



**Nyaga v Yawa (Environment and Land Appeal E001 of 2024)  
[2024] KEELC 7142 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7142 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL E001 OF 2024  
NA MATHEKA, J  
OCTOBER 31, 2024**

**BETWEEN**

**KIMATHI NYAGA ..... APPELLANT**

**AND**

**MAKUPE YAWA ..... RESPONDENT**

**RULING**

1. The application is dated 9<sup>th</sup> July 2024 and is brought under Section 1A, 1B, 3A of the Order 42 51 of the CPA, Order 42 and 51 of the CPR seeking the following orders;
  1. The matter be certified urgent service be dispensed with in z the first instance in order to be heard exparte.
  2. There be issued interim stay of execution of the entire Ruling and Order of Hon Gakuhi Chege (Vice Chair) in Mombasa BPRT Case No.E079 of 2021 delivered on 1<sup>st</sup> December 2021 pending interparties hearing and determination of this application.
  3. That the Appeal be reinstated.
  4. There be issued stay of execution of the entire Ruling and Order of Hon Gakuhi Chege (Vice Chair) in Mombasa BPRT Case No. of 2021 delivered on 1<sup>st</sup> December 2021 pending interparties hearing and determination of the entire appeal.
  5. Costs be borne by the Respondent
2. It is based on the grounds that the application is premised by the fact that aggrieved with the entire Ruling and Order of Hon Gakuhi Chege (Vice Chair) in Mombasa BPRT Case No.E078 of 2021 delivered on 1<sup>st</sup> December 2023 the Appellant filed this appeal together with a complete Record Of Appeal and the only issue the Appellants were seeking before the main Appeal is heard was stay pending appeal. On 20<sup>th</sup> June 2024 the case was listed for mention of the Appellants application dated 26<sup>th</sup>



February 2024 seeking stay pending appeal however the Advocate for the Appellant was absent and the Court, the entire Appeal for non-attendance. That reason for non-attendance the advocate is because the Advocate was indisposed. That the appeal is merely 6 months old that the Appellants were diligent enough to have complied with filing the Record of Appeal in record time that is just around 2 months after the appeal was lodged. That the only issue the Appellant was ruling pending: appeal before the suit was dismissed on 20<sup>th</sup> June 2024 during a mention. That the advocate was indisposed and the shortcomings of the advocated should not be visited on an innocent litigant who has an arguable appeal with high chances of success. That unless a stay of ruling is granted the appeal will be rendered nugatory. That the delay in prosecution of the appeal and the non- attendance leading to the dismissal of the appeal is not inordinate and is excusable.

3. This court has considered the application and the supporting affidavit. Order 12 Rule 1 of the [Civil Procedure Rules](#) State that:

"If on the day fixed for hearing, after the suit has been called on for hearing outside the court, neither party attends, the court may dismiss the suit."

4. On 30<sup>th</sup> November 2021 when the matter came up for hearing, neither the plaintiff nor the defendant were present when the matter was called out. The court dismissed the suit for nonattendance. The effect of dismissal is captured by Rule 6 (1) of Order 12 which states:

"Subject to subrule (2) and to any law of limitation of actions, where a suit is dismissed under this Order the plaintiff may bring a fresh suit or may apply to the court to reinstate the suit."

5. The principles upon which the court will exercise its discretion to reinstate or not a suit dismissed for nonattendance were set out in [Ivita v. Kyumbu](#) (1984) KLR 441, where it was held that:

"The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favor and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

6. The supporting affidavit dated 9<sup>th</sup> July 2024 sworn by Kimathi Nyaga, Counsel for the Appellant attributes his absence due to injuries sustained when he was attacked by robbers. He attached the P3form. He contended that the failure of Counsel to attend court was not deliberate and argued that the plaintiff stands to suffer irreparably He urged court to reinstate the suit and hear it on merit for the interest of justice.

7. This application seeking reinstatement was filed on 9<sup>th</sup> July 2024 after the suit was dismissed on 20<sup>th</sup> June 2024. I find that the Applicant is not guilty of inordinate delay. Secondly, I find that reasons given are reasonable as the Advocate in conduct of the matter was indisposed. It is in the interest of justice and fairness that the appeal is reinstated.



8. On the issue of stay of execution pending appeal, 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."

9. 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.

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."

10. 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.

11. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR, that;

"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

12. 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.”
13. 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 v 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....."
14. In the case of *Mohamed Salim T/A Choice Butchery v 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 ....."
15. We are further guided by this court’s decision in *Carter & Sons Ltd v 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."
16. In the instant case, the applicant avers that that being aggrieved with the entire Ruling and Order of Hon Gakuhi Chege (Vice Chair) in Mombasa BPRT Case No.E078 of 2021 delivered on 1<sup>st</sup> December 2023 the Appellant filed this appeal together with a complete Record of Appeal and the only issue the Appellants were seeking before the main Appeal is heard was stay pending appeal. I have perused the memorandum of appeal and find that the grounds are that the Vice Chair erred in fact and in law by awarding a rent increase beyond what was pleaded and that she failed to appreciate the lettable area and arrived at a wrong conclusion. I have carefully read the said judgement and find that the Vice Chair took into consideration both valuation reports and the lettable area. Be that as it may, 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 of execution. I find this application succeeds in part and I reinstate the appeal for hearing. No order as to costs as the same undefended.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 31<sup>ST</sup> DAY OF OCTOBER 2024.**



**N.A. MATHEKA**  
**JUDGE**

