



**Khamis & 2 others v Ainushamsi Multiple Agencies Limited (Environment & Land Case 241 of 2020) [2024] KEELC 13751 (KLR) (10 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13751 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 241 OF 2020  
NA MATHEKA, J  
DECEMBER 10, 2024**

**BETWEEN**

**JAMAL ABEID KHAMIS ..... 1<sup>ST</sup> PLAINTIFF**

**MOHAMED ABEID KHAMIS ..... 2<sup>ND</sup> PLAINTIFF**

**ABDULHAKIM ABEID KHAMIS ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**AINUSHAMSI MULTIPLE AGENCIES LIMITED ..... DEFENDANT**

**RULING**

1. The application is dated 11<sup>th</sup> July 2024 and is brought under Order 42 Rule 6, Order 9 Rule 9 and 10 Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B and 3A of the [Civil Procedure Act](#) seeking the following orders;
  1. That this Honorable Court be pleased to certify this Application to be of utmost Urgency and service on the Defendants be dispensed with in the first instance.
  2. That this Honourable Court be pleased to issue a temporary stay of execution of the decree/ judgment of this court dated the 24<sup>th</sup> April, 2024 pending the hearing and determination of this Application.
  3. That this Honourable Court be pleased to issue a stay of execution of the decree / judgment of this court dated 24<sup>th</sup> April, 2024 pending the hearing and determination of the preferred appeal number Mombasa Court of Appeal Number E111 of 2024 between Ainushamsi Multiple Agencies Ltd vs Jamal Abeid Khamis, Mohamed Abeid Khamis & Abdulhakim Abed Khamis.
  4. That the costs of this Application be provided for.



2. This supported by the Supporting Affidavit of Mohamed Rashid Muhumed and on the grounds that the Defendant was sued in this case by the Plaintiff for an injunction restraining the Defendant, his servants, employees, and/or agents from entering, remaining, occupying, constructing and/or in other way occupying Plot No. Kilifi/Kawala A Kadzongo/32. In a judgment of this court dated the 24<sup>th</sup> April, 2024 this court allowed the said case with costs to the Defendant. That the Defendant would like to exercise its right of appeal and has actually done so by filing an appeal in the Court of Appeal in case number Mombasa Court of Appeal Number E111 OF 2024 between Ainushamsi Multiple Agencies Ltd -vs- Jamal Abeid Khamis, Mohamed Abeid Khamis & Abdulkhakim Abeid Khamis. that the appeal is due for direction. In that case therefore it would be prudent to have the subject matter preserved as the Defendant pursues the said appeal. That the Defendant will suffer great prejudice if the orders granted in this case are implemented and later on the appeal is allowed. That the Defendant is currently in possession of the said land subject matter of appeal and has put up developments on the said land. That the preferred appeal has a chance at success and is not frivolous. That it is interest of justice that this Application be heard and appropriate orders granted for stay of the decree/Judgment of this court dated 24<sup>th</sup> April, 2024.
3. That one of the issues that escaped the trial court inadvertently was the fact that the Defendant had substantially amended its statement of defence and also filed a counter-claim through leave granted by this court on the 24<sup>th</sup> January, 2023. However, when the court retired to write judgment it, at page 3 the court reiterated the statement. The defendant on the other hand maintained that he is the registered owner of Kilifi/Kawala A' Kadzongo/32 also known as LR Title No. CR 60948 plot no. 28815 measuring 3.495.'
4. The above statement was contained in the initial statement of defence but was deleted from the statement of defence dated 11<sup>th</sup> February, 2021 through an amended defence and counter-claim dated 6<sup>th</sup> February, 2022 which substantially amended the said defence and introduced a counter-claim and sought cancellation of the Plaintiff's title among other issues. This inadvertent oversight will have a significant impact on the final outcome of the appeal in our humble view. That it is interest of justice that this Application be heard and appropriate orders granted for stay of the decree/Judgment of this court dated 24<sup>th</sup> April, 2024. The temporary orders of stay of the Judgment/decree will lapse on the 24<sup>th</sup> July, 2024 hence the urgency. The defendant is ready to provide security for the due performance of the decree in the unlikely event the appeal fails.
5. This court has considered the application and the submissions therein. On the issue of stay of execution pending appeal, 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.”
6. 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.



7. 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.”
8. 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.
9. 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.”
10. 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.”
11. 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.....”

12. 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 .....

14. 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.”

15. In the instant case, the applicant avers that that being aggrieved by this court’s judgement dated 24<sup>th</sup> April 2024 have filed an appeal in the Court of Appeal in case number Mombasa Court of Appeal Number E111 of 2024 between Ainushamsi Multiple Agencies Ltd -vs- Jamal Abeid Khamis, Mohamed Abeid Khamis & Abdulhakim Abeid Khamis and that the appeal is due for direction. That it would be prudent to have the subject matter preserved as the Defendant pursues the said appeal. That the Defendant is currently in possession of the said land subject matter of appeal and has put up developments on the said land the respondent opposed the application and stated that the Applicant was not able to provide proof of the basis in which the Land Registrar Mombasa proceeded to process the title in his name and that the court had established that it was illegally acquired by the Applicant. That there is no evidence of substantial developments on the suit land. That should the court be inclined to grant a stay then security for costs should be awarded. I have perused the memorandum of appeal and find that one of the grounds is that the court failed to appreciate the process through which the Appellant’s title was issued. It is not in dispute that the Applicant is in possession of the suit land which appears to be fenced in the photos adduced as evidence. I find the balance of convenience falls in favour of the applicants. Be that as it may, I find that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory if the judgement proceeds to execution and the applicants title in cancelled and they are evicted. I find that the applicant has fulfilled the grounds to enable me grant the stay of execution. I find this application 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 10<sup>TH</sup> DAY OF DECEMBER 2024.**

**N.A. MATHEKA**

**JUDGE**

