



REPUBLIC OF KENYA



KENYA LAW
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**Mohamed & 4 others v Ali (Cause E085 of 2021) [2022] KEHC 13081 (KLR)
(Commercial and Tax) (31 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 13081 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

CAUSE E085 OF 2021

A MABEYA, J

AUGUST 31, 2022

BETWEEN

AHMED HASSAN MOHAMED 1ST APPLICANT

ABDRAHMAN MAALIM ABDIKADIR 2ND APPLICANT

GALBEED KEYD ABDI 3RD APPLICANT

JUMBO AIRLINK AUCTIONEERS 4TH APPLICANT

AND

NATIONAL SOCIAL SECURITY FUND APPELLANT

AND

HARUN HAJI ALI RESPONDENT

RULING

1. Before court is a motion on notion dated September 14, 2021 brought pursuant to order 42 rule 6(6) of the [Civil Procedure Rules 2010](#) and section 1A, 1B, 3, 3A & 63(E) of the [Civil Procedure Act](#).
2. The same sought, *inter alia*, a stay of execution of the orders/ruling(s) made on September 13, 2021 and May 12, 2021 and a stay of proceedings in CMCOMMSU/E549/2021 pending the hearing and determination of the appeal herein.
3. The grounds thereof were that vide a plaint dated April 16, 2021 filed contemporaneously with an application of even date, the respondent moved the court and later secured orders given on May 12, 2021 by Hon Kagoni, EM (PM). That the respondent's suit in the subordinate court, until the issuance of the orders made on May 12, 2021, was never brought to the attention of the appellants.



4. It was averred that upon learning of the existence of the suit, the appellants moved the subordinate court via an application dated June 8, 2021 wherein they sought to have the respondent's suit struck out as the court lacked the requisite jurisdiction. The court struck out the respondent's suit for want of jurisdiction and as such the court became *functus officio*.
5. That despite as such, the respondent filed another application in the subordinate court seeking to review and/or set aside the orders of the subordinate court which had struck out the suit for want of jurisdiction. The court allowed that application vide a ruling dated September 13, 2021.
6. The appellants are apprehensive that if a stay of execution is not granted, pending the determination of this appeal, the respondent will proceed with the execution of the subordinate court's earlier orders of May 12, 2021.
7. Further that the respondent's suit in its entirety is *res judicata* in terms of section 7 of the [Civil Procedure Act](#) by dint of the ruling in HCC E122/2018 where the High Court denied the respondent herein injunctive orders similar to those sought in the subordinate court. That therefore the orders issued on May 13, 2021 were procured through blatant concealment and non disclosure of material facts.
8. On October 7, 2021 when this matter came up for mention, the court directed the respondent to file a response to the application and thereafter the parties were directed to exchange written submissions.
9. At the time of writing this ruling, the applicant had filed its submissions while the respondent had not filed his response to the instant application nor any submissions thereto. The application is therefore unopposed.
10. Be that as it may, the court will continue to determine this matter.
11. The court has considered the entire record. This is an application for stay of execution of the orders/ rulings made on September 13, 2021 and May 12, 2021 in CMCOMMSU/E549/2021 and a stay of proceedings pending the hearing and determination of the appeal herein.
12. The first ruling, annexed as 'AHM-1' in the appellants' supporting affidavit, from which the appellants seek a stay of execution is dated May 12, 2021. In the ruling, the court gave orders, inter alia, restraining the appellants from interfering in any manner with the parcels of land known as LR No 97/1978/394 Tassia Estate and LR No 97/1987/400 Tassia Estate pending the determination of the suit in the subordinate court.
13. The second ruling of September 13, 2021 is annexed as 'AHM-5' in the applicant's supporting affidavit. The effect of this ruling was that the subordinate court's earlier decision dated July 28, 2021 which dismissed the suit for want of jurisdiction, was set aside.
14. A grant of stay of execution pending appeal is provided for under order 42 rule 6 of the [Civil Procedure Rules](#). The net effect is that an applicant must demonstrate that he will suffer substantial loss if a stay is not granted and he must give security for the due performance of the order that will ultimately be binding on him. The application must be made timeously.
15. The present application was made on September 14, 2021. The orders sought to be stayed were made on September 13, 2021 and May 12, 2021, respectively. Since the cardinal order that resuscitated the order of May 12, 2021 is the one of September 13, 2021, the application was made timeously.
16. The second consideration is whether the appellants have illustrated that they will suffer substantial loss if the stay is not granted.



17. The appellants are apprehensive that if the stay of execution is not granted pending the determination of this appeal, that the respondent will proceed with the orders earlier issued by the subordinate court. That the said court lack jurisdiction and that due to the orders of September 13, 2021, the respondent had commenced execution of that court's earlier order made on May 12, 2021, by writing to the tenants occupying the suit property urging them not to pay rent to the appellants.
18. In the case of *Mukoma v Abuoga* (1998) KLR 645 it was held:

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
19. The appeal lodged before this court is against the subordinate court's order of September 13, 2021. The appellants argue, inter alia, that through the order, the subordinate court violated the doctrine of *functus officio*, that the court lacked jurisdiction to make such orders and that the application before it was *res judicata* as a similar application had been determined before the high court between the same parties and with the same subject matter.
20. Having considered the grounds above, the court is of the opinion that it raises weighty matters and an arguable appeal.
21. Further, the appeal would be rendered nugatory if the respondent herein is allowed to commence execution of the subordinate court's earlier order of May 12, 2021 which in essence prevented the respondent from dealing with the subject property.
22. In the court's view, the appeal would be rendered nugatory if, after the appeal, it is determined that the subordinate court had no jurisdiction to make the orders of May 12, 2021. In the premises, the appellants would thereby suffer substantial loss. Further, substantial loss would be occasioned to the appellants if the tenants in the properties, subject matter of this suit, refuse to remit rent to them pending determination of this appeal.
23. In the Court of Appeal case of *Housing Finance Company of Kenya v Sharok Kber Mohamed Ali Hirji & another* [2015] Eklr, it was stated: -

“In seeking to balance the interests of the respective parties, the approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruit of judgement in their favour and their rights are safeguarded.”
24. In order to balance the interest of the parties herein, the court will grant the stay of execution pending appeal. Further, in the circumstances of this case, the court finds no reason to order any security.
25. Accordingly, I find the application dated September 14, 2021 to be meritorious and allow the same in terms of prayers 3 and 4. The costs to abide the appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF AUGUST, 2022.

A. MABEYA, FCI Arb

JUDGE

