSTRUCTION AUTHORITY 3RD DEFENDANT
NATIONAL BUILDING INSPECTORATE 4TH DEFENDANT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 5TH
DEFENDANT
KENYA URBAN ROADS AUTHORITY 6TH DEFENDANT
ENGINEERS BOARD OF KENYA 7TH DEFENDANT
ATTORNEY GENERAL OF THE PUBLIC OF KENYA 8TH DEFENDANT**

RULING

1. The application is dated 20th June 2024 Section 3, 3A & 63(e) of The Civil Procedure Act Order 42 Rule 6 & Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders;
 1. That the Application filed herewith be certified as urgent and service upon the Respondent herein be dispensed with in the first instance.



2. That this Honourable Court be pleased to issue stay of execution of the ruling and order delivered and issued on the on 12th June, 2024 particularly the orders requiring the tenants to vacate pending the hearing and determination of the Application herewith inter-parties.
 3. That this Honourable Court be pleased to issue stay of execution of the ruling and order delivered and issued on the on 12th June, 2024 particularly the orders requiring the tenants to vacate pending the hearing and determination of the 1st Respondent's intended Appeal.
 4. That costs hereof be provided for.
2. It is supported by the Affidavit of Haji Mbarak Taisir and upon the grounds that on the 1st Respondent is the registered owner of the building built on Plot NO.1417 Mwembelegeza Scheme in Mombasa (suit property), filed suit herein as against the Respondent seeking to recover the suit property. That ruling was delivered in favour of the Petitioner on the 12th June, 2024 and prohibiting the respondents themselves or by their agents or their staff or their tenants from developing or constructing and or the building on plot no. 1417 Mwembelegeza scheme in Mombasa. That the ruling also ordered the tenants on the ground floor to vacate citing a purported Notice issued on the 4th of April, 2024. That the Respondent / Applicant being aggrieved by the ruling in its entirety we have appealed against the same. That there is, in the meantime, real and imminent threat of execution of the ruling herein. That the 1st Respondent/Applicant fears that if execution hereof to proceed the intended Appeal shall be rendered nugatory. That the 1st Respondent/Applicant is willing to abide conditions set by this Honourable court precedent to the granting of the orders sought in her Application. That the instant Application has been brought without inordinate delay and in good faith.
 3. I have read and considered the application and the submissions herein. 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.”
4. 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) vs 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.”

5. Substantial loss was described in *Jason Ngumba Kagu & 2 Others vs 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.”

6. In *[Samvir Trustee Limited vs 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...”

7. 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.”

8. The arguments by counsel for the appellant are unsatisfactory in the court’s opinion. The ruling sought to be appealed against was delivered in favour of the Petitioner on the 12th June, 2024 and prohibited the 1st respondent themselves or by their agents or their staff or their tenants from developing or constructing and or the building on plot no. 1417 Mwembelegeza scheme in Mombasa. That the ruling also ordered the tenants to vacate based on expert advice that the building was unsafe for human habitation. 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. This court had already given directions on the main appeal and parties are advised to proceed with the same. I find the application dated 20th June 2024 is unmerited and I dismiss it with costs.
9. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF SEPTEMBER 2024.

N.A. MATHEKA

JUDGE

