



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 82 OF 1997**

**IRENE NGOMBO MSHINGO (Deceased) substituted by**

**SUSAN MAUREEN NYAMBURA.....PLAINTIFF**

**-VERSUS-**

**MIRIAM KEDONGO & 6 OTHERS.....DEFENDANTS**

**SAADA AMRAN ABUBAKAR**

**MOHAMED ABUBAKAR HAJI..INTERESTED PARTIES/APPLICANTS**

**RULING**

**INTRODUCTION**

1. This suit was filed by **IRENE NGOMBO MSHINGO** (who upon her demise, was substituted by Susan Maureen Nyambura) against the Defendants claiming purchaser's right and *mesne* profits of Swahili house without land situated on Plot No. 804 Section II Mainland North Kisauni Mombasa. Judgment was entered for the original Plaintiff on 26th July 2000 by which the 1st Defendant was ordered to hand over the above stated house and to pay *mesne* profits.
2. The original Plaintiff was not paid the *mesne* profits and costs and she therefore sought to recover the same by attachment and sale of the 1st Defendant's Swahili house without land situated on Plot No. 49 Section II Mainland North Mombasa.
3. A Notice of Objection to the attachment of the Swahili house without land situated on Plot No. 49 Section II Mainland North Mombasa was filed by VERA KHADUNYI, COOKY ALIVIZA and LINDA JAHENDA. The said Objectors filed another Objection of Attachment and sale of Swahili house without land situated on Plot No. 49 Section II Mainland North Mombasa by a Notice of Objection dated 27th September 2007. The Objectors filed a Chamber Summons dated 19th October 2007 in support of their objection but the Chamber Summons was dismissed on 9th October 2008.
4. The said house was then sold by public auction on 4th July 2009, to one KABERIA MUNYOTA.
5. SAADA AMRAN ABUBAKAR and MOHAMED ABUBAKAR HAJI who describe themselves as Interested Parties filed an application dated 7th December 2011 in which they prayed, *inter alia*, that the sale of the house on Plot No. 49 be set aside.
6. That Application was heard *inter partes* and by a ruling delivered on 15th May 2014, this court dismissed the same and pronounced itself as follows:

**“ 11. The one and only issue requiring determination in this matter is whether the Interested Parties have shown a basis for this Court to set aside the execution herein by attachment and sale of the house on Plot No. 49.**

**12. On the facts before the Court I find that the Interested Parties have failed to lay down such basis. In that regard I wholly agree with the submissions made on behalf of the Plaintiff and the purchaser that the Interested Parties should have pursued the Objectors who wrongly sold the house on Plot No. 49 to them. The three Objectors first filed their objection to attachment and sale of the house on Plot No. 49, as far back as December 2001. They therefore knew even as at 2007, when they purportedly sold the house to the Interested Parties that the house was the subject of attachment by the orders of the Court in this case...**

**13. In the end the Notice of Motion dated 7th December 2011 is without merit and is dismissed with costs which are awarded to Kaberia Menyota. In the interest of justice I order Kaberia Menyota to give seven (7) days written Notice to those in occupation of Swahili house on Plot No. 49 Sec. II/MN to give vacant possession failing which an eviction order is hereby issued against all those who are in possession of house on Plot No. 49 Sec. II Mombasa Mainland.”**

7. The Interested Parties lodged a Notice of Appeal against the said ruling on 16th May 2014. They also filed a Notice of Motion dated 16th May 2014 (hereinafter “the Application”) in which they seek the following orders:

i. **That there be stay of execution of the Ruling and order dated 15th May 2014 issued herein pending hearing and determination of the Appeal filed by the Interested Parties/Applicants to the Court of Appeal.**

ii. **That costs of the application be provided for.**

8. The Application is supported by the Affidavit of SAAD AMRAN ABUBAKAR.

#### **THE ISSUE FOR DETERMINATION**

9. In my view the only issue for the court's determination is whether the Applicants have demonstrated a basis upon which this Court should grant stay of execution of the eviction order.

#### **ANALYSIS**

10. The conditions which an applicant must satisfy in order for an order of stay of execution to be granted are now well settled. In the case of **Peter Ondande t/a Spreawett Chemis –Vs- Josephine Wangari Karanja [2006] eKLR**, L. Kimaru, J. stated as follows:

**“The issue for determination by this court is whether the applicant has established a case to enable this court grant him the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him.”**

11. This Court adopted the above holding in the case of **Feisal Amin Janmohammed T/A Dunyia Forwarders v. Shami Trading Co. Ltd Mombasa High Court Civil Appeal No. 65 of 2013 [2014] eKLR** and stated as follows:

**“It is trite law, therefore, that a stay of execution order is generally granted if the applicant has successfully demonstrated that a substantial loss may result to him unless the order is made, that the application was made without unreasonable delay and that the applicant has offered proper security.”**

12. Those are the conditions which the applicant must successfully demonstrate. The impugned ruling

was delivered on 15th May 2014 and the Application was filed on 19th May 2014, four days later. There is clearly no delay in filing of the Application. Although the Interested Parties/Applicants have not expressly stated that they are willing to provide security, they have stated that they are willing to abide by any reasonable condition that this Court may impose upon the grant of the stay of execution. I suppose that would include an order as to furnishing of security.

13. On the issue of substantial loss the Applicants state as follows in the Application:

**“The Applicants shall suffer substantial loss if the orders of stay is (sic) not granted as:**

- 1. The Interested Parties/Applicants together with their 7 children and 4 tenants with their families are in occupation of Swahili House on Plot No. 49/Sec. II/Mombasa Mainland North, since December 2007 shall be evicted from the said house any time after 7 days from 15/05/2014.**
- 2. The execution of the orders shall render the Interested Parties/Applicants together with their family homeless as they do not have any other place to go.**
- 3. The Appeal has overwhelming chances of success and shall be rendered nugatory unless they the stay sought is granted.**
- 4. The Interested Parties/Applicants together with their family of 7 children would in the absence of such stay stand to suffer substantial loss.**
- 5. The application herein has been filed without unreasonable delay.**
- 6. The Interested Parties/Applicants are willing to abide by any reasonable condition this Honourable Court may impose upon the grant of the order of stay of execution.”**

14. The Interested Parties'/Applicants' case is that they will suffer substantial loss if stay is not granted because they, together with their seven children and four tenants will be evicted from the suit property which they have been occupying since December 2007.

15. In response to the claim by the Applicants that they will suffer substantial loss if stay is not granted, the Respondent, SUSAN MAUREEN NYAMBURA, in her Replying Affidavit filed on 9th June 2014 stated as follows:

**“7. That because the Applicants still occupy the house without land on Plot 49/Sec II/Mombasa Mainland North and despite the house having being (sic) sold to one Kaberia Menyota, I continue to suffer because this matter has already been determined and I deserve to enjoy the fruits of my litigation.**

**8. That the Applicants stand to suffer no substantial loss if the order of stay is not granted since the house shall still be there if the appeal reverses the decision of this court.**

**9. That contrary to what is stated in paragraph 14 of the Applicant's affidavit, the appeal shall not be rendered nugatory if stay is not granted because the said house will not be demolished and the applicants can be granted possession later on if the appellate court decides so.”**

16. Many cases have been decided on the issue of stay where the applicants are facing eviction pending determination of appeal. The trend is that eviction of the applicants from a house they occupy and call home may result to substantial loss.

17. In the case of **Martin Shikuku & Others v. Simon Obayo, Eldoret High Court Civil Appeal No. 248 of 2010, [2011] eKLR**, Karanja, J. stated as follows:

**“If the applicants are evicted from the disputed land and at the end of the day it is determined on appeal that the subordinate court was wrong in arriving at its**

**sdecision and that the eviction was wrongful, the applicants would have suffered substantial loss including loss of property and habitat.”**

18. In the case of **Kivisu Kimwele v. Benjamini Mulei, Musaki Machakos HCCC No. 65 “B” of 2012, [2014] eKLR**, Mutende, J. stated as follows:

**“Regarding the issue [of] whether she [the Applicant] will suffer substantial loss if orders sought are not granted. It is obvious she is to be evicted from the parcel of land she has occupied for what she alleges to be more than 50 years. The husband allegedly having been a purchaser for value. If she is evicted prior to the hearing of the appeal, definitely she will suffer substantial loss. In the premises justice would call upon me to grant the orders sought.”**

19. In the case of **Amin Ladak alias Amin Jaffer Gulamhusein v. Rothman's Holdings Ltd & Naushad Juma, Mombasa HCCC No. 458 of 2000, [2001] eKLR**, Waki, J. (as he then was) held as follows:

**“The subject matter in issue is immovable property although there is an alternative prayer for money. On the facts the Applicant occupies the property with his family. After this court’s earlier Ruling there is nothing to prevent the Respondent from evicting the Applicant from that property. If the Appeal succeeds on the main prayer the property may well have disappeared irretrievably although monetary compensation may be available. The respondent may not be capable of restituting the same property. In the circumstances substantial loss would ensue. I perceive on the other hand the injustice that would ensue if the Appeal does not succeed after taking a long time to determine whilst in the meantime the Applicant occupies the Respondents’ property rent free.”**

20. Although the Applicants are in occupation of the subject house it has not escaped my attention that the Applicants are enjoying and perhaps have enjoyed since 2007 rental income of a property sold to Kaberia at a public auction. Kaberia since that purchase of the house at the auction has not enjoyed its benefit whatsoever. Instead he has been engaged in protracted legal proceedings in this matter. It is for that reason that the Court declines to stay the orders of this Court issued on 15<sup>th</sup> May 2014. To protect the interests of the Applicants however Kaberia Menyota will be restrained from selling or demolishing the subject house pending the hearing and determination of the Applicants appeal. Kaberia Menyota is awarded costs of the Notice of Motion dated 16<sup>th</sup> May, 2014.

**Orders accordingly.**

**DATED and delivered at MOMBASA this 28<sup>th</sup> day of AUGUST, 2014.**

**MARY KASANGO**

**JUDGE**