



REPUBLIC OF KENYA



KENYA LAW
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Said v Abdulsheikh & 2 others (Civil Suit 347 of 2017)
[2022] KEELC 14962 (KLR) (3 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14962 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 347 OF 2017
M SILA, J
NOVEMBER 3, 2022

BETWEEN

SWALEH OMAR SAID PLAINTIFF

AND

KHALID SALIM ABDULSHEIKH 1ST DEFENDANT

FIRST COMMUNITY BANK LIMITED 2ND DEFENDANT

LAND REGISTRAR, MOMBASA 3RD DEFENDANT

RULING

(Application for stay pending appeal; plaintiff having sued claiming that 1st defendant stole his title deeds and fraudulently transferred the properties to himself; suit heard and dismissed; plaintiff now seeking a stay of execution pending appeal; while the suit was being heard, plaintiff benefitted from an order of injunction which allowed him to remain in possession and collect the rents while he provided an undertaking as to damages; application allowed subject to deposit of the sum of Kshs. 3, 780,000/= being the rent collected for the duration that the plaintiff has been in possession of the suit properties)

1. The application before me is that dated 15 June 2022 filed by the unsuccessful plaintiff. It seeks the following orders :-
 - i. Spent (certification of urgency).
 - ii. Spent (interim orders of stay)
 - iii. That this Honourable Court be pleased to issue order of stay of execution pending hearing and determination of appeal.
 - iv. That this Honourable Court be pleased to set aside judgment delivered on 7th June 2022 pending hearing and determination of appeal.



- v. That the costs of the application be provided for.

The application is opposed.

2. To put matters into perspective, the applicant commenced this suit through a plaint filed on 26 September 2017. He contended to be the rightful owner of the land parcels Mombasa/Block XXIX/76 and Mombasa/Block XVII/136 (the suit properties). He claimed that the 1st defendant/respondent was his rent collection agent and that he stole his title deeds and fraudulently transferred the suit properties to himself, and later charged the titles to the 2nd defendant/respondent. In the suit, he wished to have orders cancelling the titles in name of the 1st respondent. The case of the 1st respondent was that the applicants sold to him the suit properties for valuable consideration and that he paid the applicant through a loan received from the 2nd respondent. While the suit was on going, the applicant benefited from an order of injunction issued on 28 September 2018, which allowed him to retain possession of the suit properties and collect rent, subject to an undertaking that he will reimburse the 1st respondent if he loses the case.
3. I heard the suit and delivered judgment on 7 June 2022. I was not persuaded as to the truthfulness of the position of the applicant. My assessment of the evidence led me to the conclusion that the applicant had sold the suit properties to the 1st respondent and was duly paid from the loan that the 1st respondent had taken with the 2nd respondent. I dismissed the applicant's suit and also ordered him to make good his undertaking within 30 days of the judgment, and in default, the 1st respondent be at liberty to apply for accounts. Aggrieved, the applicant filed a notice of appeal on 8 June 2022 and followed it up with this application.
4. Apart from the rather curious prayer to set aside the judgment pending appeal, it will be observed that this is essentially an application for stay pending appeal. In his supporting affidavit, the applicant has deposed that the 1st respondent has initiated the process of execution, and is planning to evict him from the suit premises, which will render him homeless. He believes that his appeal has high chances of success.
5. The 1st respondent swore a replying affidavit to oppose the motion. Inter alia, he deposed that the applicant has been in use and occupation of the suit premises and has been collecting rent of Kshs. 70,000/= per month thus depriving him of income. He has calculated that so far the applicant has collected Kshs. 3, 780,000/= as rent. He contends that the applicant has not demonstrated any irreparable loss and he wishes to be allowed to enjoy the fruits of the judgment. He states that he is the one who is suffering at the hands of the applicant.
6. The 2nd respondent on her part filed an affidavit sworn by Amran Abdikadir, who is a legal officer with the bank. He also believes that the application is calculated at denying the 1st respondent and the bank the fruits of the judgment. He has deposed that the applicant needs to deposit the rent he has been collecting since the year 2017 as security if he is to be granted stay.
7. The application was canvassed by way of written submissions. I have seen submissions filed by counsel for the applicant and counsel for the 1st respondent and I have taken note of them before arriving at my decision.
8. At the outset, I see no place for prayer (iv) and I even wonder why such order is being sought. It is disallowed and I need not say anything more on that. That leaves the prayer for stay pending appeal.
9. Order 42 Rule 6(2) provides for the principles that the court will consider while assessing an application for stay pending appeal. It is drawn 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.

From the above, it will be observed that the applicant needs to satisfy the following :-

- (i) That the application has been made without unreasonable delay;
- (ii) That he stands to suffer substantial loss unless the order of stay is made; and
- (iii) That he will abide by such security as the court may order.

10. I have no problem with finding that the application has been filed timeously. I also think that the applicant may suffer substantial loss if the order of stay is not made and he proceeds to succeed on appeal. What I am not satisfied with is the issue of security. In his affidavit, the applicant has made no offer for security for the loss that the 1st respondent will suffer in the event that he (applicant) loses his appeal. Already, the applicant has not even made good his undertaking as to damages which he gave upon being granted the order of injunction. He has not, in his affidavit, disclosed the amount of money that he received as rent when the case was on going, nor has he offered to have this deposited, while the appeal is pending. I am afraid that the applicant cannot expect to be granted a blanket order of stay without offering security.

11. The 1st respondent has deposed that the applicant has so far collected Kshs. 3,780,000/= as rent. The applicant has not filed any supplementary affidavit to contest this figure. In my view, for the applicant to be allowed a stay of execution, this amount must be confirmed to be available within the next 14 days and must thereafter be deposited in a joint interest earning account to be held by counsel for the applicant and 1st respondent for the duration of the appeal. If there is no confirmation of the availability of the said Kshs. 3,780,000/= within the specified 14 days, then this application will stand dismissed with costs and the respondents will be at liberty to execute the judgment. In the event that the said security is deposited, the costs of this application will be costs in the appeal, otherwise as I have mentioned, the application will stand dismissed with costs.

12. Orders accordingly.

DATED AND DELIVERED THIS 3RD DAY OF NOVEMBER 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

In the presence of :-

Mr. Kahindi h/b for Mr. Mwarandu for the plaintiff/applicant

Mr. Okanga for the 1st defendant/respondent

Mr. Wafula for the 2nd defendant/respondent

Mr. Makuto for the 3rd defendant/respondent

Court Assistant – Wilson Rabong'o.

