REPUBLIC OF KENYA

HIGH COURT AT MOMBASA

CIVIL SUIT 96 OF 1999

AHMED JAMA YUSUF…….....…….PLAINTIFF/ APPLICANT

-VERSUS-

1. SALIM ALI MWABEKA

2. FRANCIS MUNYAO MULINGE

3. JEREMIAH SOO MULINGE

4. KENYA COMMERCIAL BANK LTD.....…DEFENDANTS/RESPONDENTS

RULING

This application by Notice of Motion dated and filed on *29th October, 2009* was brought under Order XLI (Rule 4) of the earlier edition of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap. 21, Laws of Kenya). The applicant has one main prayer, that ***"there be a stay of execution herein pending the hearing and determination of the petitioner's appeal."***

The supporting grounds are set out as follows:

(i) the plaintiff/applicant has preferred an appeal against the Judgment delivered on *30th March, 2007****, which appeal risks being rendered nugatory if stay orders are not granted;***

(ii) the plaintiff stands to suffer substantial loss, if stay orders are not granted;

(iii) the plaintiff has an arguable appeal with high chances of success;

(iv) it is in the interests of justice that stay orders be granted, as this request will occasion no prejudice to the respondents.

For supporting evidence, the applicant swore an affidavit on ***29th October, 2009*** averring (in summary) as follows: he filed suit on ***9th March, 1999*** seeking a declaration that he is a tenant on the suit property (L.R. No. Kwale/Ukunda/3091) and was the owner of the ***house*** located thereon; he sought to have his rights in that regard recorded on the land register; the claim was heard, and Judgment adverse to him delivered on *30th March, 2007*; on the applicant's behalf, *M/s. Timamy & Co., Advocates*, on *10th April, 2007* filed a notice of appeal, and began on the preparation of the record of appeal; on *26th October, 2009* the applicant was served with a proclamation of attachment of movable property, in respect of the respondent's costs of the suit; the applicant had not been served with an application for execution, nor with warrants of attachment and sale of his property; such attachment and sale of the applicant's goods will occasion him substantial hardship, in particular, because the respondents have subsumed his ***house*** under ***movable property***.

On behalf of the respondents, ***Francis Munyao Mulinge*** (2nd respondent) swore a replying affidavit on *31st March, 2010*, deponing that the applicant's prayers come *"after a very long period spanning at least two years, and the applicant has inordinately delayed in filing the application*"; that "*the Court issued its considered Judgment upon hearing the evidence tendered before it, and there is a very high likelihood that the said Judgment [of the appellate Court] may follow the same course*"; that "*the plaintiff has failed to annex any memorandum of appeal to enable the Court to determine whether the plaintiff raises any arguable appeal"*; that, by counsel's advice, the truth of which the deponent believes, *"an appeal does not stay any payment of costs in the previous matter and the same [is] payable before an appeal is heard*"; *the respondents stand to suffer greatly, if the Court should allow the application for stay."*

M/s. Timamy & Co. Advocates, on behalf of the applicant, submitted that while the respondents have taxed their bill of costs and have attached and are threatening to sell the applicant's ***house***, the said house is the subject of appeal and, if it is sold, the subject-matter of the appeal will have been destroyed, thus rendering the appeal nugatory.

For good measure, counsel urged that *"the attached house is, in fact, the residence of the applicant and his entire family";* the house is "*the only asset [the applicant] has after retiring"*; the house carries "*sentimental value to the applicant [which] cannot be estimated in monetary terms"*; "*if the house is sold it will cause the applicant not only substantial loss but mental anguish, stress and helplessness*." These are the applicant's most vital grounds in support of the prayer for stay orders.

To incline the Court's discretion in favour of his main anxieties, the applicant invoked a Ruling of the Court of Appeal in ***Butt v. Rent Restriction Tribunal*** [1982] KLR 417 in which the following passage, in the rendition by ***Madan, JA,*** occurs (pp.419-20):

"It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in [such] a way ….as not to prevent the appeal, if successful, from being nugatory….."

Madan, JA in that case found apposite the statement of the English Judge, ***Cotton, LJ*** in ***Wilson v. Church*** (No.2) 12 Ch.D. (1879), 454 at p.458:

I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if

successful, is not nugatory."

Counsel submitted that the applicant had established the special circumstances of this case; in his words:

"The dispute presents a novel question on the application of the law. The concept of a *house without land,* ***where one party owns the land but another owns the building constructed thereon. The***

applicant's rights are not [recorded] in the register, but are recognized [under] the Registered Land Act (Cap.300, Laws of Kenya). The house is his only asset now that he is retired."

Counsel urged that the principle in ***Butt v. Rent Restriction Tribunal*** would accommodate the applicant's case for grant of stay orders.

While acknowledging that, by Order XLI, Rule 4(2)(b) of the Civil Procedure Rules, an applicant such as the one herein is required to provide security, as the Court may order, for due performance of decree or order such as would bind that party, counsel contended that this case had unique circumstances: ***"the decree is a refusal by the Honourable Court to declare the applicant the owner of the house on Plot No. 3091…and that his relationship with the respondent is one of an indeterminate tenant. The central dispute is on the ownership of the house. The due performance of the decree would be to hand over the house to the 4th respondent who would be at liberty to exercise its right of [sale] over it to any willing buyer."***

Were the Court to accept as special circumstances justifying the grant of stay orders, the foregoing scenario, then the applicant's position is that he need not give any security, save that he may be required to undertake not to dispose of the suit premises pending the hearing and determination of the appeal.

Counsel submitted that since the Judgment was delivered on *30th March, 2007* and the application for execution was made in *October, 2009*, by virtue of Order XXI (Rule 18(1)(a)) the respondents should have applied for notice-to-show-cause in relation to the execution of the decree. Consequently, it was urged, ***"it was wrong for the respondents to have applied for attachment and sale of the applicant's immovable property".*** Counsel submitted that the respondents had treated the suit premises as ***moveable property***, yet it was, in fact, immovable property; and that the proper procedure would have been to apply for an order prohibiting the applicant from transferring or charging the property (in accordance with O.XXI, Rule 49). Counsel urged that the application for execution was bad in law.

For 1st, 2nd and 3rd respondents, it was urged that the applicant had shown no substantial loss that he was bound to suffer, in the event the Court did not grant stay orders.

On the question whether the respondents were attaching immovable property, rather than moveable property, counsel contended that this was an insignificant point: the real issue was "***execution of this Court's valid judgment***"; ***"the defendants are merely complying with the judgment of the Court and they should not be fettered from realizing the fruits of their judgment***"; ***"the 1st, 2nd and 3rd defendants have been kept away from what is rightfully theirs for far too long***."

Counsel next contested the application on grounds of delay: that, since *30th March, 2007* and *10th April, 2007* respectively when judgment was given and when the notice of appeal was filed, "***the applicant reverted to deep slumber until the defendants taxed their bill of costs and obtained a certificate of costs on*** *24th October, 2009*"; and only after a period of nearly three years was the proclamation served upon the applicant, and then he realized he had not sought stay of execution. It was urged that the applicant was guilty of *laches,* disentitling him to the orders sought.

Counsel submitted that the applicant had given no security to support the orders he was seeking, but had only pleaded personal hardships.

The real question for determination by this Court is whether, on the basis of the meritorious principles governing judicial practice in such cases (see ***Butt v. Rent Restriction Tribunal*** [1982] KLR 417; ***Wilson v. Church*** (No.2) 12 Ch.D. (1879), 454), it is right to grant stay orders in respect of execution, pending the exercise of the applicant's right of appeal. A secondary question relates to ***costs,*** as an element in the Judgment being appealed against.

I think the applicant well appreciates that the ***costs*** attendant on the earlier Judgment have indeed, become due and payable – and this is not to be contested. His only plea is that, owing to personal

circumstances, he is unable to pay the said costs at this stage; and if the costs-burden is settled on the property in respect of which he is appealing, then his appeal case, no matter the outcome, is rendered nugatory.

The question before the Court is one of ***equity.*** That a legal obligation has arisen for the applicant to pay up the costs is a fact. Must this Court hold the applicant strictly to that legal duty, at this stage? If yes, then that takes away the Court's ***discretion*** to do equity; and the Court's obligation to do equity arises now, because the attempt to execute for costs has been directed at the very property which is to be the subject of appeal. Upholding the right of appeal, for any party, is a basic responsibility of the Court which should under no circumstances, foreclose an ***arguable appeal***.

The Judiciary, whether by original trial or by appeal, is constrained by the terms of Article 159(2) (d) of the Constitution:

"(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

……

(d) justice shall be administered without undue regard to procedural technicalities….."

If, by the constitutional principle, this Court must allow the property-claim, the gravamen in the appeal, to be resolved then it cannot at the same time hold that the accrued costs payable by the applicant, be settled by ***selling-off that very property***; the Court must not decide in a manner that defeats the merits of the appeal case in advance.

The Court in arriving at a decision in this matter, is under a further judicial duty: underlying the claims herein is a novel concept in legal argument, namely, ***house-without-land***. This entails the construction and ownership of an architectural unit, by one party, on land that belongs to another party. This is a common phenomenon in legal disputes on Kenya's coastal belt. An example is ***Famau Mwenye & 19th Others v. Mariam Binti Said, Malindi*** HCCC No. 34 of 2005, in which ***Ouko, J*** stated as follows:

"The dispute arises from a land tenure unique... to Mombasa which has baffled scholars, practitioners and even jurists. That land system is only referred to as *'house without land',* ***that is, the owner of the house is different from the owner of the land on which it stands. It therefore defies the common law concept of land expressed in the Latin maxim****cujus est solum ejus est usque ad coelum* ***[meaning,*** *'whose is the soil, his is also that which is above it****'***].*"*

The terms regulating the relationship between the owner of the land and the "***owner of the house***" do vary, from case to case, as this Court noted in ***Msallam Said Abdalla v. Suleiman Lazari Nangela & Another***, Mombasa HCCC No. 219 of 2010:

"In the instant case…I find that the defendant had an obligation to make some form of payment to the plaintiff, on such terms as the parties might have agreed. The evidence before the Court is that the defendants failed to make due payment…."

The Court ought to allow proper canvassing of such ***novel points*** insofar as they may affect the ***merits*** of the applicant's case on appeal; and accordingly, the case for sustaining the applicant's path of litigation, in my opinion, outweighs that for requiring the immediate discharge of the costs-burden in the trial Court.

The applicant's prayer is allowed, on condition that the *status quo* on the suit property shall be maintained pending the hearing and disposal of the appeal. Costs, both in the trial Court and in the appellate Court, shall be consolidated in the appeal.

Orders accordingly.

SIGNED at **NAIROBI** …….

J.B. OJWANG
JUDGE

DATED and **DELIVERED** at **MOMBASA** this 18th day of October, 2011.

.....

H.M. OKWENGU
JUDGE