



**Gumba & 9 others v Abdallah (Environment and Land Appeal
E027 of 2023) [2024] KEELC 13758 (KLR) (11 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13758 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E027 OF 2023
NA MATHEKA, J
DECEMBER 11, 2024**

BETWEEN

**JOSHUA OSIMBO GUMBA & 9 OTHERS & 9 OTHERS & 9 OTHERS & 9
OTHERS & 9 OTHERS & 9 OTHERS APPELLANT**

AND

MASJID RASHID ABDALLAH RESPONDENT

RULING

1. The application is dated 7th August 2024 and is brought under Sections IA, 1B, and 3a of the [Civil Procedure Act](#) Chapter 21 of the Laws of Kenya, Order 42 Rule 6 of the Civil Procedure Rules, [Judicature Act](#) Section 10, High Court Vacation Rules, Article 159 (d) of [the Constitution](#) of Kenya 2010 seeking the following orders;
 1. This application be certified as urgent and service thereof be dispensed with in the first instance.
 2. The Honourable court be pleased to grant leave for the Appellants / Applicants Application to be heard during the High Court's Vacation period and ex parte in the first instance.
 3. This Honourable Court be pleased to issue a temporary Order of Stay of Execution of the Judgement and Decree of this court dated 25th July, 2024 together with all consequential Orders against the Appellants/ Applicants pending the hearing and determination of the Application interparties.
 4. This Honourable Court be pleased to issue an Order of Stay of Execution of the Judgement and Decree of this court dated 25th July, 2024 together with all consequential Orders against the Appellants/ Applicants pending the hearing and determination of the Appeal in the Court of Appeal.
 5. The costs of this application be in the cause.



2. It is supported by the Supporting Affidavit sworn by Joshua Osimbo the Applicant herein and grounds that on the 24th August, 2023 the Magistrate Court in MSA MCCC No. 2198 of 2018 issued its Judgement dismissing the Applicants' suit and ordered the Applicants to vacate the suit properties known as MSA/4800, 48011 4802 and 4803/ Section II/ MN situated at Barsheba area, Kisauni sub-county within Mombasa County. That the Applicants aggrieved by the said decision instituted ELC Appeal No. E027 of 2023 Mombasa against the Respondents. That the Appeal was heard and determined on 25th July, 2024. The Appeal was dismissed with costs, thereby upholding the lower court's decision. That the effect of dismissing the Applicant's appeal is that the lower court judgement shall be executed. The Appellants will be forcefully evicted from the suit property before the intended appeal is heard and determined rendering the Intended appeal nugatory. That if the said orders are not granted then the substratum of the Appeal herein "possession" will be lost. That the Applicant being aggrieved by the Judgement lodged a Notice of Appeal to the Court of Appeal against the whole of the said Judgement and Decree. That on 26th July, 2024 the Applicants requested for certified and typed copies of proceedings. That the Applicant is however yet to be supplied with certified typed copies of Proceedings, Judgment and Decree to enable him to file the Record of appeal. That if the said orders are not granted, the appeal will be rendered nugatory and the intended Appellants will suffer a substantial injury which they will never recover from.
- 3 The Respondent stated that he is the registered owner of all the suit properties, after he bought the same empty with no structures on them. He produced Exhibit marked "MRA-1" copies of the Title Deed and Deed Plan and the Appellants have not challenged my acquisition of the Titles. That after full trial the trial Court allowed his claim and proceeded to give orders for evictions of the Appellants and upon Appeal the Appellate Court confirmed the said Judgment of the trial Court. That the Appellants are professional squatters with no permanent structures of the suit properties. That he has suffered and continue to suffer irreparable loss damage and emotional distress for having been denied access to his duly purchased properties.
- 4 I have read and considered the application, supporting affidavit, replying affidavit and submissions therein. The issue for discussion is whether this court can grant a temporary injunction. The appropriate provision for stay pending appeal can be found in order 42 (6) (1) of the civil procedure rules which states 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.”

Sub rule 2 says as follows:

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.”

5. 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.”

6. Substantial loss was described in *Jason Ngumba Kagu & 2 Others vs Intra Africa Assurance Co. Limited (2014) eKLR* where it was held that:

The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.”

7. In *Samvir Trustee Limited vs Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997* the court observed that;

...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...”

8. 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



9. 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.”

10. In the instant case, the Applicants were aggrieved by the said decision of the lower court instituted ELC Appeal No. E027 of 2023 Mombasa against the Respondent. That the Appeal was heard and determined on 25th July, 2024. The Appeal was dismissed with costs, thereby upholding the lower court's decision. That the effect of dismissing the Applicant's appeal is that the lower court judgement shall be executed. The applicant avers that he has filed and served a Notice of Appeal against the judgement of this Court delivered on 25th July, 2024. This was application filed on the 8th August 2024. That the applicant will suffer irreparable and substantive loss in the event execution is allowed to proceed before the appeal is heard.
11. I find the judgement was delivered on the 25th July 2024 and this application was filed on the 8th August 2024, I find the delay is not inordinate. The Applicants insist that they have been in occupation for over 40years and that the Respondent acquired the land knowing of their existence. That if the said orders are not granted, the appeal will be rendered nugatory as they will be evicted and the intended Appellants will suffer a substantial injury. The Respondent stated that he is the registered owner of all the suit properties, after he bought the same empty with no structures on them. He produced the title documents.
12. Be that as it may, this court is persuaded after looking at the memorandum of appeal, that the appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, 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 this application dated 7th August 2024 is merited and I grant the same. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 11TH DAY OF DECEMBER 2024.

N.A. MATHEKA

JUDGE

