



**Mohammed & another v Nyaganga alias Joseph O. Nyaganga (Environment & Land Case 265 of 2008) [2022] KEELC 2932 (KLR) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2932 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 265 OF 2008**

**NA MATHEKA, J**

**JUNE 29, 2022**

**BETWEEN**

**AMIRALI HASSANALI MOHAMMED ..... 1<sup>ST</sup> PLAINTIFF**

**ZARINA AMIRALI HASSANALI MOHAMMED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOSEPH ODERO NYAGANGA ALIAS JOSEPH O. NYAGANGA ... DEFENDANT**

**RULING**

1. The application is dated 19<sup>th</sup> June 2019 and is brought under Order 51 *Rule* 1, Section 3(A) and 1(A) and 1(B) of the *Civil Procedure Act* seeking the following orders;
  - a. The application be certified urgent and a hearing date be given on priority basis due to the urgency.
  - b. The Court be pleased to discharge/set aside the order issued on 26<sup>th</sup> June 2018 staying execution of the decree pending the hearing and determination of the then intended Appeal.
  - c. Costs of the Application.
2. It is based on the grounds that the order of stay of execution should be discharged or set aside as of right because the Respondent does not have a valid Appeal which the order for stay can be pegged on. The perceived Appeal terminated on 12<sup>th</sup> February 2018 by operation of Rule 83 when the 60 days for instituting the Appeal lapsed and the Notice of Appeal filed on 3<sup>rd</sup> November 2017 deemed as withdrawn. That the Respondent initiated the intended Appeal against the judgment delivered on 1<sup>st</sup> November 2017 by filing the Notice of Appeal on 3/11/2017 but did not serve on the Respondents/Applicants any written application for the Court Proceedings. Rule 82 (1) of the Court of Appeal rules required the Respondent to institute the Appeal by lodging the Memorandum of Appeal, the Record of Appeal, pay the prescribed fee and security of costs for the Appeal within 60 days from 3<sup>rd</sup> November



2017 when the Notice of Appeal was filed. The last day for filing the Appeal was 12<sup>th</sup> February 2018. The Respondent did not institute the Appeal within the 60 days i.e. on or before 12<sup>th</sup> February 2018 and has not in any event filed the record. The Notice of Appeal filed on 3<sup>rd</sup> November 2017 was by operation of Rule 83 deemed as withdrawn on 12<sup>th</sup> February 2018 when the 60 days for instituting the Appeal lapsed. Further and without prejudice to the foregoing, the Appeal is time barred because, The Certificate of Delay issued under Rule 82(1) certifies that the period required for preparing and delivering the proceedings was from 9<sup>th</sup> November 2017 to 13<sup>th</sup> December 2018. The 60 days under Rule 82(1) of the Court of Appeal Rules run from 13<sup>th</sup> December 2018 up to 13<sup>th</sup> January 2019. On the sixtieth day i.e. by 13<sup>th</sup> January 2019, the Notice of Appeal was under Rule 83 deemed as withdrawn.

3. The Applicants as the owners of the suit property are suffering irreparable loss and damage because since 26<sup>th</sup> June 2018 when the order for stay of execution was issued they were prevented from evicting the Respondent, entering on the suit property, developing the suit property or otherwise enjoying quiet possession of the suit property as the owner. The Applicants will be left without a remedy or any sufficient remedy in law because the order did not require the Respondent to give any security or otherwise give any undertaking as to damages. On the other hand, the Respondent is in possession of the suit enjoying all rights but without paying rent to the owners or otherwise compensating the owners.
4. The Defendant/Respondent stated that the order of stay of execution should not be discharged because he has filed an application in the Court of Appeal for leave to file Notice of Appeal and Record of Appeal out of time. Annexed and marked JOO-1 is a copy of the application. That he has filed the said application pursuant to the striking out of the Appeal which he had filed in the Court of Appeal. That the balance of convenience tilts in his favour and it is in the interest of justice that the Orders of stay of execution remain in place considering that he has developed a portion of the suit property. That there is a pending case in this Honourable Court being ELC case No. 336 of 2016 in which the Applicant has been barred from having any dealings with the suit plot being No. MSA/Block/133. Annexed and marked JOO-2 is a copy of the Court order.
5. This Court has considered the application and submissions therein. The defendant/respondent stated that the order of stay of execution should not be discharged because he has filed an application in the Court of Appeal for leave to file Notice of Appeal and Record of Appeal out of time. Annexed and marked JOO-1 is a copy of the application. The Defendant /Respondent admits that he has filed the said application pursuant to the striking out of the Appeal which he had filed in the Court of Appeal. On 26<sup>th</sup> June 2018 the court ordered a stay of execution of the decree pending the hearing and determination of the then intended Appeal. There is no appeal now as per the evidence before me hence the same was struck off. I find that the application dated 19<sup>th</sup> June 2019 is merited and I grant the following orders;
  1. The Court the order issued on 26<sup>th</sup> June 2018 staying execution of the decree pending the hearing and determination of the then intended Appeal is set aside.
  2. Costs of the Application to the applicant.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 29<sup>TH</sup> DAY OF JUNE 2022.**

**N.A. MATHEKA**

**JUDGE**

