

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO.317 OF 2002

SABBY OMAR HASHIM PLAINTIFF

VERSUS

MOHAMED HASSAN 1ST DEFENDANT

KASSIM HASSAN 2ND DEFENDANT

R U L I N G

The application before the Court now is a Notice of Motion dated 26th March 2003 filed by MOHAMED HASSAN and KASSIM HASSAN (the defendants/applicants) through M/s Gikandi & Co. advocates seeking the setting aside of the decree issued by Hon. Mr. Justice Ouna and all consequential warrants of eviction; orders of stay of execution of the said orders pending hearing and disposal of an intended appeal to the Court of Appeal and for their reinstatement into the suit property to ensure the restoration of the status quo.

The said application is opposed by SABRY OMAR HASHIM (the Plaintiff/Respondent) through Mrs. Ananda advocate.

This application was scheduled to be heard before me on the 4th June 2003 but Mrs. Ananda made an oral application for transfer of the same back to Hon. Mr. Justice Ouna on grounds that he is the one who issued the orders being sought to be set aside or stayed; that he is now well conversant with the facts of this case dated 26th March 2003, and, more important, that applications for stay of execution made under Order 41 Rule 4 of the Civil Procedure Rules ought to be placed, in the first instance, before a Judge who gave the orders in question and that Mr. Justice Ouna is still in the station.

I have established from perusal of the pleadings and proceedings in this file that indeed the application dated 5th August 2002 was heard by Hon. Mr. Justice Ouna on 12th September 2002 and he issued the said orders. There is also a notice of Appeal dated 5th February 2003 which has been filed by the law firm of M/s Gikandi & Co. Advocates for and on behalf of the defendants/applicants now before me who, being dissatisfied with the ruling of Mr. Justice Ouna given on the 3rd February 2003 intend to appeal to the Kenya Court of appeal against the whole of that ruling. The application before me is therefore for orders of stay of execution of the orders issued by Mr. Justice Ouna pending determination of the intended appeal.

It is Mr. Gikandi's submission, in opposing the Respondent/Plaintiff's oral application, that any judge can hear this application. Mr. Gikandi does not submit on the one important issue: Why Mr. Justice Ouna, who gave the orders sought to be stayed, cannot hear this application.

The cumulative effect of this application for stay filed by the Applicants/Defendants is to set aside orders of Mr. Justice Ouna, in particular, setting aside the orders of eviction and reinstating the applicants/defendants into the suit premises. Being a judge enjoying concurrent jurisdiction with Mr. Justice Ouna, I decline to set aside the orders he issued on 3rd February 2003.

Consequently I allow the Plaintiff/Respondent's oral application and direct the Deputy Registrar to place this application before Mr. Justice Ouna to deal. Dates for hearing of the same to be taken in the Registry.

It is so ordered.

Dated and delivered at Mombasa this 5th June 2003.

A.G.A. ETYANG

JUDGE

In the present of Mr. Ananda for the Plaintiff.

No appearance by Mr. Gikandi or defendants.

Furaha – court clerk.

A.G.A. ETYANG

JUDGE