



**Omar & another (As executors of the Will of Omar Bin Khamis) v  
Kenya Airports Authority & another (Environment & Land Petition  
E007 of 2023) [2024] KEELC 7093 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7093 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND PETITION E007 OF 2023  
NA MATHEKA, J  
OCTOBER 31, 2024**

**BETWEEN**

**ABEID AWADH OMAR ..... 1<sup>ST</sup> PETITIONER  
OMAR KHAMIS OMAR ..... 2<sup>ND</sup> PETITIONER  
AS EXECUTORS OF THE WILL OF OMAR BIN KHAMIS**

**AND**

**KENYA AIRPORTS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT  
THE HON ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application is dated 5<sup>th</sup> July 2024 and is brought under Order 42 Rule 6, Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules and Sections IA 1B & 3A of the [Civil Procedure Act](#) seeking the following orders that;
  1. That this application be certified as urgent and service thereof be dispensed with in the first instance.
  2. That this Honourable Court be pleased to issue an Order for stay of execution of the judgment delivered in this matter on 28<sup>th</sup> February, 2024 and all the consequential orders arising therefrom pending the hearing of this application interpartes.
  3. That this Honourable Court be pleased to issue an order of stay of execution of the judgment delivered in this matter on 28<sup>th</sup> February, 2024 and all the consequential orders arising therefrom pending the hearing and determination of the 1<sup>st</sup> Respondent's/ Applicant's intended appeal to the Court of Appeal.



4. That this Honourable Court be pleased to grant any further relief and/or order it may deem fit and just to grant in the circumstances.
5. That the costs of this application be provided for.
2. It is based on the grounds that this Honourable Court delivered its judgment on February, 2024 wherein it entered judgment for the Petitioners against the 1<sup>st</sup> Respondent/ Applicant in the sum of Kshs.84,000,000/= plus costs. That thereafter, through a delivered on 21<sup>st</sup> Mav, 2024, the Petitioners' costs were assessed at Kshs.2,058,967/=. That being dissatisfied with the judgement of the court delivered on 28<sup>th</sup> February, 2024, the 1<sup>st</sup> Respondent/ Applicant has already filed its Notice of Appeal signifying its intention to file an appeal against the said decision to the Court of Appeal.
3. That the Applicant's intended Appeal raises several crucial arguable grounds of appeal which have chances of success. That Petitioners have commenced execution of the judgment by seeking to attach the 1<sup>st</sup> Respondent's/ Applicant's funds through Garnishee proceeding's and as such, the Applicant is apprehensive that the said execution will greatly prejudice the 1<sup>st</sup> Respondent/ Applicant as both this application and the intended appeal, if successful, will be rendered nugatory and/or a mere academic exercise. That execution by the Petitioners is contrary to the provisions of Section 35 of the [Kenya Airports Authority Act](#) which bars execution against the Authority and the same is therefore illegal, unlawful and/or irregular. As such, unless this Honourable Court intervenes and issues the orders sought, the said unlawful execution will continue to the great detriment of the Applicant herein.
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. As to what substantial loss is, it was observed in *James Wangalwa & Another vs 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.”

9. 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.”

10. 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.....”

11. 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 .....



12. 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.”

13. In the instant case, the court on February, 2024 entered judgment for the Petitioners against the 1<sup>st</sup> Respondent/ Applicant in the sum of Kshs.84,000,000/= plus costs. That thereafter, through a ruling delivered on 21<sup>st</sup> May, 2024 costs were assessed at Kshs.2,058,967/=. That being dissatisfied with the judgement the 1<sup>st</sup> Respondent/ Applicant has already filed its Notice of Appeal signifying its intention to file an appeal against the said decision to the Court of Appeal. 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 and the appeal have been lodged without undue delay.
14. The respondent opposed the application and stated that they have not started execution proceedings on the judgement sum. That there has been inordinate in preparing the memorandum of appeal and filing the instant application. That they have not shown what prejudice will be suffered if the application is not granted.
15. I have perused the court record and find that the judgement was delivered on the judgment on 28<sup>th</sup> February, 2024 for the Petitioners against the 1<sup>st</sup> Respondent/ Applicant in the sum of Kshs.84,000,000/= plus costs. That thereafter, through a ruling delivered on 21<sup>st</sup> May, 2024, the Petitioners' costs were assessed at Kshs.2,058,967/=. This application was filed on the 5<sup>th</sup> July 2024, I find that there is no inordinate delay. One of the grounds of appeal is that the learned Honorable Trial Court erred in law and fact by admitting into evidence the Valuation Report by Ultimate Valuers Limited dated 23<sup>rd</sup> February, 2023 notwithstanding the fact that the author/ maker of the said report was not called to produce the same contrary to the provisions of Sections 35 and 63 of the [Evidence Act](#). The Applicant submitted that the Petitioners have no known disclosed assets, or any known place of abode, from which the 1<sup>st</sup> Respondent/Applicant can recover the monies that are likely to executed for any time now. As such, if the orders sought are not granted, the 1<sup>st</sup> Respondent/ Applicant stands to suffer irreparably as the colossal sum of Kshs. 84,000,000/= plus costs of Kshs 2,058. 967/ = will be irretrievably gone by the time the preferred appeal is heard and determined hence rendering both the application herein and the appeal nugatory. The decretal sum is a colossal amount and the Applicant may not be able to recover the same if their appeal is successful. I concur with the Applicant's submissions and I am 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 fulfilled the grounds to enable me grant the stay. I find this application dated 5<sup>th</sup> July 2024 is merited and I grant it as prayed. Costs to be in the cause.

It is so ordered.

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

**N.A. MATHEKA**

**JUDGE**

