



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**HIGH COURT CIVIL 231 OF 2000**

JUMILLA ATTARWALLA .....1<sup>ST</sup> PLAINTIFF

SHEHNAZ ISSADJEE.....2<sup>ND</sup> PLAINTIFF

VERSUS

HUSSEIN ABDULAZIZ.....1<sup>ST</sup> DEFENDANT

MARY AM HEMED.....2<sup>ND</sup> DEFENDANT

**RULING**

This Ruling will determine two applications.

1 The first in time is dated 2<sup>nd</sup> December 2014. It was filed by the defendants. By that application they seek to stay the execution of this court's judgment dated 4<sup>th</sup> December 2014 pending appeal.

2 The second is filed by the plaintiff and is dated 6<sup>th</sup> May 2015. By that application the plaintiffs seek an order directing the auctioneer Benjamin M. Mutune t/a Faith Auctioneer Agencies, with the assistance of the court bailiff or on his own to evict the defendants from Flat No. 2 on premises known as MOMBASA/BLOCK XXXIV/106; and for an order for OCPD Mombasa and OCS Central Police station Mombasa do provide security during that eviction of the defendants.

3 By the judgment of this court dated 4<sup>th</sup> December 2014 the court ordered the defendants to give vacant possession within 30 days of a flat on property MOMBASA/BLOCK XXXIV/106. It is in that background that the two applications were filed.

4 I will begin by considering the defendant's application because if it is successful the plaintiff's application will become redundant.

**DEFENDANT'S NOTICE OF MOTION**

5 The defendants by their application seek to stay their eviction pending their appeal. To succeed the defendants need to overcome three distinct hurdles, as set out in order 42 Rule 6 of the Civil Procedure Rules, namely they need to satisfy the court that:

(a) that substantial loss may result to the applicant unless stay is granted;

(b) that the application for stay of execution was made without unreasonable delay;

(c) that they shall provide security as the court may order for the due performance of the decree.

6 The advocate for the defendant who swore the affidavit in support of the defendants' application deponed that the defendant's appeal touched on the subject property and that the said property should "be preserved so that the applicants (defendant's) can exhaust their rights." Those were the only depositions that remotely attempted to show the possibility of loss that would be suffered by the defendants if stay was not granted.

7 The plaintiffs by their written submissions and by the replying affidavit of the first plaintiff referred to the defendants' failure to address the first requirement in the application for stay pending appeal that is the substantial loss likely to be suffered.

8 I am inclined to agree with the plaintiffs' said submissions. The defendants needed to spell out the precise loss they would suffer if a stay of execution was not granted. It was not denied during the trial that the plaintiffs are the registered owners of the subject property. The defendants occupy that property under licence. They therefore needed to state what loss they will suffer if they are evicted from the property.

9 The courts have previously considered submissions on substantial loss and in the following cases had this to say:

**In Machira T/A Machira & Co. Advocates vs East African Standard (No 2) (2002) KLR 63 it was held that:**

***"The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court".***

In that vein I refer to the often quoted case of **KENYA SHELL LIMUTED –VS - KIBIRU (1986)KLR** where it is stated-

***"Substantial loss in its various forms, is the corner stone of the jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money".***

In that case it was further stated:

***"It is not sufficient by merely stating that the sum of shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment."***

10 The mischief that Rule 6 of Order 42 sought to meet is to ensure that the applicants loss would be shown to be greater than the prejudice or loss that would be suffered by a successful party. The defendants did not state that if they are evicted they will be rendered homeless. Indeed they did not state that the subject property was the only accommodation available to them. Why then should the court deny the plaintiffs the fruits of their Judgment? That question remained unanswered.

11 Although the defendants application for stay of execution was filed without inordinate delay as required by Rule 6 of Order 42 I am of the view that their application must and does fail because

defendant will not suffer substantial loss if stay is not granted.

### **PLAINTIFFS NOTICE OF MOTION**

12 Plaintiffs sought for an order for an auctioneer in conjunction with the court bailiff and the police to evict the defendants. That prayer is based on the 1<sup>st</sup> Plaintiff's deposition as follows:

**“In support of the application dated 10<sup>th</sup> February, 2015 for execution of the decree issued on 15<sup>th</sup> January, 2015, I wish to state that although the Court allowed the Plaintiffs to evict the Defendants from the premises known as Mombasa/Block XXXIV/106, the Suit premises is situate on Nyeri Street, in the old town of Mombasa where, coupled with the inherent vagaries, acrimony and hostility associated with any eviction process, there exists a heightened security risk as I have previously experienced immense hostility and threats when obtaining possession of a backyard situate in Mombasa/Block XXXIV/106 which was erstwhile under the control of trespassers.”**

13 The only response in the defendants replying affidavit, to the above deposition, was that the defendants have not been aware of any eviction nor are they aware that such eviction had met opposition.

14 In my view, and it is in the public domain that there is always inherent dangers in carrying out eviction in Kenya. It is therefore not unreasonable for the plaintiff to seek an order that the police do afford them protection in carrying out eviction of the defendants.

15 The plaintiffs seek to evict the defendants prior to taxation of their costs. Under section 94 of the Civil Procedure Act the court has discretion to grant execution of the decree before taxation of and costs. That section provides:

**“Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.”**

16 I will exercise that discretion in favour of the plaintiffs because they have been kept out of their property for more than 15 years.

### **CONCLUSION**

17 **The court therefore grants the following orders:**

**a) The Notice of Motion dated 22<sup>nd</sup> December 2014 is dismissed with costs to the Plaintiffs.**

**b) An order is hereby issued directing Mr. Benjamin M. Mutune t/a Faith Auctioneers Agencies with the assistance of the court's bailiff, to evict before taxation HUSSEIN ABDULAZIZ and Maryan Hemed and their servant or agents or whoever from FLAT NO. 2 on property Mombasa/Block XXXIV/106 and thereafter to put the plaintiff in possession thereof. The OCPD Mombasa and OCS Central police station Mombasa shall provide security during the eviction.**

**C) Plaintiff are awarded costs of the Notice of Motion dated 2<sup>nd</sup> December 2014 and the one dated 6th May 2015.**

**DATED and DELIVERED at MOMBASA this 30<sup>TH</sup> day of JULY, 2015.**

**MARY KASANGO**

**JUDGE**

30.7.2015

Coram

Before Justice Mary Kasango

C/Assistant - Kavuku

For the Plaintiffs:

For the defendants:

Court

Ruling delivered in their presence/absence in open court.

**MARY KASANGO**

**JUDGE**