



**Husseini Builders Limited v Oceanic Towers Limited (Environment & Land
Case 110 of 2018) [2023] KEELC 196 (KLR) (24 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 196 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 110 OF 2018
NA MATHEKA, J
JANUARY 24, 2023**

BETWEEN

HUSSEINI BUILDERS LIMITED PLAINTIFF

AND

OCEANIC TOWERS LIMITED DEFENDANT

RULING

1. The application is dated May 27, 2022 and is brought under order 42 Rule 6. Order 43 Rule 3 of the [Civil Procedure Rules](#) and sections IA. 1B & 3A. 75 of the [Civil Procedure Act](#), 2010 seeking the following orders;
 1. That leave to Appeal be granted by this honourable court.
 2. That there be a stay of proceedings herein pending the determination of this application inter-partes.
 3. That there be a stay of proceedings herein pending the determination of an appeal filed by the defendant/applicant against the Ruling delivered herein on the May 16, 2022 on such terms as appear just and proper.
 4. That this Honourable court be pleased to make any such order and/or orders as it may deem just and appropriate in the circumstances.
 5. That cost of this application be awarded to the respondent/applicant.
2. It is based on the grounds that this honourable court delivered its Ruling on May 16, 2022 dismissing the applicant's preliminary objection dated April 27, 2021. The defendant/applicant being aggrieved and dissatisfied with the aforementioned Ruling of this honourable court delivered on May 16, 2022, intends to appeal therefrom and has lodged a Notice of Appeal and a Memorandum of Appeal against the of the said decision. The defendant/applicant stands to suffer substantial loss and irreparable harm should an order of Stay of proceedings pending Appeal not be granted. In such event, the defendant's



intended appeal shall be rendered nugatory. In the event proceedings are not stayed, the same will result in duplicity of suits which will result in wastage of the court's precious judicial time should the appeal be successful. the defendant/applicant's intended Appeal is meritorious and has good prospects of success since the essence of the dispute herein is commercial in nature. This application has been filed without delay. It is only fair and just in the circumstances that the defendant be granted an opportunity to challenge the decision of this honourable Court on Appeal.

3. The plaintiff/respondent stated that on May 16, 2022 Lady Justice Nelly Matheka dismissed the defendant/applicant's preliminary objection dated April 27, 2022 with costs to the plaintiff/respondent. That aggrieved and dissatisfied by the defendant/applicant on May 26, 2022 filed a notice of appeal dated the even date seeking to appeal against the said ruling. That the said Application is an abuse of the court process to frustrate the hearing and delay the expeditious disposal of this matter. All indications are that the defendant/applicant has filed the same to frustrate the progress of this matter by alleging that this suit is tied to other matters relating to different issues. That the defendant/applicant has not demonstrated any basis for the court to grant the stay of proceedings. Conversely, the defendant/applicant has failed and/or neglected to reveal to the court that the subject suit has arisen from a contract of sale of an apartment. Therefore, the allusion to other court matters is a delaying tactic and is brought in bad faith.
4. That in support of the above assertion that the defendant/applicant has failed to file its Memorandum of Appeal as well as a Record of Appeal from May 16, 2022 to date, despite serving the plaintiff/respondent with the Notice of Appeal on May 26, 2022. The Memorandum of Appeal the defendant/applicant alleges to have lodged in the Court of Appeal has not been filed to frustrate the hearing and determination of this matter. That the defendant/applicant does not stand to suffer prejudice if this Application is declined. The defendant/applicant will have an opportunity to present evidence in support of their case on the hearing of the main suit. Further, the defendant/applicant received the full purchase price of Kshs. 22,000,000 for the apartment from the plaintiff/respondent in 2016 but has refused to hand over the completion documents to the plaintiff/respondent to date. Therefore, the intimation that the defendant/applicant will suffer irreparable harm and substantial loss is misplaced. That on the contrary, if this Application is allowed it is the plaintiff/respondent who will suffer irreparable harm and further substantial loss. This is because despite the plaintiff/respondent making full payment for the apartment in question the defendant/applicant has never handed over the completion documents to allow the plaintiff/respondent to occupy and enjoy the property. That the defendant/applicant has failed to disclose to the court that the building on which the apartment is and the defendant/applicant handed over to them. It is only the plaintiff/respondent who has not received the completion documents from the defendant/applicant since 2016 to date.
5. This court has carefully considered the application and the submissions herein. The applicant stated that the court delivered its Ruling on May 16, 2022 dismissing the Applicant's Preliminary Objection dated April 27, 2021. The defendant/applicant being aggrieved and dissatisfied with the aforementioned Ruling of this honourable court delivered on May 16, 2022, intends to appeal therefrom and has lodged a Notice of Appeal and a Memorandum of Appeal against the whole of the said decision. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the *Civil Procedure Rules* as follows:

“No appeal or a 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 an



application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”

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. The appellants need to satisfy the court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and
3. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

7. 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) v 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.”

8. 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 v 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.....”



9. In the case of *Mohamed Salim T/A Choice Butchery v 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

10. We are further guided by this court’s decision in *Carter & Sons Ltd v 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.”

11. The plaintiff/respondent submitted that this Application is an abuse of the court process to frustrate the hearing and delay the expeditious disposal of this matter. That the defendant/applicant has failed and/or neglected to reveal to the court that the subject suit has arisen from a contract of sale of an apartment and they have paid the full purchase price. I find that the ruling sought to be appealed against arose out of a preliminary objection on the issue of jurisdiction. This court made a finding on a matter of law. This court is not persuaded, 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. I find that the Applicant has not fulfilled any of the grounds to enable me grant the stay. I find this application dated May 27, 2022 has no merit I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF JANUARY 2023.

N.A. MATHEKA

JUDGE

