



**Aroi v Lali & 5 others; Brek (Aggrieved Party) (Civil Suit  
294 of 2012) [2022] KEELC 13763 (KLR) (11 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13763 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CIVIL SUIT 294 OF 2012  
M SILA, J  
OCTOBER 11, 2022**

**BETWEEN**

**FATUMA YUSUF AROI ..... PLAINTIFF**

**AND**

**IBRAHIM AMRA ..... 1<sup>ST</sup> DEFENDANT**

**JUMA LALI ..... 2<sup>ND</sup> DEFENDANT**

**HUSSEIN OMAR ..... 3<sup>RD</sup> DEFENDANT**

**GHALIB SHARIF ..... 4<sup>TH</sup> DEFENDANT**

**BASHIR AHMED WARIFA ..... 5<sup>TH</sup> DEFENDANT**

**MOHAMED BAKARI ..... 6<sup>TH</sup> DEFENDANT**

**AND**

**SAID BREK ..... AGGRIEVED PARTY**

**RULING**

1. The application before me is that dated 11 March 2022 filed by “the aggrieved party.” The substantive prayer in the application is prayer (3) which seeks the following order :-

That pending hearing and determination of the appeal filed herein, the court do grant orders of stay of execution of the decree and judgment delivered by the honourable court on September 29, 2021.

2. The application is opposed.
3. The background is that this suit was commenced by way of a plaint filed on December 17, 2012 against 6 defendants. The plaintiff brought suit as administratrix of the estate of the late Yusuf Avumau



Aroi (deceased). She pleaded that the deceased was owner of four plots excised from the land parcel 539/III/MN in Mtwapa where the deceased constructed a mosque and madrassa. She pleaded that on December 8, 2012, she and her committee members decided to close the madrassa and put up a notice to that effect. She averred that this notice was torn by the defendants and that the defendants subsequently held a meeting and enthroned themselves as owners and managers of the disputed properties. In the suit, the plaintiff sought orders of a declaration that the defendants have no right over the madrassa and mosque, and a permanent injunction to stop them from interfering with the management or running of the mosque and madrassa. The defendants filed defence denying the claims of the plaintiff. The suit was heard by Omollo J who delivered judgment on July 15, 2020. She entered judgment for the plaintiff as prayed in the plaint.

4. After the judgment, one Said Brek, who described himself as an “aggrieved party” filed an application seeking that the judgment be reviewed and set aside and for the matter to be heard afresh. In his application, he contended that on the suit property are built a mosque, a madrassa, and three flats, which were developed out of contributions from the public and that he contributed the lions share towards construction of the flats. He complained that if the plaintiff proceeded to repossess the property she would be unjustly enriched. I was not persuaded to allow that application and I dismissed it through my ruling of 29 September 2021. Partly, I held that the flats were not in issue in the suit, and that what was in issue was rights over the mosque and madrassa, and that the court did not therefore pronounce itself on the flats. I found that any question related to the flats would be a different cause of action and nothing prevents the applicant from filing suit over the same.
5. In this application, the aggrieved party/applicant avers that he is not satisfied by the ruling and he has filed a notice of appeal. He avers that in the judgment, the court gave liberty to the plaintiff to evict the defendants from the suit property. He contends that if the plaintiff proceeds to take possession of the property, it would defeat why he used much of his money to benefit the public.
6. The plaintiff has filed a replying affidavit to oppose the motion. She has deposed inter alia that the application for review was based on matters that were not in issue in the suit and further that there is no demonstration how the public will be prevented from benefitting. She has deposed that the applicant has no arguable appeal and that the notice of appeal has been filed by a person who is not party to the suit.
7. I directed that the application be canvassed by way of written submissions and I have taken into account the submissions of Mr Gikandi, learned counsel for the applicant, and Mr Hamza, learned counsel for the plaintiff/respondent.
8. This is an application for stay pending appeal and I stand guided by the principles laid down in order 42 rule 6 (2) which provides that :-
  - 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 the decree or order as may ultimately be binding on him has been given by the applicant.
9. It will be observed from the above that the court considers three issues being :-
  - i. Whether the application has been made without unreasonable delay;



- ii. Whether the applicant has demonstrated that he stands to suffer substantial loss if the order is not granted; and
  - iii. Whether the applicant has provided security as the court may order.
10. I will start with delay. This application is premised on a notice of appeal that was filed on 7 October 2021. The application itself was filed more than 5 months later on 11 March 2022. Neither Mr Gikandi for the applicant, nor Mr Hamza for the respondent, addressed themselves on this time period in their written submissions. On my part, I am not persuaded that the applicant needed to wait for 5 months before lodging this application. In fact, it does appear to me to have been filed because there was an application by the plaintiff for eviction of the defendants, dated 16 November 2021, which was due to come up for inter partes hearing on 14 March 2022; this application was filed three days to that date. In his affidavit, the applicant has also been silent on why he waited for 5 months before filing the application. I am of opinion that the applicant has filed his application after unreasonable delay and on that alone this application must fail.
11. Even if I was of opinion that the application has been made timeously, it would still fail for failure to demonstrate substantial loss if the order of stay is not given. First, it should be remembered that the suit herein was never against the applicant but the six defendants. The suit related to the operation of the mosque and madrassa not the flats which the applicant claims to be entitled to some sort of stake. If the judgment is to be executed, it will be executed against the six defendants, not the applicant. I therefore wonder what substantial loss the applicant stands to suffer. If it is the taking over of the mosque and madrassa, where is the loss that the applicant stands to suffer? Nobody has said that if the plaintiff takes over the mosque and madrassa then the applicant will be barred from worshipping there. Assuming that the applicant will be barred, aren't there other mosques and madrassa that the applicant can attend? I am clearly not persuaded that there will be any substantial loss suffered by the applicant if the plaintiff takes over the management of the mosque and madrassa.
12. For the above reasons, I find this application devoid of merit and it is hereby dismissed with costs.
13. Orders accordingly.

**DATED AND DELIVERED THIS 11<sup>TH</sup> DAY OF OCTOBER 2022**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

Delivered in Presence of :-

Ms. Gwahala h/b for Mr. Gikandi for the applicant.

Ms. Hamid h/b for Mr. Hamza for the respondent.

No Appearance on the part of M/s Khatib & Company Advocates for the defendants.

Court Assistant – Wilson Rabong'o.

