



REPUBLIC OF KENYA



KENYA LAW
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**Abed v Muli (Environment and Land Appeal 11 of 2018)
[2022] KEELC 15092 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15092 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 11 OF 2018
SM KIBUNJA, J
NOVEMBER 23, 2022**

BETWEEN

SAID MABRUK ABED APPELLANT

AND

MARGARET MUMBUA MULI RESPONDENT

RULING

1. The appellant moved the court through the notice of motion under certificate of urgency dated the March 24, 2022, seeking for an order of stay of execution of the decree and judgement in Mombasa CMCC No. 405 of 2009, Margaret Mumbua Muli versus Said Mabruk Abed & Another delivered on the 7th June 2018, to issue pending the interpartes hearing of the application and determination of the appeal by the Court of Appeal. The application is based on the nine (9) grounds on its face, and supported by the affidavit sworn by Said Mabruk Abed, the appellant, on the 24th March 2022. It is the appellant's case that after the lower court passed judgement in favour of the respondent on the 7th June 2018, he appealed to this court, but on the February 2, 2022, the court dismissed his appeal. That being aggrieved by that judgement, he filed the Notice of Appeal and intends to file an appeal with the Court of Appeal. That an order of stay of execution should therefore be issued as the respondent is likely to execute the decree and or sell the suit property, thereby rendering the appeal nugatory.
2. The application is opposed by the respondent through the replying affidavit sworn by Margaret Mumbua Muli on the May 10, 2022. It is the case of the respondent that she has a right to enjoy the fruits of the judgement delivered on the 7th June 2018. That the Appellant inordinately delayed in filing this application for stay by nearly seven weeks. That the appellant has been benefitting from the building on the suit land unlawfully, which should not be allowed now that she has succeeded on appeal, and the application should be dismissed with costs.
3. The learned counsel for the appellant and respondent filed their submissions dated the September 26, 2022 and October 19, 2022, respectively which I have considered.



4. The issues for determinations are as follows;
 - a. Whether the appellant has satisfied the threshold for issuance of stay of execution order pending determination of the appeal.
 - b. Who pays the costs of the application.
5. The court has considered the grounds on the application, affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon, and come to the following determinations;
 - a. That as submitted by both counsel, applicants for stay of executions orders are required to meet the threshold set by order 42 rule 6 of the Civil Procedure Rules before the court's discretion can be exercised in their favour. An applicant must show that substantial loss may occur unless the order is granted, that the application has been made without inordinate or unreasonable delay, and that the applicant has given or is ready to tender security for the due performance of the decree.
 - b. That Appellant herein was the 2nd defendant, and the Respondent was the plaintiff, in the original suit being Mombasa CMCC No. 405 of 2009 which was determined through the judgement delivered on the 7th June 2018 that is annexed to the application. The respondent had sued the appellant and another for permanent injunction, declaration over plot No. 217/MN and house thereon, loss of income and costs. The learned trial magistrate found in favour of the respondent and issued the injunction and declaratory orders plus costs against the appellant and that other. The appellant then filed the appeal before this court that was determined through the judgement delivered on the 2nd February 2022 that upheld the lower court's decision, with a variation that the house on the suit land belonged to the estate of the deceased, as opposed to the lower court's finding that it belonged to the respondent absolutely. The court added that "the appellant must immediately give vacant possession of the house to the respondent, as the representative of the estate of the deceased, and no later than 14 days from today." That is the order the appellant want the court to stay.
 - c. The instant application was filed on the 24th March 2022 which is about seven (7) weeks, or 49 days, after the delivery of the judgement on the 2nd February 2022. The court can only conclude that the appellant did not comply with the order that he gives vacant possession of the house to the respondent in 14 days from the date of judgement, which period lapsed on or about the 16th February 2022. The appellant contends that unless the stay of execution order is granted, he will suffer substantial loss. The appellant has through ground (g) and (h) on the notice of motion, and paragraphs (7) and (8) of the supporting affidavit stated that the respondent has threatened the tenants on the property, and indicated intention to dispose it to third parties, as the basis of the nature of the likely loss. The appellant has however not availed affidavit evidence from any of the tenants who may have been threatened and or evidence to show the respondent's intention or resolve to sell the property. The court finds the appellant has not shown the nature of the loss he terms as substantial or irreparable that he is likely to suffer if the stay of execution order he seeks is not issued. That in any case, any rental income lost or the value of the property can easily be established, in the event it became necessary after the appeal is heard and determined by the Court of Appeal. The appellant has therefore failed to establish that if the stay order is not granted he stands, or is likely to suffer substantial loss that is unlikely to be made good through a monetary award or compensation in case execution occurs and he is successful in the appeal before the Court of Appeal.



- d. The appellant has annexed a copy of the Notice of Appeal dated the 10th February 2022, that was filed on the 11th February 2022, and lodged with the Deputy Registrar on the 15th February 2022. As indicated in (c) above, the application subject matter of this ruling was filed on 24th March 2022, which was after about seven (7) weeks, or 49 days from the 2nd February 2022, when the judgement was delivered. Considering that the judgement had required the appellant to give vacant possession of the house to the respondent in 14 days, the court would have expected the appellant would have moved the court much earlier, within the 14 days that he was expected to vacate from the house, but did not. The appellant has not attempted to tender any explanation as to why the application was not filed within the 14 days that he was expected to give vacant possession of the house, or soon thereafter. It is the finding of the court that there was unreasonable delay on the part of the appellant in filing the notice of motion that has not been explained or justified. The appellant has therefore failed to establish that he moved the court without inordinate or unreasonable delay.
 - e. That the appellant at the last ground of his notice of motion, and paragraph 13 of the supporting affidavit has expressed his preparedness to abide “by any reasonable conditions that may attach to the orders of stay of execution”, which would have been sufficient in satisfying the third requirement of security for the due performance of the decree, had the other two have been established. That as appellant was under duty to satisfy all the three conditions under Order 42 Rule 6 (2) of the Civil Procedure Rules to succeed, and has failed to establish two of them, then the notice of motion dated and filed on the 24th March 2022 is without merit.
 - f. That pursuant to section 27 of the Civil Procedure Rules, the respondent as the successful party in opposing the application is awarded the costs.
6. That in view of the above findings, the court directs as follows;
- a. That the Appellant’s notice of motion dated and filed on the 24th March 2022 is without merit and is hereby dismissed.
 - b. The Appellant to pay the Respondent’s costs.
 - c. The file be closed.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 23rd DAY OF NOVEMBER 2022.

S. M. KIBUNJA, J.

ELC MOMBASA

IN THE PRESENCE OF;

APPELLANT : Absent

RESPONDENT: Absent

COUNSEL : M/s Taka for Mutubia for Appellant

M/s Wahala for Gikandi for Respondent

WILSON .. COURT ASSISTANT.

S. M. KIBUNJA, J.

ELC MOMBASA

