



**Athuman v Rawal (Environment and Land Appeal E034 of 2024)  
[2024] KEELC 13711 (KLR) (10 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13711 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL E034 OF 2024  
NA MATHEKA, J  
DECEMBER 10, 2024**

**BETWEEN**

**ALI OMAR ATHUMAN ..... APPELLANT**

**AND**

**YOGENDRA RAMANLAL RAWAL ..... RESPONDENT**

**RULING**

1. The application is dated 1<sup>st</sup> October 2024 and is brought under order 51 Rule 1 & 2, Order 42 Rule 6(6) of the Civil Procedure Rules seeking the following orders;
  1. That the Application be certified as urgent and be heard ex-parte in the first instance.
  2. That the Court be pleased to grant a Stay of execution pending inter parte hearing of the Chief Magistrate's Judgment dated 08<sup>th</sup> August, 2024 terminating the Appellants tenancy on Plot No. Mombasa MS/1/286 and ordering vacant possession within sixty [60] days which expires on 07<sup>th</sup> October, 2024.
  3. That there be a Stay of execution from evicting or in any way interfering with the Appellant's occupation on Plot No. Mombasa MS/1/286 pending the hearing and determination of the Appeal here
  4. That the Court gives direction to the hearing of the Appeal since the Record of Appeal having been filed and served.
  5. That costs to be in the cause.
2. It is supported by the following grounds, that the Trial Magistrate had given Order terminating the Appellant's occupation within sixty (60) days which expires on 07<sup>th</sup> October, 2024. That the Respondent can evict the Appellant anytime indeed he has threatened to do so and the Appeal herein will be rendered nugatory. That the Appellant has a good arguable Appeal as per the grounds on



the Memorandum of Appeal filed herein. That the Appeal has merits since the Respondent did not prove his Counter-claim. The Appellant operates a garage and storage facility for over fifteen (15) years hence many third parties shall be affected by the orders issued. The Record of Appeal has been filed and served. That the Notice to Terminate was never proved to have been issued and served upon the Appellant.

3. I have read and considered the application and the supporting affidavit herein. 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.”
4. 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;
  5. 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 court through its judgment delivered on 8<sup>th</sup> August 2024 found in favour of the defendant and the plaintiff was directed to vacate the suit premises and the court further granted 60 days stay of execution of the decree. The applicant avers that he has filed and served a Notice of Appeal against the judgement of the Court delivered on 8<sup>th</sup> August 2024. This application filed on the 2<sup>nd</sup> October 2024. That the applicant will suffer irreparable and substantive loss in the event execution is allowed to proceed before the appeal is heard. That the record of appeal has been filed and served and is awaiting directions.

11. I find the judgement was delivered on the 8<sup>th</sup> August 2024 and the order to vacate lapsed on the 7<sup>th</sup> October 2024 and this application was filed on the 2<sup>nd</sup> October 2024, I find the delay inordinate. Be that as it may, this court is not 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 not persuaded that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory as the prayers in the plaint include adequate compensation. I find that the applicant has not fulfilled any of the grounds to enable me grant the stay. I find this application dated 1<sup>st</sup> October 2024 has no merit and I dismiss it with no orders as to costs.

It is so ordered.



**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 10<sup>TH</sup> DAY OF DECEMBER 2024.**

**N.A. MATHEKA**

**JUDGE**

