



REPUBLIC OF KENYA



**Aroi v Lali & 5 others; Brek (Aggrieved Party) (Environment & Land Case 294 of 2012) [2023] KEELC 21492 (KLR) (15 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21492 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 294 OF 2012  
SM KIBUNJA, J  
NOVEMBER 15, 2023**

**BETWEEN**

**FATUMA YUSUF AROI ..... PLAINTIFF**

**AND**

**JUMA LALI ..... 1<sup>ST</sup> DEFENDANT**

**IBRAHIM AMRA ..... 2<sup>ND</sup> DEFENDANT**

**HUSSEIN OMAR ..... 3<sup>RD</sup> DEFENDANT**

**GHALID SHARIF ..... 4<sup>TH</sup> DEFENDANT**

**BASHIR AHMED WARIFA ..... 5<sup>TH</sup> DEFENDANT**

**MOHAMED BAKARI ..... 6<sup>TH</sup> DEFENDANT**

**AND**

**SAID BREK ..... AGGRIEVED PARTY**

**RULING**

1. The plaintiff moved the court through the notice of motion dated the 16<sup>th</sup> November 2021 seeking for the eviction of the defendants, their agents and or servants, who have not obeyed the judgement and decree of this court, from the mosque and madrassa on plot No. 539/111/MN. The application is based on the six (6) grounds on its face and is supported by the affidavit of Fatuma Yusuf Aroi sworn on the 15<sup>th</sup> November 2021 among others deposing that after the court delivered its judgement and ruling, her advocate sent a demand letter to the defendants to vacate and stop interfering with the suit premises but they have declined to comply and vacate from the suit premises; that it is in the interest of justice for her application to be granted as the defendants' conduct is demeaning and disrespectful to the court.



2. The defendants have to date not filed any replies in opposition to the application.
3. The aggrieved party, who was not named in the application, filed the notice of preliminary objection dated the 9<sup>th</sup> December 2021 that raises four (4) grounds *inter alia* that the court is without jurisdiction to determine the application before taxation of costs; that the application is not filed in compliance with the law; that the procedure in execution of decrees has not been complied with and the application is incurably defective, misconceived, bad in law and should be struck out with costs. Ms Murage, learned counsel for the aggrieved party informed the court on the 26<sup>th</sup> April 2023 that the preliminary objection is their reply to the application.
4. I have also seen on record grounds of opposition dated the 15<sup>th</sup> June 2023 by the aggrieved party raising four grounds *inter alia* that the application dated the 16<sup>th</sup> November 2023 had ignored the aggrieved party; that the judgement dated the 15<sup>th</sup> July 2020 is subject to an appeal by the aggrieved party vide notice of appeal filed on the 7<sup>th</sup> October 2021; the eviction of the defendants and aggrieved party would result in the appeal being rendered nugatory and that it is in the public interest to have the status quo maintained pending the determination of the appeal. Also, on record is a replying affidavit by Farid Abdalla Said Brek sworn on the 17<sup>th</sup> July 2023 among others deposing that if execution of the judgement took place the aggrieved party will suffer substantial losses. The grounds of opposition and replying affidavit above were filed long after directions on filing and exchanging submissions were given on the 26<sup>th</sup> April 2023, and without leave of the court.
5. The court issued directions and timelines for filing and exchanging submissions on the 26<sup>th</sup> April 2023. Subsequently the learned counsel for the plaintiff filed their submissions dated the 14<sup>th</sup> February 2022. The learned counsel for the aggrieved party filed two sets of submission. The first is dated the 11<sup>th</sup> March 2022 headed “in support of the preliminary objection dated 16<sup>th</sup> November 2021” and the second is dated the 15<sup>th</sup> June 2023 and headed “in opposition of the notice of motion dated the 16<sup>th</sup> November 2021”. The court has considered the submissions by the two learned counsel.
6. The issues for the determination of the court are as follows:
  - a. Whether the plaintiff’s application for eviction of the defendants from the suit premises flows from the judgement and decree of this court.
  - b. Whether there is merit in the application and what orders to issue.
7. The court has carefully considered the grounds on the application, preliminary objection, grounds of opposition, affidavit evidence, submissions by the learned counsel, the record and come to the following conclusions:
  - a. The record confirms that the plaintiff had filed this suit through her plaint dated the 17<sup>th</sup> December 2012 against the defendants seeking for a declaration that defendants had no rights over the madrasa and mosque on the suit property and that they be permanently enjoined from interfering with it. The record further confirms that the suit was heard and determined through the judgement delivered on 15<sup>th</sup> July 2020 in favour of the plaintiff.
  - b. The record also confirms that Said Brek, described as Affected party/applicant, moved the court through the application dated the 30<sup>th</sup> July 2020 and filed on 3<sup>rd</sup> August 2020, seeking for *inter alia* stay of execution and review of the judgement. The application was heard and



declined in the ruling delivered on the 29<sup>th</sup> September 2021 in which the court among others held that;

“ 20. .... I am not persuaded that he applicant only came to know of this matter after judgement. I do not see how, if indeed he is the financier, he could not have known of the suit, yet the court did direct, that pending the hearing of the case, the mosque and madrassa be run by a joint committee. If he was funding the mosque, then he must have funded this joint committee and you cannot separate the joint committee from the case herein for its creation was through this suit. If at all the applicant thought that he had an issue to raise, he had opportunity to do so while the case was pending, for in my view, there is no way he could not have known of it.

21. Whichever way I look at it, there is no good reason tendered as to why this judgement should be set aside based on the allegations of the applicant. The applicant has clearly not met the test to entitle him to a review of the judgement herein. I thus proceed to dismiss this application with costs to the plaintiff. The plaintiff is at liberty to execute the judgement unless otherwise barred by law or any order of court.”

The same party now described as the aggrieved party filed another application dated the 11<sup>th</sup> March 2022 seeking for stay of execution of the decree and judgement delivered on the 29<sup>th</sup> September 2021 pending the hearing and determination of the appeal that had been filed. The application was heard and dismissed with costs vide the ruling delivered on the 11<sup>th</sup> October 2022, upon the court finding *inter alia* that there was unreasonable delay, that the suit was never against the applicant and the applicant has not established the test on substantial loss.

- c. I have perused the record and noted that from the date the court delivered its judgement on 15<sup>th</sup> July 2020 to today, the defendants have not intimated to the court that they were dissatisfied and or were filing an appeal. That it was well documented in the rulings of 29<sup>th</sup> September 2021 and 11<sup>th</sup> October 2022 that the aggrieved party, who is the only one opposing the plaintiff's instant application, was not a party in the suit and has not been joined in the proceedings to date. Yet the aggrieved party appear to be as it were, holding the defendants' brief that the appeal would be rendered nugatory when the defendants themselves have no pending appeal. The aggrieved party further submits that the defendants would suffer substantial loss, while there is no evidence that he has the legal capacity to speak or act or give instructions on behalf of the defendants.
- d. That in the judgement of this court delivered on the 15<sup>th</sup> July 2020 the court *inter alia* held that;

“ 22. ....The plaintiff has proved that she is the one legally allowed to deal with the assets/liabilities of the deceased thus she has proved her case on a balance of probabilities. Moreover, if the orders sought are not granted, it amounts to assisting the defendants intermeddle in the deceased estate which may likely expose the beneficiaries of the deceased's estate to lose their entitlements of the property due to them.



23. The upshot of the foregoing is that I am satisfied that there is merit in the plaintiff's claim hence I enter judgement in her favour as prayed in the plaint .....

The court's edict as contained in the judgement delivered on the 15<sup>th</sup> July 2020, from where the above extracts have been picked from, has not been appealed against to date. I have perused the court record and there is only one Notice of Appeal. I have perused it and it is dated 4<sup>th</sup> October 2021 and lodged with the Deputy Registrar on 14<sup>th</sup> October 2021. It was filed through Ms. Gikandi & Company Advocates for the Aggrieved Party and is in respect of the decision of 30<sup>th</sup> September 2021. It states at paragraph one as follows;

“Take Notice that the Aggrieved Party herein, Said Brek, being dissatisfied with the judgement and decision given by Honorable Munyao Sila at Mombasa on 30<sup>th</sup> September 2021 intends to appeal to the Court of Appeal against the whole of the said decision.”

The judgement herein was delivered on 15<sup>th</sup> July 2020 by the Honourable Lady Justice Anne Omollo, and is not evidently referred to in the said notice of appeal.

- e. What the plaintiff seeks through her instant application is definitely to give effect to the orders granted through the judgement delivered on the 15<sup>th</sup> July 2020 as prayed in her plaint dated the 17<sup>th</sup> December 2012, that the defendants do not have any right whatsoever over the madrasa and mosque on Plot No. 539/111/MN, and that the defendants personally or through their employees, servants and or agents be permanently enjoined from interfering with the management or running of the mosque and madrasa on Plot No. 539/111/MN. The plaintiff therefore seeks for eviction orders to be executed against those of the defendants, their agents and or servants who have not obeyed the court order. The aggrieved party, being the only one opposing this application has failed to present to the court reasonable cause as to why the court should not assist the plaintiff get the fruits of her judgement that is yet to be appealed against by the defendants, who have themselves not presented any opposition.
- f. That the grounds of opposition dated the 15<sup>th</sup> June 2023 and replying affidavit sworn on 17<sup>th</sup> July 2023 that I have detailed at paragraph (4) above were filed without leave, and after the directions on filing and exchanging submissions were issued on 26<sup>th</sup> April 2023. It was also filed months after the plaintiff filed its submissions. The plaintiff has not addressed the court on these documents, and even if their contents were considered, it would not have made the court to come to any different decision. For reason that the said documents were filed without leave and in contravention of the law they are hereby struck out from the record.
- g. In accordance with section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya, that costs should follow the events unless otherwise directed by the court, the plaintiff is awarded costs of the application.
1. In view of the conclusions above, the court finds merit in the plaintiff's notice of motion dated the 16<sup>th</sup> November 2021 and is allowed in the following terms:
- a. That the defendants, their servant and or agents who are still interfering with the management or running of the mosque and madrasa on Plot No. 539/111/MN contrary to orders in the judgement of the court delivered on the 15<sup>th</sup> July 2020, are hereby directed to within the next thirty (30) days from



today to cease or stop any further interference, and in default eviction order to issue at the expiry of the said period to be carried out in accordance with the law.

- b. The OCS, Mtwapa Police Station to provide security during the eviction of the defendants, their servants and or agents from the management and running of the mosque and madrassa on Plot No. 539/111/MN upon payment of applicable fees, if any.
- c. The aggrieved party to pay the plaintiff's costs in the application.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED THIS 15<sup>TH</sup> DAY OF NOVEMBER 2023.**

**S. M. Kibunja, J.**

**ELC MOMBASA.**

**IN THE PRESENCE OF:**

**PLAINTIFF: M/s Hamid for Hamza**

**DEFENDANTS: No appearance**

**AGGRIEVED PARTY : M/s Kiptum for Gikandi.**

**WILSON – COURT ASSISTANT.**

**S. M. Kibunja, J.**

**ELC MOMBASA.**

