



**Mulla v Malik & 13 others (Environment & Land Case 31 of 2012)
[2024] KEELC 14165 (KLR) (26 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 14165 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 31 OF 2012
FM NJOROGE, J
NOVEMBER 26, 2024**

BETWEEN

YAHYA MOHAMED ALI MULLA PLAINTIFF

AND

**ABDUL MALIK & 13 OTHERS & 13 OTHERS & 13 OTHERS & 13 OTHERS &
13 OTHERS & 13 OTHERS DEFENDANT**

RULING

1. The Defendants' application dated 15/7/2024, which was brought under sections 1A, 1B and 3A of the provisions of the *Civil Procedure Act* and Order 42 rule 6 of the Civil Procedure Rules has come up for determination before this court. The orders sought are tailored as follows: -
 1. Spent;
 1. Spent;
 3. That this honourable court be pleased to grant a stay of execution of the judgment delivered on 28th May 2024, decree and all other consequential orders emanating therefrom pending the hearing and determination of the appeal;
 4. That costs of this application be provided for.
2. The application which is premised on the sworn supporting affidavit of Ali Said Tsuma is based on the grounds that this court delivered a judgment on 28/5/2024 in favour of the Plaintiff against which the Defendants intend to appeal. The deponent stated that they filed a notice of appeal on 25/6/2024 and have since applied for typed and certified copies of the proceedings vide a letter dated 10/6/2024. The Defendants are apprehensive that the Plaintiff may at any time execute the decree, action which would render their intended appeal nugatory. He added that the Defendants have an arguable appeal and that the Plaintiff will not suffer any prejudice should the application be allowed.



3. The Plaintiff opposed the application. He filed a replying affidavit sworn on 30/7/2024 wherein he deposed that the application does not meet the threshold for granting the orders sought. He urged the court to dismiss the application with costs.
4. Pursuant to the Court's directions, the Plaintiff on the one hand filed written submissions dated 15/10/2024, which I have considered while the Defendant on the other failed to comply with the court's directions.

Analysis And Determination

5. I have considered the application. It is for stay pending appeal. The principles upon which the court assesses such an application are laid down in Order 42 Rule 6 (1) of the [Civil Procedure Rules](#) 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.”

6. Rule 6 (2) further provides: -

“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.”

7. The above provisions are couched in mandatory terms and the three conditions must thus be satisfied before an applicant succeeds on an application for stay pending appeal are that the appeal needs to be in existence, that the application for stay need to have been made without unreasonable delay, and that the court is satisfied that substantial loss may result to the applicant unless the order is made.
8. I will start with the issue of the existence of the appeal. There is no doubt that a notice of appeal dated 10/6/2024 was filed in the matter and so for the purposes of the present application, an appeal must be deemed to be in place.
9. Regarding delay, judgment was delivered in the suit on 28/5/2024, and the present application filed on 15/7/2024, after a period of forty eight days. This delay does not appear inordinate to this court.
10. Next, regarding whether substantial loss has been demonstrated, it must be remembered that this is a matter dealing with land as the substratum of the suit. It is obvious that ownership and possession will



be at the core of the appeal. In addressing the issue of preserving the substratum of the subject matter pending appeal, in the case of *RWW v EKW* [2019] eKLR, the Court stated as follows:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay, however, must balance the interests of the Appellant with those of the Respondent.”
11. Balancing the interests of the parties herein, the Plaintiff is the owner of the suit property, while the Defendants claim ownership by virtue of adverse possession. As ordered by the court, the Defendants are to be evicted from the suit property and all structures standing thereon are to be demolished. I am of the view that the execution of the decree may render the intended appeal nugatory.
12. The issue of security is the last. This court is mandated to issue appropriate orders as to security within its discretion.
13. Having considered the application as a whole, this court finds that it will be in the interests of justice to grant the stay orders pending the hearing and determination of the appeal to preserve the substratum of the suit. I therefore order as follows:
 1. The application dated 15/7/2024 is granted in terms of prayer no 3 thereof subject the condition in order no 2 herein below;
 2. The applicants shall file and serve the record of appeal upon the respondent within 21 days of this order in default of which the orders of stay granted in (1) hereinabove shall automatically lapse and the respondent shall be entitled to execution;
 3. The costs of that application shall abide by the outcome of the appeal.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 26TH DAY OF NOVEMBER, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

