



Shabaya v Kamunyi (Suing through Jossy Wangechi Munyi under a Power of Attorney) (Environment and Land Appeal E025 of 2023) [2024] KEELC 6301 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6301 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E025 OF 2023
LC KOMINGOI, J
SEPTEMBER 26, 2024**

BETWEEN

BENN KHADIAGALA SHABAYA APPELLANT

AND

ROBERT SAMUEL KARIUKI KAMUNYI RESPONDENT

SUING THROUGH JOSSY WANGECHI MUNYI UNDER A POWER OF ATTORNEY

(Being an appeal against the Judgement and Decree of the Honorable Magistrate (Hon. P. Achieng), delivered on 30th November 2023 in Ngong MCELC 24 of 2018)

RULING

1. This is the Notice of Motion dated 30th November 2023 brought under; (Order 42 rule 6 of the [Civil Procedure Rules](#), Section 1A, 1B, 3A and 63 (e) of the [Civil Procedure Act](#), Article 159 of the [Constitution](#) and all other enabling provisions of law).
2. It seeks Orders;
 1. Spent.
 2. Spent.
 3. That the Honourable court be pleased to grant a stay of execution of the judgement issued on 30th November 2023 and all consequential orders issued pending the hearing and determination of this appeal.
 4. That the costs of the application be in the cause.
3. The grounds are on the face of the application and are set out in paragraphs a to J.



4. The Notice of Motion is supported by the affidavit of Benn Khadiagala Shabaya, the Appellant herein, sworn on the 30th November 2023.
5. The Application is opposed. There is a Replying Affidavit sworn by Jossy Wangechi Munyi, Donee of the power of Attorney from Robert Samuel Kariuki Kamunyi, the Respondent herein, sworn on the 1st April, 2024.
6. On the 24th April 2024, the court with the consent of the parties directed that the Notice of Motion be canvassed by way of written submissions.

The Appellant's Submissions.

7. They are dated 13th June 2024. Counsel relies on Order 42 rule 6 of the [Civil Procedure Rules](#) and the case of [Transbel Limited v Ann Mwelu Mutungi & Another](#) [2007] eKLR .
8. Counsel submitted that the Application has been brought without undue delay, shortly after the delivery of Judgement in the lower court.
9. It is also submitted that the Appellant's property is at risk of demolition if these orders are not granted. Further that, the Appellant has demonstrated substantial loss and reliance is placed on the case of [Rhoda Mukuma v John Abuoga](#) [1988] eKLR.
10. Counsel further submitted that this Appeal will be rendered nugatory and the Appellant greatly prejudiced if the orders are not granted and that in the event the Appeal succeeds it would be impossible to obtain a refund of damages arising out of the demolition of his matrimonial home.
He has put forward the case of [Waruru & Another v Oyatsi](#) NAI CACA 223 OF 2000;
Consolidated [Marine v Nampijja & Another](#), Civil App. No. 93 of 1989;
[Butt v Rent Restriction Tribunal](#) [1979] eKLR .
11. Counsel further submitted that the Appellant is willing to abide by any conditions the court were to impose on security. He has put forward the case of [Arun C. Sharma v Ashana Raikundalia & 5 Others](#) [2015] eKLR .
He prays that the orders be granted.

The Respondent's Submissions.

12. They are dated 8th July 2024. Counsel submitted that the Appellant has failed to demonstrate that he will suffer substantial loss if these orders are not granted.
He has put forward the cases of [Machira t/a Machira & Co. Advocates v East African Standard \(No. 2\)](#) [2002] KLR 63;
[Samvir Trustee Limited v Guardian Bank Limited](#) Nairobi (Milimani) HCC 795 of 1997.
13. Counsel further submitted that the Appeal has no high chances of success. He has put forward the case of [Lucy Wanjiku Mwangi \(Suing as the legal representative of the estate of Benson Mwangi Macharia\) v Chief Land Registrar & 2 Others](#) [2022] eKLR .
14. It is further submitted that the Appellant has been indolent by failing to prosecute his defence in the lower court.
He prays that the application be disallowed.



15. I have considered the Notice of Motion, the Affidavit in support, the response thereto, the rival submissions and the authorities cited. The issues for determination is whether the Notice of motion is merited.
16. In her Judgment the Learned trial magistrate observed thus;

“.....The 1st Defendant was denied further adjournment and his case closed on 3rd August 2023, while the 3rd and 4th Defendant failed to attend court on the same date. When the matter was pending delivery of Judgement, the 1st Defendant’s counsel filed an application dated 30th October 2023 under Certificate of Urgency, seeking to reopen the case and be allowed to adduce evidence. The said application could not however be admitted for consideration owing to the orders issued on 3rd August 2023 disallowing an adjournment and also since the court was in the process of considering the matter for Judgement.”
17. Given the above reasons, the Appellant ought to have sought a review of the said Judgment and not file an appeal.
18. Since he chose to appeal, this court will consider the fact the Respondent was able to prove his ownership of the suit property. While the Appellant did not put forth his case. As things stands it is not clear what his defence was.
19. For these reasons I find that he has failed to demonstrate that he will suffer substantial loss if these orders are not granted.
20. He has also failed to demonstrate that the appeal has high chances of success and that the Respondent would not be able to compensate him should he succeed on appeal.
21. The upshot of the matter is that I find no merit on this application and the same is dismissed with costs to the Respondent.

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

L. KOMINGOI

JUDGE.

In The Presence Of:

N/A for the Appellant.

Mr. Irungu for the Respondent.

Court Assistant - Mutisya

