

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 48 OF 2016

HUSSEIN ALI BENYOKA.....PLAINTIFF/RESPONDENT

VERSUS

KAYDEE QUARRY LIMITED.....DEFENDANT/ APPLICANT

RULING

The application is dated 12th October 2021 and is brought under Order 22 Rule 22 (1) and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 1A, 1B and 3A of the Civil Procedure Act seeking the following orders;

1. That this application be certified as urgent and heard ex-parte at the first instance.
2. That there be a stay of execution against the judgment and decree delivered on the 29th March 2019 and/or any further proceedings pending the inter partes hearing and determination of this application.
3. That there be a setting aside of the orders allowing the application for execution of decree dated the 21st September 2021 and filed on the 22nd September 2021 made by Okanga and Company Advocates.
4. That there be a setting aside and/or vacating the warrant to the bailiff to give possession of land issued on the 24th September 2021 at the instance of the respondent.
5. That the costs of this application be awarded to the Applicant.

It is based on the grounds that on the 8th October 2021, the Applicant was informed that there was pending imminent execution proceedings which would have it evicted from the suit property and all its structures erected on the property forthwith demolished. On perusing the court file, it was apparent that the Respondent's Advocates had applied for execution of the decree on the 22nd August 2021 and that the court granted the said application by issuing the eviction warrants to the Bailiff on the 24th September 2021. On further perusing the court file, it was evident that though the Respondent had filed its party to party Bill of Costs on the 11th August 2021 there were no proceedings before the taxing officer having conducted taxation of this Bill of Costs before commencing the execution proceedings. In the absence of pursuing the taxation of its costs before commencement of the execution proceedings; the Respondent has failed to comply with the express provisions of Section 94 of the Civil Procedure Act and Order 22 Rule 7 (h) of the Civil Procedure Rules, 2010. The provisions require that the Respondent must have taxed off its Bill of Costs prior to commencement of execution proceedings in the absence of which, he must have sought leave by way of a formal application in this court before applying to execute the decree. The Respondent having failed to either tax his Costs or seek leave prior to commencement of execution proceedings against the Applicant, warrants a stay of these execution proceedings as the same are founded on a fatal illegality, hence the orders sought for in this application. If the unlawful execution proceedings commenced on the 21st September 2021 by way of the application for execution of the decree being filed in court on the 22nd September 2021 not stayed as prayed; that the Applicant will be vulnerable to an illegality that goes to the root of miscarriage of justice. That unlawful execution will thrust the Applicant into unprecedented economic hardship in the face of an already financially straining season of business, unless the orders sought for herein are granted as prayed. The Respondent does not stand to suffer any prejudice if the orders sought for in the application are allowed as prayed.

The respondent submitted that there is no execution to stay as the Defendant/Applicant has vacated the Plaintiff's plot in compliance with the Honourable Court's Decree dated the 29th March 2019. That the Defendant/Applicant has no further interest in the Plaintiff/Respondent's property.

This court has carefully considered the application and submissions therein. On perusal of the court record I find that that by an application dated 9th April 2019 the defendants made an application for stay of execution pending appeal under certificate of urgency. The application came for hearing on the 19th June 2019 and the same was not opposed. Both counsels were present in court. That a temporary stay of execution was granted against the judgement issued on the 29th March 2019 until the appeal filed in the court of appeal is heard and determined by Justice Omollo. The order was issued on the 19th June 2019. This court is now functus officio and no execution orders can issue unless the Court of Appeal directs otherwise. Any orders issued are hereby set aside and costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 18TH JANUARY, 2022

N.A. MATHEKA

JUDGE