



Kitheka v County Director of Housing - Mombasa County (Civil Appeal E031 of 2023) [2024] KEELC 13517 (KLR) (21 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13517 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL APPEAL E031 OF 2023
LL NAIKUNI, J
NOVEMBER 21, 2024**

BETWEEN

JOHN M. KITHEKA APPELLANT

AND

**THE COUNTY DIRECTOR OF HOUSING - MOMBASA
COUNTY RESPONDENT**

RULING

I. Introduction

1. The Honorable Court is tasked with the determination of two Notice of Motion applications dated 23rd November, 2023 by The County Director of Housing – Mombasa County – Respondent herein. It was brought under the provisions of Sections 1A, 3A and 63 (e) of the *Civil Procedure Act*, Cap. 21, Order 42 Rule 6 (1) and Order 51 Rule 1 of the Civil Procedure Rules 2010. The second application was dated 13th December, 2023 was brought by Abdulhakim Haji, the Intended Interested Party herein seeking to be joined in this appeal. The Application was brought under the provision of Article 159 of *The Constitution*, Sections 1A,3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 22 Rule 52 Order 51 Rule 1 of the Civil Procedure Rules 2010.
2. Upon service of the said application, while in its opposition, the Appellant/Respondent filed a Replying Affidavit dated 29th November, 2023 to the application dated 23rd November, 2023 and a Replying Affidavit dated 12th January, 2024 to the Application dated 13th December, 2023. Subsequently, the Intended Interested Party filed a further affidavit dated 8th March, 2024 to that effect.

II. The Respondent/Applicant's case in the Notice of Motion application dated 23rd November, 2023

3. The Respondent/Applicant sought for the following orders:-
 - a. Spent.



- b. Spent.
 - c. That there be stay of proceedings and the orders of 7th November 2023, pending the hearing and determination of the Appeal filed by the Applicants.
 - d. Spent.
 - e. That this Honorable Court do issue such further orders or directions that it may deem fit to grant in the interest of justice.
 - f. That the costs of this application be in the cause.
4. The application is premised on the grounds, testimonial facts and the averments made out from the 9 Paragraphed Supporting Affidavit of RODGERS WAKHUNGU the County Director of housing under the State Department of Housing and Urban Development herein dated even date together with one (1) annexure Marked as “RW – 1” annexed thereto. He averred that:
- a. The court delivered a ruling on the Respondent’s Application on 7th November 2023, directing the Applicant to reinstate the Respondent into House No. LG/42/A Tononoka which would mean that Mr. Abdulhakim Haji who was not part of the proceedings is evicted from the suit premises.
 - b. They had considered the said ruling and they were dissatisfied with the court’s decision and had instructions to lodge an appeal against the said ruling.
 - c. They had filed a Notice of Appeal and had sought for typed proceedings to enable them file a record of Appeal. (annexed in the affidavit the Copy of Notice of Appeal and letter for typed proceedings marked as “RW - 1”).
 - d. Their Advocates on record had instructed them that the Draft Memorandum of Appeal was ready and they were awaiting the typed proceeding to file their record of Appeal. (find attached herein the Draft Memorandum of Appeal).
 - e. Their appeal raised serious issues of law and fact and had a very high chance of success. He prayed that the orders herein being sought for stay of proceedings be granted.
 - f. The affidavit in support of the Application herein and pray that the same be allowed in the interest of justice.
5. In further support of the Notice of Motion application dated 23rd November, 2023, the Respondent premised on the grounds, testimonial facts and the averments made out from the 8 Paragraphed further Supporting Affidavit of Rodgers Wakhungu the County Director of housing under the State Department of Housing and Urban Development herein dated 1st December, 2023. He averred that:
- a. The Appeal to the court of Appeal was successfully lodged on 28th November 2023 and registered as “Civil Appeal no. E187 of 2023 -County Director of Housing, Mombasa – Versus - John M. Kitheka”.
 - b. The same had been served upon the Respondent herein as they await for direction of disposal from the Deputy Registrar on how to dispose the Appeal.
 - c. He had read the Replying Affidavit by the John M. Kitheka and it was clear in Paragraph 13 that he accepted that there was a 3rd Party in the suit property. As much as they did not agree with the allegations but it was a fact that he was not living within the suit property.



- d. They prayed for stay to enable them prosecute their Appeal without the fear of making it an academic exercise in futility.
- e. The Affidavit was in support of the Application herein and pray that the same be allowed in the interest of justice.

III. The response by the Respondent

6. The Appellant/ Respondent filed a 19 Replying Affidavit sworn by John M. Kitheka on 29th November, 2023 opposing the Notice of Motion application dated 23rd November, 2023. He deposed as follows:-
 - a. The application was misconceived, frivolous, vexatious and otherwise an abuse of the court process.
 - b. The application for stay of proceedings was not merited since this court had already entered its decision on his application dated 10th May, 2023. He had already filed his record of Appeal and he was ready to have it heard expeditiously.
 - c. The Application had not fulfilled the condition for grant of orders of Stay pending Appeal.
 - d. He came to Court before the Magistrate Court since the Respondent was evicting him illegally from the house no. LG/42/A Tononoka.
 - e. In the suit before the magistrate the Respondents were well represented counsel from the Attorney General office one Mr. Paul Waga.
 - f. The trial Magistrate issued temporary orders barring his eviction and even after hearing his application for injunction on 18th April 2023 it granted stay of any eviction against him for 30 days.
 - g. In the meantime he rushed before this Court which granted him an order of injunction.
 - h. It was clear since he came to court he had never been protection of the court.
 - i. Despite existence of Court orders and the Respondent being well represented by a Legal Advisor Mr. Paul Wagah from the office of Attorney General went ahead and evicted him from suit premises.
 - j. The Respondent/Applicant was not innocent at all and has all along deliberately and blatantly disregarded this court's orders.
 - k. The third party alluded to this case one Mr. Abudulhakim B.haji was not an innocent party but was a Police Officer who had been recently transferred to Tononoka near his house. He was Police Officer Number 2011329050 and he aided, colluded and connived with the Respondent to evict him & his family, in the most humiliating manner.
 - l. The actions of the Respondents were contemptuous and intended to erode the powers of the court and set a dangerous trend which the court should not allow.
 - m. Since 7th November 2023 the Respondents had not reinstated him to the suit property as directed and had come before this court with unclean hands with the sole purpose of perpetrating further their acts of contempt.



- n. The actions of the Respondent with their erstwhile Counsel were quite scornful to this court and the entire judicial system.
- o. The conditions for a stay pending appeal had not been fulfilled since the Applicants had not shown what irreparable loss they shall suffer.
- p. The Respondents had not provided any security for the due performance if stay is granted as Mandatorily required by law. Since no security had been granted the application should be dismissed.

IV. The Intended Interested Party's case as per the Notice of Motion application dated 13th December, 2023

- 7. The Respondent/Applicant sought for the following orders:-
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That pending the hearing and determination of this suit, the court be pleased to grant a stay of execution of orders emanating from Civil Appeal No.31 Of 2023 by Hon. Justice L.I Naikuni delivered and dated on 7/11/2023.
 - e. That pending the hearing and determination of this suit, there be an injunction restraining the Appellant and the Respondent whether by themselves, employees, servants and/or agents from evicting the Applicant herein from the house known as LG/42/A Tononoka Estate Mombasa.
 - f. That the court be pleased to join the Applicant as an Interested Party in the proceedings.
 - g. That this application be served upon the Appellant and the Respondent.
 - h. That the costs of this application be provided for.
- 8. The application is premised on the grounds, testimonial facts and the averments made out from the 26 Paragraphed Supporting Affidavit of Abdulhakim Haji, the Intended Interested Party/ Applicant. He averred that:
 - a. He was a servant in National Police Service attached to Shelly Beach Police Station in Likoni. (Annexed in the affidavit and marked as "ABH - 1" was a copy of his job Identity Card
 - b. Vide the letter dated 3rd January, 2023 the Respondent allocated the Applicant Government House No. LG/42/A Tononoka Estate situated in Tononoka within Mombasa County. (Annexed in the affidavit and marked as "ABH - 2" was a copy of the Letter dated 3rd January, 2023).
 - c. There was a suit in respect of the previous tenant however that the matter had been concluded and a verdict of dismissal of the application had been made by the court
 - d. Before taking occupation of the House No. LG/42/A, the Applicant visited the place and inspected the house and confirmed that it was indeed vacant with no occupant(s) residing in it.



- e. Having disarrayed all his doubts and fears, the Applicant together with his family moved into the House No. LG/42/A on 9th May, 2023 where they have been living together as bona fide tenants.
- f. Upon moving in, the applicant found that the condition of the walls, roof, ceiling, kitchen, bathroom and washroom, water taps and power cables were pathetic, deplorable and/or dilapidated and begun to revamp and facelift the house and to make it fit for human habitation.
- g. On or about June 2023 the Applicant embarked on a mission to renovate the house and therefore contracted the plumbers, masons, carpenters and the electricians to commence the work of revamping the house.
- h. The journey of making the house more hospitable and descent to the applicant and his minor children has been a costly affair and has taken a great stall on the applicant financially as he had spent colossal sums to the tune of Kenya Shillings One Hundred and Fifty Thousand Three Fourty Five (Kshs. 150,345/-).
- i. On 27th November, 2023, the applicant received an eviction notice from the Respondent. The notice, gave the applicant 30 days to vacate from the House No. LG/42/A pursuant to the court ruling dated on 7th November, 2023.
- j. The Applicant was and remained to be an innocent and bona fide tenant who is in actual occupation of the suit property.
- k. The houses offered by the government were considerably cheap than the current prevailing market rates of the similar house and if the stay of execution was not granted the applicant will suffer the risk of been evicted and might not be able to get a similar house at a lower cost.
- l. At all material times, the Applicant was not aware of any court proceedings and has not taken part in any proceeding whether directly, indirectly or by proxies.
- m. It was travesty of justice to condemn the Applicant unheard in toto disregard to his constitutional rights espoused under the provision of Articles 22, 25(c), 43 (1) (c), 50 and 159 of *the Constitution* of Kenya, 2010.
- n. Unless this court intervened and granted the orders prayed in this application, the applicant is in the verge of losing his hard-earned monies extended in face-lifting the house No. LG/42/A which money might never be recovered from the Appellant and the Respondent.
- o. If the Applicant was evicted from the suit property, he might never recover fittings and fixtures amounted on the house and might never recover his money totaling Kenya Shillings One Hundred and Fifty Thousand Three Fourty Five (Kshs. 150,345/-) from the Appellant and the Respondent.
- p. The Applicant, his family and his four children of tender age stood to suffer irreparable loss and prejudice if the orders sought were not granted.
- q. The Applicant pleaded with this Honorable court to grant a stay of execution of orders emanating and consequential to Civil Appeal No. 31 of 2023 by Hon . Justice LL. Naikuni delivered and dated on 7th November, 2023 till the hearing and determination of this case.
- r. The Applicant had come before this Honourable court in good faith seeking to be joined as an interested party so that his interest over the suit property can be safeguarded and ventilated upon.



- s. The Appellant and the Respondent stood to suffer no prejudice if the stay of eviction was granted for reasons that the Appellant was not in actual occupation of the suit property.
- t. It was in the interest of justice that a stay is granted and the interested party be allowed to properly come on record to defend its interest and cure the anomalies on the face of the record on true status of occupancy of the House No. LG/42/A Tononoka Estate.

V. The response by the Appellant/ Respondent

- 9. The Appellant/ Tenant filed a 16 Replying Affidavit sworn by John M. Kitheka on 12th January, 2024 opposing the Notice of Motion application dated 13th December, 2023. He deponed as follows:-
 - i. The application as taken out, drawn & filed was frivolous misconceived, vexatious and otherwise an abuse of the court process.
 - ii. A party could not be enjoined to proceedings on Appeal and to that extent the application should be dismissed pre-temporally.
 - iii. As of 13th February 2023, when he filed his case before the Magistrate through Environment & Land case Number E021 of 2013 he was a tenant of the County Government of Mombasa in the subject house No. LG/42/A at Tononoka.
 - iv. When he filed his suit No.CM E & L No. E021 of 2023 the trial Magistrate granted him a temporary order of stay of execution pending the hearing of my application inter partes.
 - v. Though on 18th April 2023 the trial Magistrate did dismiss his application for injunction it nevertheless granted him 30 days stay of execution.
 - vi. When he approached this court it further granted me a temporary order of stay pending inter partes hearing of his application for injunction pending Appeal.
 - vii. On 7th November 2023, this Honourable court ruled he be reinstated in the suit premises within 14 days since it was clear he and his family were evicted while there were orders of stay both by the trial Magistrate and this Honourable Court.
 - viii. Up to date he had not been reinstated into the suit premises.
 - ix. From the foregoing the Applicant was not telling the truth for the following reasons:-
 - a. He could not have been allocated his house on 3rd January, 2023 since he was still in occupation.
 - b. By an affidavit sworn on 3rd January 2023 filed in this cause Roger Wakhungu the County Director of housing clearly averred that the Appellant was evicted on 9th May 2023.
 - x. It was clear from the foregoing the interested party had not come to court with clean hands.
 - xi. The interested party a police officer was working in cohort with the Director of Housing to evict him from the subject house herein.
 - xii. Since he came to Court on 13th February, 2023 the Court had always protected him vide lawful orders however the Respondents, their counsel and the interested party had intentionally decided not to obey the court orders.



- xiii. It was clear this application was intended to further the Respondent acts of being scornful of this Court orders and the same should be dismissed.

VI. The Interested Party's Further affidavit

10. The Interested Party filed a 14 paragraphed supplementary affidavit sworn by Abdulhakim Haji, the Intended Interested Party on 8th March, 2024 in response to the issues raised in the Appellant's Replying Affidavit sworn and filed on 12th January 2024 in response to my application dated 13th December 2023 where he averred that:
- a. In response to the averment that his Application was frivolous and vexatious, he wished to state that the same was untrue since he had offered sufficient evidence in his Application and Affidavit to demonstrate to this Honourable Court that he was currently the legal and physical tenant of the subject matter of this suit therefore any decisions that this Court was invited to make will inevitably affect his rights as a tenant.
 - b. In response to the averment that the court did not have the jurisdiction to entertain his Application, this Honourable court had the requisite jurisdiction to admit him to these proceedings to enable it to satisfy itself that any decisions will be rendered after giving all interested parties a fair hearing.
 - c. He reiterated that he was a stranger to the proceedings before the subordinate court with respect to the tenancy of the Appellant and whereas he may have some recourse against the Respondent, justice demanded that he also respected his right as an innocent tenant to enjoy quiet possession of the suit property since he was already in occupation of the same.
 - d. Contrary to what the Appellant would have this Honourable Court believe, he was not in any way involved in the decision by the Respondent to evict him from the suit property.
 - e. He was a law-abiding citizen and inclined to obey any orders issued by this Honourable Court against him, however he had a right to present his case and be heard by this Honourable before any adverse decisions are rendered.
 - f. Despite the averments made by the Appellant; he wished to state that his interest in the suit property only arose after the same became vacant and was allocated to him by the Respondent in accordance with their Housing policy.
 - g. Contrary to the what the Defendant would have this Honourable Court believe, his application was brought before this Court in good faith and with great confidence that the court will objectively sift through the predicament of all the parties herein and render a just and most practical decision.
 - h. The Appellant can pursue its rights against the Respondent by seeking reasonable compensation for any perceived breach of contractual obligations.
 - i. No prejudice will be suffered by the Appellant and Respondent if his Application dated 13th December 2023 was allowed.
 - j. The Affidavit was sworn in further support of his application herein dated 13th December, 2023.



III. Submissions

11. On 20th May, 2024 while all the parties were present in Court, they were directed to have the Notices of Motion applications dated 23rd November, 2023 and 13th December, 2023 be disposed of by way of written submissions and all the parties complied. The Honorable Court appreciates that the Learned Counsel effectively executed their duties diligently, dedicatedly and with devotion. Thereafter, a ruling date was reserved on 21st November, 2024 by Court accordingly.

A. The Written Submissions by the Appellant/Respondent

12. The Appellant through the Law firm of Messrs. B.W. Kenzi & Company Advocates filed their Written submissions dated 28th March, 2024. Mr. Kenzi Advocate submitted that the applications before the Honourable Court was the one dated 23rd November 2023 by the Respondent in which he sought stay of proceedings of this court pending the hearing of an Appeal preferred to the court of Appeal against this court ruling of 7th November 2023. The second application dated 13th December 2023 was by One Abdulkakim Haji seeking to be enjoined in this Appeal. The Learned Counsel intimated that both applications were opposed by the Appellant. On 7th November 2023 the court read Ruling and inter-alia made the following orders:

- i. That the Notice of Motion application dated 10th may 2023 be and is found to have merit and hereby allowed in its entirety.
- ii. That an order made that the Respondent to be reinstated by an order of injunction from evicting or in any way interfering with the Appellants Tenancy in House No. LG/42/A Tononoka pending the hearing and determination of the Appeal herein.
- iii. That an order made for the Respondent to ensure smooth facilitation on having the Appellant /Applicant rein-stated into the occupation, use and peaceful enjoyment of the suit premises within the next Fifteen (15)days from the date of the delivery of this Ruling pending the hearing and final determination of the Appeal.
- iv. That for expediency sake, the Appellant granted 21 days leave to compile and serve the Record of Appeal based on the filed Memorandum of Appeal dated 2nd May 2023 against the Ruling of the lower Court delivered on 18th April 2023 .There be mention on 28th February 2024, for taking direction on the disposal of the impugned Appeal.
- v. That the costs of this application shall abide the Appeal.

13. The Learned Counsel submitted on the background told the court that the Appellant filed civil suit No. 21 of 2023 before the Chief Magistrate Court in February 2023 because he was being evicted by the Respondent from house No. LG/42/A Tononoka Mombasa. He got orders of temporary stay before the Magistrate. Though the Magistrate did dismiss his application for injunction he nevertheless granted him 30 days stay of execution. The stay was extended by this court on Appeal and on 7th November 2023 the injunction was confirmed and order of reinstatement issued since it was crystal clear the Appellant was evicted on the face of orders of stay not only from the Magistrate but from this court.

14. It was their submission therefore since February 2023 the Appellant had been in protection of the court, and therefore the Respondent /Applicant herein was not acting bona fides. The Applicants were seeking stay of proceedings under the provision of Order 42 (6) of The Civil Procedure Rules 2010. The order had two Mandatory requirements:-



- a. That the Applicant should show he shall suffer irreparably if orders of stay are not granted.
 - b. That the Applicant should provide security for due performance of the Stay.
15. It was their submissions that the Applicant had not fulfilled any of the conditions. The Applicant did state the Appeal and the Court's order of 7th November 2023 should affect the right of an innocent tenant who was entered the premises this Honourable court this could not be a serious submission since February 2023 the Appellant/Respondent had been and was still a tenant of the Respondent/Applicant having obtained protection of the court. The entry of a 3rd party as asserted by the Applicant could only be contravention of valid court orders.
16. The third party by an affidavit says he was allocated the house on 3rd January, 2023. Mr. Wakhungu the Director of the Respondent in an affidavit of 13th May, 2023 said the Appellant was evicted on 9th May 2023. This was contradictory and pointed to clear collusion. On the issue of security if the court was minded of granting of applicant for stay of proceedings do urged the Court to imposed a security of Kenya Shillings One Million (Kshs. 1,000,000/-) considering the loss the Appellant was losing for non- occupation of the house in dispute.
17. In the case of "Chris Munga N. Bichange – Versus – Richard Nyagaka Tongi & 2 others eKLR", to consider grant of execution the court held:
- “The law as regards applications for 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...”
18. It was their submission in view of the background of this case there was no arguable Appeal and the Applicants were only in pursuant, of their goal as condemners of this court orders. In ELC Appeal No. 13 Of 2022, this court in agreeing security was Mandatory quoted the case of "Vision Housing Co-Operative Limited - Versus - Wairimu Kinyanjui & Ano. (2015) eKLR" with approval where Onyanja J observed thus:-
- “On the security to be given, the Applicant has not stated what security they will furnish. The applicant has only stated in their submission that they are willing to abide by the terms and conditions that will be set by the court. Order 42 Rule 6 (2b) requires the Applicant to provide such security as may ultimately be binding upon him.”
19. Further, therefore this Court noted that the offer for security was for costs. It was to be fully satisfied as a ground for stay of execution pending the hearing of an Appeal. In the upshot they respectively submit the application for stay of proceedings should be dismissed.
20. The Learned Counsel submitted that the Application dated 13th December, 2023 for joinder of one Abdulkhakim Haji as a party to the Appeal, the Learned Counsel submitted that it was their position that it had no merits. The 3rd party was seeking to be enjoined very late in the day. The question which should be in the mind of the court is when he became aware of these proceedings. In his affidavit he annexed a letter assigning him the subject house on 3rd January 2023.The Respondents Director Wakhungu says in an affidavit the Appellant was evicted on 9th May 2023. This clearly showed the 3rd party knew of the proceeding before the Magistrate and all along never applied to be enjoined. It was crystal clear his occupation of the house was in contravention of clear court orders which he was



alive to. They urged the court to disallow the application. He argued the Appellant had a recourse for damages if he was illegally evicted it could as well be said of him that he had a recourse against the respondent damage.

21. They were guided by the case of “HCC Appeal No. 123 of 2019 (Kisii) Osugo Patee Makombi – Versus – Britam General Insurance” where Joinder was refused on Appeal. Order 1 rule 3 of the civil procedure envisages joinder of Co-plaintiff and Co-defendant. However nowhere did the Civil Procedure provide for joinder of an Appellant or Respondent on Appeal. The rationale being that after Joinder of a party in a suit the other party had opportunity to amend the pleadings which may not be the case on Appeal.

VII. Analysis and Determination

22. I have carefully considered the application, the affidavit in support, the response thereto as well as the rival submissions.
23. In my considered view, the three (3) salient issue that arise for determination are:-
 - a. Whether the Notice of Motion application dated 23rd November, 2023 is merited.
 - b. If the answer to prayer (a) is in the alternative whether the Notice of Motion application dated 13th December, 2023 is merited.
 - c. Who will bear the costs of the Notice of Motion applications dated 23rd November, 2023 and 13th November, 2023.

ISSUE No. a). Whether the Notice of Motion application dated 23rd November, 2023 is merited.
24. Under this sub – heading, the main substratum is whether the Court should grant a stay of the proceedings and the orders of 7th November 2023, pending the hearing and determination of the Appeal filed by the Applicants. Notably, the conditions under which either the trial court or an appellate court may order stay of proceedings pending an appeal have not been specified. However, the conditions under which an order for stay of execution are clearly spelt out in Order 42 Rule 6 (2) of the Civil Procedure Rules.
25. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules, 2010 which stipulates as follows:
 1. 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.
 2. No order for stay of execution shall be made under subrule (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.
 3. Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
 4. For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
 5. An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
 6. Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
26. Primarily, what concerns the application before the Court is the provision of Order 42 Rule 6 (6) of the Civil Procedure Rules, 2010. The principles for grant of temporary injunction pending appeal are settled. 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.”
27. The court therefore has to rely on the settled principles on when proceedings may be stayed pending appeal. The question of whether or not to grant an order for stay of proceedings is a discretionary one. This discretionary power must be exercised judiciously. The court has to consider if it will be in the interests of justice to grant the same. The underlying interest ought to be that the appeal should not be rendered nugatory. Gikonyo J addressed the question of an order for stay of proceedings being an important consideration in the case of “Lucy Waithera Kimanga & 2 Others – Versus - John Waiganjo Gichuri”.
28. This aspect of being rendered nugatory must be hinged on the fact of whether or not the appeal is arguable on appeal and not whether the appeal will be successful. The reason for this is that at this stage, a court ought to be very cautious not to look into the merits or otherwise of the appeal as that is under the purview of the appellate court. At this stage, the court should only be concerned with the question of whether or not the appeal will be rendered nugatory. Going further, this court was cognisant of the fact that an arguable appeal only needed to raise a single bona fide point worthy of consideration and need not be one that must necessarily succeed as was held in the case of “Co - operative Bank of Kenya Ltd – Versus - Banking Insurance of Finance Union (Kenya) [2015]eKLR”.
29. As the Court of Appeal also held in the case of “UAP Insurance Company Ltd – Versus - Michael John Beckett [2004] eKLR”, all an applicant is required to show is that he has an arguable appeal which is not frivolous and that the appeal will be rendered nugatory if the stay of proceedings is not granted.



30. Further in the case of “Niazsons (K) Limited – Versus - China Road & Bridge Corporation (Kenya) [2001] eKLR”, Onyango-Otieno, J (as he then was) held that:-

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay...should be granted.”

31. The prayer for stay of proceedings is an equitable relief. An applicant must have come to court with clean hands. It is therefore important for the court to consider whether or not the application for stay of proceedings has been filed expeditiously. The Court takes cognisance that the ruling the Respondent intended to appeal was delivered on 7th November 2023, directing the Applicant to reinstate the Respondent into House No. LG/42/A Tononoka which would mean that Mr. Abdulkakim Haji who was not part of the proceedings is evicted from the suit premises. This application was filed on 23rd November, 2023 which is 16 days could not be said to have been unreasonable nor inordinate delay. Thus, this Court is satisfied that the present application was filed without any delay.

32. A perusal of the aforesaid Memorandum of Appeal leads this Court to the conclusion that the intended Appeal was indeed arguable and not frivolous. Although the Respondent had submitted that the application herein was an abuse of the court process, frivolous and vexatious, this court found and held that in the event it did not grant an order for stay of proceedings and the Appeal herein was heard and was successful, the proceedings in the lower court would have been rendered unnecessary, even though an appropriate order for costs could have been made to remedy that.

33. Accordingly, having considered the affidavit evidence and the Written Submissions and the case law by the respective parties, this court came to the firm conclusion that this was a suitable case for it to grant an order of stay of proceedings so as not to render the Appeal herein nugatory. Judicial time is precious and scarce and must not be wasted in proceedings that would end up being academic exercises.

34. As was held in the case of “Muchanga Investments Limited – Versus - Safaris Unlimited (Africa) Limited & 2 Others [2009]eKLR”, the Court of Appeal rendered itself as follows:-

“Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.”

35. For these reasons therefore, I find that the Notice of Motion application dated 23rd November, 2023 be and is found to have merit. For this reason I shall not proceed to examine the notice of Motion application dated 13th December, 2023 being that the proceedings in this Appeal are hereby stayed pending appeal. The same is hereby stayed pending the hearing and the determination of “Civil Appeal No. E187 of 2023 -County Director of Housing, Mombasa -Versus - John M. Kitheka” in the Court of Appeal.

Issue No. b). Who will bear the Costs of Notice of Motion applications dated 23rd November, 2023 and 13th December, 2023.



36. Previously, I have well stated in my own precedents and most especially in the case of:- “Sagalla Lodge Limited – Versus - Samwuel Mazeru Mwamunga & another (Suing as the Executors of Eliud Timothy Mwamunga – Deceased) [2022] eKLR”, that:

“58. The Black Law Dictionary defines “Cost” to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in this case is that the Notice of Motion application dated 7th December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and that of the Defendants dated 21st December, 2021.”

37. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. In this case, as Court finds that the costs of this application shall abide the appeal in the Court of Appeal.

VIII. Conclusion & Disposition

38. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Clearly, the Applicant has a case against the Respondent. In a nutshell, I proceed to order the following:-

- a. That the Notice of Motion application dated 23rd November, 2023 be and is found to have merit and is hereby allowed in its entirety.
- b. That the Notice of Motion application dated 13th December, 2023 be and is hereby stayed pending the hearing and determination of “Civil Appeal No. E187 of 2023 - County Director of Housing, Mombasa – Versus - John M. Kitheka”.
- c. That an order of stay proceedings and the orders of 7th November, 2023 be and is hereby made pending the hearing and determination of the Appeal filed by the Applicants.
- d. That there be a mention of this matter on 24th March, 2025 to attain the progress report on the Appeal in the Court of Appeal.
- e. That the costs of this application shall abide the outcome in the Court of Appeal.

It Is So Ordered Accordingly.

RULING DELIVERED, THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 21ST DAY OF NOVEMBER 2024.

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HON. MR. JUSTICE L.L. NAIKUNI
ENVIRONMENT AND LAND COURT AT
MOMBASA

Ruling delivered in the presence of:

- a. M/s. Fridaus Mbula, the Court Assistant.
- b. Mr. Titus Mbario Advocate holding brief for Mr. B.W Kenzi Advocate for the Appellant.



- c. No appearance for the Respondent.
- d. Mr. Ruwa for the Intended Interested Party.

