



REPUBLIC OF KENYA

IN THE HIGH COURT OF AT MOMBASA

CIVIL APPEAL 56 of 2010

NOOR SALIM SAID.....APPELLANT/APPLICANT

-VERSUS-

JUMAAN AWADH MBARAK.....RESPONDENT

RULING

The appellant, through the firm of *M/s. Gikandi & Co., Advocates*, moved this Court by Notice of Motion dated **28th October, 2010** and brought under Order XLI, Rule 4 of the earlier edition of the Civil Procedure Rules, and ss.1A, 1B and 3A of the Civil Procedure Act (Cap.21, Laws of Kenya). The application, at this moment, has one substantive prayer outstanding, that:

“pending the hearing and disposal of the appeal filed in the Court of Appeal, there be a temporary stay of the Order of stay of the Ruling delivered by the Court on 8th October, 2010.”

The application is founded on the following grounds:

(i) the subject of the dispute between the parties is ownership of plot No.57/XVII/KALOLENI, MOMBASA;

(ii) in Kadhi’s Civil Case No. 80 of 2002, the respondent was required to pay Kshs.1,635,000/= to the applicant which has now gathered interest in the sum of Kshs.1,377,600/= – but the respondent has never paid;

(iii) the applicant should not be required to vacate the suit premises, when the respondent has not complied with the Judgment in Kadhi’s Civil Case No. 80 of 2002;

*(iv) the applicant has filed an appeal, and in the meantime, it is only fair that the **status quo** be maintained;*

(v) if these prayers are not granted, the appeal will be rendered nugatory, and the applicant will suffer irreparable loss;

(vi) the interests of justice will be served by granting the applicant’s prayers.

The applicant, in her affidavit of **28th October, 2010** deposed that the Kadhi’s Court, in Civil Case No. 80 of 2002 had ordered she be paid past maintenance, estimated at Kshs.1,620,000/= – and the same had accumulated interest at the Court rate of 14% per annum and now stands at a figure in excess of

KShs.3,000,000/=. She deponed that she remains in occupation of the house on plot No.57/XVII/KALOLENI which the respondent as her husband previously occupied with her; but now the respondent is attempting to evict her even though he has failed to pay up the decreed maintenance monies. The deponent avers that her application for stay of the orders of eviction had been dismissed on **8th October, 2010**, and she has appealed to the Court of Appeal in that regard.

The deponent avers that, in the event she is evicted while her appeal pends, the entire appeal will be rendered nugatory; she further deposes: *“I shall also suffer substantial losses in that I have always deemed the suit premises as my residential quarters...”*

The respondent depones, in his replying affidavit of **5th November, 2010**, that the appellant has her own business outfits at plot No. Mombasa/Block XVII/786/A and No. Mombasa/Block XVII/261 – and so her appeal will not be rendered nugatory. The rest of the affidavit is devoted to matters of advice emanating from counsel.

Learned counsel **Mr. Gikandi**, for the applicant, urged that this Court has inherent jurisdiction and power in every case to order stay of execution, and to grant injunctions even after dismissing an applicant’s earlier interlocutory case, pending the outcome of an appeal: *“the reason for this is to ensure that the subject-matter in any cause is not wasted or eroded, as such will render the appeal totally nugatory...”*

Mr. Gikandi invoked passages in the Ruling of **Madan, JA** in **M.M. Butt v. The Rent Restriction Tribunal**, Civ. Application No. Nai. 6 of 1979, in aid of his **argument**:

(i) “If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the Judge considers that another which in his opinion will be a better remedy will become available to the applicant at the conclusion of the proceedings.”

(ii) “It has been said that the Court as a general rule ought to exercise its best discretion in a way [such] as not to prevent the appeal, if successful, from being nugatory... per Brett, LJ in Wilson v. Church (No.2), 12 Ch.D. (1879), 454 at p.459...”

“Megarry, J...followed Wilson (supra) in Erinford Properties Limited v. Cheshire County Council (1974) 2 All E.R. 448, at p.454, and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the Order is to prevent the Court of Appeal’s decision being rendered nugatory should that Court reverse the Judge’s decision.”

(iii) “The Court will grant a stay where special circumstances of the case so require... The special circumstances in this case are that there is a large amount of rent in dispute between the parties, and the appellant has an undoubted right of appeal.”

I understand **Mr. Gikandi** to be demonstrating that even though this very Court had dismissed the appellant’s earlier application, there do exist special circumstances for allowing the instant appeal and, in particular, an appeal has properly been lodged before the Court of Appeal, and the High Court should stem the risk of that pending appeal being rendered nugatory.

Counsel submitted that the appellant has already filed the said appeal, in compliance with the terms of Order XLI, Rule 4 of the earlier edition of the Civil Procedure Rules (now Order 42, Rule 6(4) under the Civil Procedure Rules, 2010); that the dispute relates to the right of possession and occupation of the house standing on plot No.457, Kaloleni, Mombasa; that if the appellant is evicted now, then the appeal will become *“a pure academic exercise”* even if it turns out in the appellant’s favour; and that, in such an event, *“the appellant will have suffered irreparable loss.”*

Counsel urged that the respondent was not opposing the instant application on merits, but only on technical points. He submitted that this Court should grant stay for as much as one year, to preserve the applicant’s right of appeal, *“a right given by statute and [by the] Constitution.”*

Counsel urged the Court to overlook the respondent's attribution of ownership of alternative property to the applicant: for *the applicant* avers that the suit property is her only residence, and the respondent in his replying affidavit attaches no copies of title documents to prove his claim; and the respondent, as regards himself, "*has not said that he has no other residence.*"

While it is true that this Court, on **8th October, 2010** declined the applicant's prayers seeking stay of the Subordinate Court's orders regarding the suit property, I am in agreement with **Mr. Gikandi** that the instant application must be viewed in its special context, and that the Court should exercise a free discretion *without the burden of the earlier Ruling*.

This is because there is clear authority indicating the existence of a judicial obligation to *sustain the purpose of a pending appeal*. In this instance there is a pending appeal; and notwithstanding the specific considerations recorded in the Ruling of **8th October, 2010** a new *status quo*, of a setting being in place for appellate proceedings, has come about which is entirely consistent with parties' rights, and with the procedural law. I find no impediment to a free exercise of discretion, in these conditions; and I hereby exercise my discretion to reinforce *locus* for the hearing of the pending appeal. I will order as follows:

(i) Pending the hearing and disposal of the appeal filed in the Court of Appeal, I grant a temporary Order of stay of the Ruling delivered on 8th October, 2010.

(ii) Order No. (i) herein is subject to the condition that the applicant shall act diligently to prosecute her appeal.

(iii) Parties have the liberty to apply.

(iv) The costs of this application shall be costs in the appeal.

SIGNED at NAIROBI

J.B. OJWANG
JUDGE

DATED and DELIVERED at MOMBASA this 24th day of February, 2012.

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M.A. ODERO
JUDGE