



**Lassie (Suing on Behalf of the Estate of the Late Lassie Bin Abdulla)
v Jeneby & 3 others (Environment & Land Case 198 of 2013)
[2022] KEELC 13747 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13747 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 198 OF 2013
M SILA, J
SEPTEMBER 27, 2022**

BETWEEN

**SOUD ABDALLA LASSIE PLAINTIFF
SUING ON BEHALF OF THE ESTATE OF THE LATE LASSIE BIN ABDULLA**

AND

**FATMA KHAMIS JENEBY 1ST DEFENDANT
LAND REGISTRAR, MOMBASA 2ND DEFENDANT
ROQAYA ABDALLA LASSIE 3RD DEFENDANT
LASSIE ABDALLA LASSIE 4TH DEFENDANT**

RULING

1. This ruling is in respect of the application dated February 11, 2022 filed by the unsuccessful plaintiff. The applicant seeks an order for stay of execution of the judgment delivered on January 26, 2022 pending hearing and determination of an intended appeal to the Court of Appeal. The application is opposed.
2. To put matters into perspective, the applicant commenced this suit through a plaint filed on September 6, 2013. The suit was filed by the applicant on behalf of the estate of Lassie Bin Abdulla (the deceased). It was the case of the applicant that the deceased was owner of a house under the coastal arrangement of house without land. It was averred that this portion was later offered for sale and that the plaintiff together with three of his siblings purchased the land. It was claimed that the payment was however made using the personal cheque of Abdalla. Abdalla is now deceased and the 1st defendant is his widow. The land, which was said to have been purchased jointly by the siblings, was registered as Mombasa/Block XVI/509. It was the case of the applicant that the registration of the land in favour of the 1st



defendant was fraudulent, and in this suit, the applicant wished to have the title of the 1st defendant cancelled, and in place thereof, the land be declared to belong to the estate of Lassie Bin Abdulla (deceased). The case of the 1st defendant was that the suit land was solely purchased by her late husband (Abdalla) without any contribution from the family, and that before his death, he had commenced construction of a three storey building on the land. After his death, the plaintiff took over the property and put one of his relatives to reside in it. She averred that the property is registered in her name in trust for her two children who are the 3rd and 4th defendants in this case.

3. The evidence showed that Lassie Bin Abdulla died in the year 1986 and that the offer to purchase the land was made in the year 1987. Payment to purchase the land was made through a personal cheque of Abdalla (late husband to the 1st defendant and brother to the plaintiff). Abdalla also intended to build a three storey block on the land but died after only building the ground floor. It was also mentioned in the case that it was one Salma, a sister of the plaintiff, who was in possession of the house and that the property is let out to tenants. Possession was taken upon the death of Abdalla in the year 2007 and the proceeds of rent have never been shared with the 1st defendant or with the 3rd and 4th defendants.
4. In my judgment, I held that the land was purchased solely by Abdalla and I further held that the estate of Lassie Bin Abdulla and/or the plaintiff in his own person, have no stake in the property. I ordered that they should give vacant possession within 14 days of the judgment or they be evicted. Aggrieved, the plaintiff/applicant filed a notice of appeal and has now filed this application. The applicant seeks that there be a stay of execution of the judgment and an order restraining the 1st, 3rd and 4th defendants (respondents in this application) from transferring, charging or in any other manner deal with the title of the suit land pending hearing and determination of the intended appeal.
5. The supporting affidavit is sworn by the applicant. He has inter alia deposed that unless stay is granted, the respondents will execute the judgment and evict tenants who are occupying the suit premises. He deposes that if stay is not granted, the appeal will be rendered nugatory, and that he and his siblings will suffer substantial loss and prejudice, which cannot be remedied by an award of damages. He also contends that he has an arguable appeal and has listed various grounds upon which he intends to base his appeal.
6. The respondents have opposed the motion through the replying affidavit of the 1st defendant. She has deposed inter alia that she has never benefited from the property since the death of her husband after she was warned not to set foot there with her two children. She has averred that since November 2007, the plaintiffs have never paid her anything. She feels hurt by the action of the applicant who has been enjoying the rent from the suit premises.
7. I have considered the application alongside the submissions of Mr Wachira King'ang'ai, learned counsel for the applicant and Mr BO Odongo, learned counsel for the respondents.
8. This is an application for stay of execution pending appeal and it falls within the purview of order 42 rule 6 (2) which provides as follows :-
 - (2) No order for stay of execution shall be made under subrule (1) unless –
 - a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
9. From the above, it will be noted that three principles need to be satisfied, being :-



- (i) That the application has been made without unreasonable delay;
 - (ii) That the applicant demonstrates that he stands to suffer substantial loss unless the order of stay is made; and
 - (iii) That there applicant abides by such security as the court may order.
10. Although in his affidavit, the applicant took some trouble to demonstrate that he has an arguable appeal, that is not one of the grounds upon which this court will consider when assessing an application for stay pending appeal to the Court of Appeal. I will confine myself to the principles set out in order 42 rule 6(2) above.
 11. Starting with delay, I am persuaded that the application was made timeously as it was made within 19 days of the judgment. The next is to assess whether the applicant has made a case that he stands to suffer substantial loss if the order of stay is made. On this, I am not persuaded. First, the applicant does not live on the suit property. The suit property is rented out to tenants. The only benefit that the applicant receives is rent. I do not therefore see any substantial loss that the applicant stands to suffer if the respondents take possession of the suit property. If the applicant succeeds on appeal, he can take over the possession of the property and claim any rent that the respondents will have received. It should not be forgotten that the applicant and persons he has assigned have been the ones in possession of the property since the year 2007 and have been receiving the rent all along. I do not see how they will suffer substantially for not receiving rent for a year or so that the appeal will probably take to be heard. The respondents are the successful litigants and they have a right to enjoy the fruits of their success. I am only persuaded to issue an order to the respondents not to sell, charge, or in any other way encumber the suit property, or knock down the existing building, destroy or negatively waste the suit land, for the duration of the appeal. For the avoidance of doubt, I am not persuaded to stop the respondents from taking possession or enjoying the property, or proceeds of rent of the property pending hearing of the appeal. I had given the applicants 14 days from the date of judgment to give vacant possession. That time is now long lapsed. I will only add a further seven days from today for the applicant to give vacant possession.
 12. Since I am not persuaded to order possession in favour of the applicant, there is no need to make any order on security. If it is security of the premises, I have already directed the respondents not to sell or charge the property and not to negatively waste it, and in my view, that suffices for the circumstances of this case.
 13. The costs of this application will be costs in the appeal.
 14. Orders accordingly.

DATED AND DELIVERED THIS 27TH DAY OF SEPTEMBER 2022.

**JUSTICE MUNYAO SILA
JUDGE, ENVIRONMENT AND LAND COURT
AT MOMBASA**

In the presence of:-

Mr Muthuri holding brief for Mr Wachira for the applicant.

Mr B. O Odongo present for the respondents.

Court Assistant – Wilson Rabong’o

