



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mzee v Mohamed; Michubu & 4 others (Defendant) (Environment and Land Appeal E004 of 2022) [2022] KEELC 3782 (KLR) (28 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3782 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIRONMENT AND LAND APPEAL E004 OF 2022**  
**NA MATHEKA, J**  
**JUNE 28, 2022**

**BETWEEN**

**AMINA SALIMU MZEE ..... APPELLANT**

**AND**

**MUHIDIN ABDULKADIR MOHAMED ..... RESPONDENT**

**AND**

**NICHOLAS MICHUBU ..... DEFENDANT**

**MOSES MBOGO ..... DEFENDANT**

**MORENET CYBER ENTERPRISES ..... DEFENDANT**

**AYUB STORES ..... DEFENDANT**

**LATE CHEMIST ..... DEFENDANT**

**RULING**

1. The first application is dated 7<sup>th</sup> February 2022 and is brought under Order 42 rule 6 of the [Civil Procedure Rules](#), Section 3A of the [Civil Procedure Act](#) seeking the following orders;
  1. That service of this application be dispensed with in the first instance and this matter be certified as urgent.
  2. That this honourable court be pleased to issue an order of stay of execution in this matter with regard to the Plaintiff herein who is about to initiate eviction procedures against the Appellant herein in the lower court file CMCC No. 520 of 2018 which matter is directly related to this appeal pending the hearing and final determination of the Appellants Appeal No. E 004 of 2022 filed herein.
  3. That costs of this application be provided for.



2. It is based on the grounds that following the ruling delivered by Hon. Ndegwa Magistrate in CMCC No. 520 of 2018 Mombasa which is directly related to this appeal by virtue of the subject matter herein being the Appellants beneficial ownership of her property i.e. LR No. 14070/II/MN situated at Bamburi area, Mombasa County, the Appellant is apprehensive that there is now a real and imminent threat of the Plaintiff/Respondent herein, Muhidin Abdulkadir Mohamed is about to initiate eviction procedures against her taking into account the fact that Hon. Ndegwa Magistrate dismissed the Appellant's application for review dated 15/9/20 holding that it had no merit yet the Appellant's Appeal No. E 004 of 2022 herein is still pending before this Honourable court. That unless this Honourable Court immediately and urgently grants an order for stay pending appeal against the Plaintiff/Respondent herein, the Appellant stands to suffer irreparable loss and damages from the threat of eviction since the subject property herein has been and still is to date her family property since time immemorial. That it is therefore in the interest of justice and fairness as well as to preserve the subject matter herein that this Honourable Court grants an order for stay of execution in this instance pending the hearing and final disposal of the Appellants Appeal No. E 004 of 2022.
3. The respondent stated that the Appeal is against the ruling of the lower court in CMCC no 434 of 2020 where the Appellant filed an application dated 30/7/2020 seeking stay of orders in the trial suit and which came up for ruling on 1/10/2020 where the application was dismissed, (attached and marked "MAM-1" is a copy of the said Application). That the Appellants application dated 7<sup>th</sup> February 2022 is unsavoury, and incompetent and the facts as raised in the Application are those that justify this court to strike out the said application as being an abuse of the court process under the provisions or Order 2 Rule 15 (1) a, b, c, and d of the *Civil Procedure Rules*. That the Application for stay under orders as prayed number 2 of the Notice of Motion Application seeks stay of execution in the appeal stating the reason being that the appellant is at risk of eviction in lower court CMCC No 520 of 2018 whereas the memorandum of appeal on record and filed on 7/2/2022 states that the Appeal is against the ruling of the lower court CMCC No E434 of 2021. (attached and marked "B8AM-2" is a copy of the said Memorandum of Appeal). That the order numbered 2 on the Appellant's notice of motion herein clearly shows the Appellant is praying for a stay through this Appeal to stop an eviction in CMCC No 520 and not in CMCC No. 434 of 2020 as sited in the memorandum of appeal as the ruling annexed under paragraph 2 of the appellants supporting affidavit sworn on 7<sup>th</sup> February 2022 by one Amina Salmin Mzee is the ruling delivered in CMCC No. 520 of 2018 and not the ruling which is the subject matter in this suit that was delivered on 1<sup>st</sup> October 2021 in CMCC No. E434 of 2020.
4. That the Appellant has not annexed the ruling forming the basis of the Appeal in the Application dated 7<sup>th</sup> February 2022 because the said ruling shall expose that the Appellant was not a party to the lower court proceedings and the Appellant deliberately failed to disclose this so that the court would not know or find out that she has no *locus* to lodge an appeal out of CMC No. E434 of 2020 on the basis that the application was dismissed for the said reason that she was not a party to the lower court suit and had no audience or right to the orders sought therein and the same position applies herein, (attached and marked "ISAM-3" is a copy of the said ruling in CMCC No. E434 of 2020 delivered on 1<sup>st</sup> October 2021).
5. That Appellant filed an application as an interested party in the lower court dated 30<sup>th</sup> July 2021 seeking stay of order issued in the suit where the Appellant had not entered appearance or appointment under order 7 nor most importantly filed an application seeking leave to be enjoined as a third party hence the Application was improper on record and as such the Appeal herein is based on a nullity. That there is no dispute between the Appellant and him that the owner ship and possession of the suit property in CMCC No E434 of 2020 is vested one and that he is the lawful and registered owner of the property known as L.R. No. 14070/11 MN comprised in Certificate of Title Number CR. 63155



- measuring approximately 0.0275 Ha together with all the developments thereon situated at Bamburi having bought the same from Swiftway Auctioneers on 28<sup>th</sup> February 2020 for a consideration of Kenya Shillings Four Million, Five hundred Umusand (Kshs. 4,500,000.00/=) pursuant to the warrant attachment and sale issued by the Chief Magistrate’s Court at Mombasa on 31<sup>st</sup> January 2020 in Civil Suit No. 520 of 2018. (attached and marked “MAM-4a” is a copy of the said Certificate of Title, “MAM-4b” is a copy of the consent judgement, “MAM-4c” is a copy of the Decree, “MAM-4d” is a copy the Proclamation Notice, “MAM-4e” is a copy of an advertisement by Daily Nation Newspaper of the sale of the suit property by public auction and “MAM-4P’ is a copy of the Certificate of Sale).
6. That the Appellant herein did not obtain any stay of the execution of the consent judgement in MCC NO. 520 of 2018 entered on 10<sup>th</sup> December 2018 and all consequential orders therefrom nor did she proffer an appeal of the said consent judgement however the Memorandum for Appeal as filed herein details the Appeal is out of the ruling delivered in CMCCC 434 of 2020 and not CMCC 520 of 2018 hence the orders as drafted cannot be granted. That the Appellant is not in possession of the suit property herein and that if she has any claim she ought to move the same by filing a fresh suit in the Environment and Land Court for the redress because on appeal, this court has no jurisdiction to delve into issues of ownership of the suit property as the Appellant never raised any issue in E434 of 2020 where he evicted the 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> 5<sup>th</sup> and 6<sup>th</sup> Respondents herein as Defendants therein *vide* orders dated 17<sup>th</sup> December 2020 by Hon. Francis N. Kyambia and 18<sup>th</sup> February 2021 by Hon. A.S. Lesootia, he evicted the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> 5<sup>th</sup> and 6<sup>th</sup> Respondents from the suit property. (Annexed and marked as “MAM S” is a copy of the said orders).
  7. The second application by the Plaintiff is filed in court on 21<sup>st</sup> February 2022 and seeking the following orders;
    1. That this application be certified urgent and heard immediately.
    2. That the Memorandum of Appeal dated 4<sup>th</sup> February, 2022 and filed on 7<sup>th</sup> February, 2022 be struck out.
    3. That the court does summarily reject and dismiss the same Memorandum of Appeal filed here.
  8. It is based on the following grounds that Appellant has filed the Memorandum of Appeal herein without extracting any proper decree such that the present appeal is incompetent ab initio. That the chain of events as set out in the annexed supporting affidavit discloses a firm basis for reasonable inference that Appellant/Respondent does not have any serious justification or triable issues to prosecute their appeal with any likelihood to succeed. That the Applicant/1<sup>st</sup> Respondent should not be kept out of his judgment and orders in the lower Court CMCC No E434 of 2020 for no justifiable reason. That this Appeal is one that ought to be rejected as the Appellant’s Appeal is seeking untenable orders as the order of stay is incapable to be granted to a party who was not a party to the lower court suit. That further, the Appeal is fatally defective and absolute waste of the court’s time and resources and should be dismissed for reasons that the ruling delivered on 1<sup>st</sup> October 2021 which is being appealed from is a negative order hence there cannot be a stay on a negative order. That the Appellant has not in filing the appeal demonstrated any facts or grounds that have passed the test of justifying the circumstances under which the Court may order stay of execution of a Decree or Order pending an Appeal as provided for under Order 42 Rule 6 of the [Civil Procedure Rules](#), 2010. That the Appellant has not demonstrated any positive order capable of being stayed as it is also trite law and as evidenced by precedents that an application for stay of execution pending appeal requires that there be a positive requirement/or order that is capable of being stayed. That the Appeal herein is ripe to be rejected for the reasons that the orders sought are untenable in the circumstance of the case herein, that it is vexatious, it is otiose, bad in law, it bears grounds not supported by any facts, it is fatally defective



and is an abuse of the court process. That the jurisdiction or power to reject this appeal lies firmly with this court as per the reading of Section 79B of the *Civil Procedure Act*, the decision to summarily reject an Appeal from the subordinate court is a discretion that is vested with this court. That the honourable Judge herein is mandated with the task to peruse the Memorandum of and if it is found that there are no ample reasons to sustain the Appeal the judge must reject the appeal.

9. This court has considered the applications and submissions therein. Section 79B of the *Civil Procedure Act* provides as follows;

Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily”.

Order 42 Rule 13 of *Civil Procedure Rules* provides as follows;

- 1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.
- 2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.
- 3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.
- 4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
  - a) the memorandum of appeal;
  - b) the pleadings;
  - c) the notes of the trial magistrate made at the hearing;
  - d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
  - e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
  - f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:  
Provided that—
    - i. a translation into English shall be provided of any document not in that language;
    - ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).



10. I have perused the court file before me and find that the Memorandum for Appeal as filed herein details the Appeal is out of the ruling delivered in CMCCC 434 of 2020 and not CMCC 520 of 2018. The Appellant is not a party in that suit. However, in the current application they seek stay of execution in the Appeal stating the reason being that the Appellant is at risk of eviction in lower court CMCC No 520 of 2018. No decree has been filed in respect to this latter file and the file is not before me and not in issue in this Appeal. I find that their application and the Appellant's appeal is an abuse of the court process. The Appellant's application dated 7<sup>th</sup> February 2022 is dismissed with costs to the Respondents. I find that application dated 21<sup>st</sup> February 2022 is merited and I strike out this appeal with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28<sup>TH</sup> DAY OF JUNE 2022.**

**N.A. MATHEKA**

**JUDGE**

