



**Khator & another (As administrators of the Estate of Tima and Fatuma,
children of Ali Bashir (Deceased)) v Ahmed & 2 others (Environment & Land
Case 23 of 2013) [2022] KEELC 15609 (KLR) (15 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15609 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 23 OF 2013
SM KIBUNJA, J
NOVEMBER 15, 2022**

BETWEEN

**RICHARD ABDULREHMAN KHATOR (AKA RISHAD ABDULREHMAN
KHATOR) 1ST PLAINTIFF**

ALI BWANA BWANAADI 2ND PLAINTIFF

**AS ADMINISTRATORS OF THE ESTATE OF TIMA AND FATUMA,
CHILDREN OF ALI BASHIR (DECEASED)**

AND

IDHA MARIE AHMED 1ST DEFENDANT

REGISTRAR, COAST 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. (Notice of Motion dated March 1st March 2022)

The application was filed by the 1st defendant seeking for leave to appeal to the Court of Appeal against the decision arising out of the ruling of this court delivered on February 16, 2022, and for the costs to be in the cause. The application is brought pursuant to order 43 rule 1(2) and (3), order 51 rule 1 of the [Civil Procedure Rules](#), and sections 1A, 1B, 3A, and 75 of the [Civil Procedure Act](#). It is based on the eight (8) grounds on its face marked (a) to (h) and supported by the affidavit of Idha Marie Ahmed sworn on March 1, 2022. It is the 1st defendant's case that he is aggrieved by the decision in the ruling of February 16, 2022, and needs leave to appeal, as it was not orally sought on the day of the delivery. That a Notice of Appeal was filed on February 28, 2022 and this application within 14 days set out



by order 43 rule 1(3) of the Civil Procedure Rules, and therefore without delay. That unless leave is granted, his right to appeal will be lost.

2. The application is opposed by the 1st plaintiff through the six (6) grounds of opposition dated March 21, 2022 and affidavit sworn on the same date. It is his case that the order of February 16, 2022 is appealable as of right, and no leave is required; that if leave is required it must be conditional to the applicant's compliance with the court order; that the 1st defendant should not be heard in the application until after he purges the contempt as he has neither vacated the premises nor accounted for the accrued rent; that the 1st defendant has already registered the preliminary decree on the title to the suit land claiming a sixth (1/6) share thereof.
3. That following directions on filing and serving submissions, the learned counsel for the 1st defendant and plaintiffs filed the submissions dated October 4, 2022 and October 28, 2022 respectively.
4. The following are the issues for the determinations by the court:
 - a. Whether leave to appeal in respect of the orders in the ruling of February 16, 2022 is required, and if so, whether the 1st defendant moved the court timeously.
 - b. Whether the 1st defendant has made a reasonable case for leave to appeal to issue.
 - c. Who pays the costs.
5. The court has carefully considered the ground on the application and opposition, affidavit evidence by both parties, submissions by counsel, superior courts decisions cited thereon and come to the following findings:
 - a. The record has confirmed that the court delivered its ruling on February 16, 2022 *inter alia* directing "the respondent [defendant] to file a complete and accurate statement of rent account with an affidavit of verification for the rent received from July 1, 2012 to date. this be done within 14 days. After filing, the parties appear before the deputy registrar for verification of the accounts. Upon verification, 2/3rds of the amount verified be paid to the applicant[plaintiff] within 14 days thereof failing which execution to issue. Any future rents also be shared in the same ratio of 1/6th, 1/6th, and 2/3rds." That is the order in respect of which the 1st defendant seeks leave to appeal. The 1st defendant's notice of motion also sought for stay of further proceedings but that was "pending the final determination of this application *interpartes*." That as the application is being determined through this ruling, there is no order of stay of further proceedings that can issue for any future period as it was not sought.
 - b. The record further confirms that a Notice of Appeal dated February 28, 2022 was according to the court's receiving stamp on its face, and the e-receipt filed on the same date. The said notice indicates that the 1st defendant intends to appeal to the Court of Appeal of Kenya against the whole ruling delivered on February 16, 2022. That though the 1st defendant has not disputed the plaintiff's claim that he had already taken advantage of part of the order/decree of February 16, 2022, that she now seeks leave to appeal by registering his 1/6th share against the title, the correct position is that the order on the parties' share entitlement had been determined through the judgement delivered on October 31, 2019. Therefore, the plaintiff's submissions that the 1st defendant's application amounts to approbating and reprobating is misplaced.



- c. The court has taken note of the fact that the chamber summons dated February 12, 2021 that was determined through the ruling of February 16, 2022 had been brought pursuant to order 20 rule 49, of the Civil Procedure Rules and sections 1A, & 3A of the Civil Procedure Act. The provision of order 43 of the Civil Procedure Rules headed “appeals from orders” shows under rule 1 that orders made under order 20 rule 49 of the said rules are not among those where right to appeal lie as of right. That order 43 rule 1(1) (2) of the rules provides that “an appeal shall lie with leave of the court from any other order made under these rules.” That being the case, and considering that no oral application was made on February 16, 2022 when the ruling was delivered, then it is in order for the 1st defendant to move the court for leave as he did through the instant application.
 - d. That going by the court’s receiving stamp on the face of the application, and the e-receipt on the record, the instant application dated March 1, 2022 was filed on March 2, 2022, which has been deposed, and submitted on to be within 14 days from the date of the ruling, and in compliance of order 43 rule 1(1) (3) of the Civil Procedure Rules. That in view of the foregoing, the court therefore finds the application was filed without unreasonable delay.
 - e. That as no reasonable cause has been presented upon which to lock the 1st defendant from approaching the Court of Appeal to ventilate his grievances, and considering the plaintiff will also have his day in court during the hearing of the appeal, the prayer for leave to appeal the orders in the ruling of February 16, 2022 is merited.
 - f. That no prayer for stay of execution has been made and for record purposes, none is considered or granted.
 - g. That on the issue of costs of the application, the same is to abide the outcome of the appeal, the provision of section 27 of the Civil Procedure Act notwithstanding.
6. That flowing from above the court finds merit in the 1st defendant’s notice of motion dated March 1, 2022 and filed on March 2, 2022, and directs as follows;
 - a. That leave to appeal be and is hereby granted.
 - b. The costs of the application abide the outcome of the appeal.
 - 7 Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 15th DAY OF NOVEMBER 2022.

S M KIBUNJA, J

ELC MOMBASA.

In The presence of;

Plaintiff : absent

Defendants : absent

Counsel : Ms Waithera for Kimani for plaintiff. Mr Njoroge for 1st defendant.

Wison .. Court assistant

S M Kibunja, J

