



REPUBLIC OF KENYA



**Gathembu & another v Kalala (Environment & Land Case 90 of 2012)  
[2024] KEELC 6102 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6102 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 90 OF 2012  
NA MATHEKA, J  
SEPTEMBER 24, 2024**

**BETWEEN**

**ANTHONY GATHEMBU ..... 1<sup>ST</sup> PLAINTIFF**

**ESTHER MUTHONI GATHEMBU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**PAUL KATANA KALALA ..... DEFENDANT**

**RULING**

1. The application is dated 3<sup>rd</sup> April 2024 and is brought under Order 42 Rules 6, 7 Order 22 Rule 22 Order 51 Rule 1 of the [Civil Procedure Rules](#) 2010 and Sections IA and 1 B of the [Civil Procedure Act](#) seeking the following orders;
  1. That this Honourable Court do certify this application as urgent and dispense with service at first instance and hear it ex-parte.
  2. That the Honourable Court be pleased to grant a stay of execution of the Order emanating from the decision of Honourable Justice N.A. Matheka delivered against the Defendant on the 31<sup>st</sup> January 2024 pending the hearing of this application inter parte.
  3. That the Honourable court be pleased to grant a stay of execution of the Order emanating from the decision of Honourable Justice N.A. Matheka delivered against the Defendant on the 31<sup>st</sup> January 2024 pending the hearing and determination of the appeal in the Court of Appeal being Mombasa Civil Appeal No E035 of 2024 (Paul Katana Kalala vs Anthony Gathembu & Dr. Esther Muthoni Gathembu)
  4. That the costs of the application be provided.
2. It is based on the supporting affidavit of Paul Katana Kalala and the grounds that in this matter Defendant was directed to grant vacant possession of the suit property by a decision of Honourable



Justice N.A. Matheka delivered against the Defendant on the 31<sup>st</sup> January 2024. That the Plaintiff is at liberty to proceed with the execution given that the Defendant was granted 60 days which lapse on 31<sup>st</sup> March 2024 to demolish and vacate and in default an eviction order to issue. That the Defendant is aggrieved by the decision of Honourable Justice N.A. Matheka delivered against the Defendant on the 31<sup>st</sup> January 2024 and have preferred an appeal to the Court of Appeal. That the Defendant will suffer irreparable and substantive loss in the event execution is allowed to proceed before the appeal is heard. That this application, the appeal and the record of appeal have been lodged without undue delay. That granting a stay of execution for an aggrieved party who intends to pursue an appeal is one of the components of the overriding objectives of the law so as to achieve substantial justice and fairness for both parties. That the Honourable court be pleased to grant a stay of execution of the Order emanating from the decision of Honourable Justice N.A. Matheka delivered against the Defendant on the 31<sup>st</sup> January 2024 pending the hearing of this application interparte. That the Honourable court be pleased to grant a stay of execution of the Order emanating from the decision of Honourable Justice N.A. Matheka delivered against the Defendant on the 31<sup>st</sup> January 2024 pending the hearing and determination of the appeal in the Court of Appeal being Mombasa Civil Appeal No E035 of 2024 (Paul Katana Kalala Vs Anthony Gathembu Dr. Esther Muthoni Gathembu)

3. The Respondent stated that this court through its judgment delivered on 31<sup>st</sup> January 2024 found in favour of the Plaintiff and declared the Defendant a trespasser in respect of the suit premised. Consequently, the defendant was directed to vacate the suit premises and the court further granted 60 days stay of execution of the decree. The this honourable court having already determined this matter rendering a judgment and even order a stay of execution. That the court herein no longer has powers to deal with the matter on the orders sought by the judgment debtor. That despite the lapse of the stay of execution orders on 31<sup>st</sup> March 2024 no steps have been taken to execute the decree resulting from the judgment of 31<sup>st</sup> January 2024. The judgment debtor/applicant has not been threatened with any execution and therefore the application under certificate of urgency was not necessary. That despite there been order restraining the Defendant from interfering with the Plaintiff's suit properties, the Defendant has chosen to disregard the orders and instead has been putting up new structures/renovating the existing structures therefore the Defendant has approached this Court with unclean hands and therefore does not deserve the orders.
4. This court has considered the application and submissions therein. Order 42, rule 6 states:

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.”
5. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#), the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions.
6. Section 1A(2) of the [Civil Procedure Act](#) provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objectives are; “the just determination



of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”

7. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
8. 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.”

9. The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in *Chris Munga N. Bichange vs Richard Nyagaka Tongi & 2 Others* eKLR where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus;

..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

10. In the case of *Mohamed Salim T/A Choice Butchery vs Nasserpuria Memon Jamat* (2013) eKLR, the court stated that;

That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right .....

11. We are further guided by this court’s decision in *Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others* Civil Appeal No. 291 of 1997, at Page 4 as follows:

... the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . . the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant



must furnish security, and the application must, of course, be made without unreasonable delay.”

12. In the instant case, the court through its judgment delivered on 31<sup>st</sup> January 2024 found in favour of the Plaintiff and declared the Defendant a trespasser in respect of the suit premised. Consequently, the defendant was directed to vacate the suit premises and the court further granted 60 days stay of execution of the decree. The applicant avers that he has filed and served a Notice of Appeal against the judgement of the Court delivered on 31<sup>st</sup> January 2024. This application filed on the 3<sup>rd</sup> April 2024. That the applicant will suffer irreparable and substantive loss in the event execution is allowed to proceed before the appeal is heard. That this application, the appeal and the record of appeal have been lodged without undue delay.
13. The Respondent opposed the application and stated that despite there been order restraining the Defendant from interfering with the Plaintiff’s suit properties, the Defendant has refused to vacate and has chosen to disregard the orders and instead has been putting up new structures/renovating the existing structures therefore the Defendant has approached this Court with unclean hands and therefore does not deserve the orders.
14. I concur with the Respondent’s submissions and find that the Applicant has not come to court with clean hands and has disregarded court orders. The judgement was delivered on the 30<sup>st</sup> January 2024 and the order to vacate lapsed on the 31<sup>st</sup> March 2024 and this application was filed on the 3<sup>rd</sup> April 2024, I find the delay inordinate. Be that as it may, this court is not persuaded, that the appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, 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 any of the grounds to enable me grant the stay. I find this application dated 3<sup>rd</sup> April 2024 has no merit and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**N.A. MATHEKA**

**JUDGE**

