



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 276 OF 2018**

**WAKF COMMISSIONERS OF KENYA.....PLAINTIFF**

**VERSUS**

**FARIDA ALMASI MUKIRA.....1<sup>ST</sup> DEFENDANT**

**SALMA ALMASI MUKIRA.....2<sup>ND</sup> DEFENDANT**

**LYDIA KAGUNA JAPHETH.....3<sup>RD</sup> DEFENDANT**

**RULING**

*(Application for stay pending appeal; principles to be considered; applicant/1<sup>st</sup> defendant having purchased a lease from the 2<sup>nd</sup> and 3<sup>rd</sup> defendants; plaintiff being head lessor and contending that it has not given its consent for the transfer; plaintiff further claiming that the plaintiff is using the premises for a business that is against the Islamic faith; plaintiff operating a hotel/lodge on the premises that inter alia sells liquor; judgment entered in favour of the plaintiff; applicant now seeking stay pending appeal; principles to be applied; Order 42 Rule 6; substantive loss; applicant having invested over Kshs. 60 million in the premises and will thus suffer substantial loss; balance of prejudice tilting in favour of the applicant; order of stay of execution pending appeal granted)*

1. The application before me is that dated 29 October 2020 filed by the 3<sup>rd</sup> defendant. It is an application brought pursuant to the provisions inter alia of Order 42 Rule 6 of the Civil Procedure Rules, 2010. The substantive prayer in the application is for an order of stay of execution of the judgment delivered on 16 July 2020 pending hearing and determination of an appeal filed at the Court of Appeal, being Civil Appeal No. 71 of 2020. The application is opposed by the plaintiff.

2. To put matters into context, the plaintiff filed this suit against the applicant and two other persons, namely Farida Almasi Mukira and Salma Almasi Mukira (Farida and Salma). The plaintiff is owner of the premises Mombasa/Block XX/62 upon which is developed a hotel/lodge. On 16 April 2013, the plaintiff leased the suit property to Farida and Salma for a period of 99 years with effect from 1 January 2013. In September 2015, Farida and Salma transferred their interest in the lease to the applicant. Arising therefrom, the plaintiff filed this suit seeking orders nullifying the lease agreement of 16 April 2013 and the subsequent transfer of lease. It was the case of the plaintiff that the transfer of the lease to the applicant was against the provisions of the Wakf Commissioners Act, inter alia for reason that the Commissioners had not given any consent for the transfer. The plaintiff also sought forfeiture of the lease of Farida and Salma inter alia for reasons that they are using the premises against some doctrines of the Islamic faith mainly that the premises is being used for sale of alcohol.

3. I heard the dispute and in my judgment of 16 July 2020, I did find that the plaintiff had not given consent to the transfer of the lease to the applicant and therefore the transfer was null and void. I was of opinion that the result of the cancellation would revert the lease back to Farida and Salma, and not to the ownership of the plaintiff. I also found that the 3<sup>rd</sup> defendant has no right to do business in the suit premises and gave her 3 months to vacate. There was also an order to stop the sale of liquor in the premises for that, in my opinion, was one of the conditions of the lease to Farida and Salma.

4. Aggrieved, the applicant filed a Notice of Appeal and it is now apparent that she has already filed the appeal before the Court of Appeal. She now wants stay pending appeal.

5. The plaintiff has opposed this application through a replying affidavit sworn by Dr. Ibrahim Bulushi, the Secretary of the plaintiff. He has deposed inter alia that following the judgment of the court, the applicant no longer has an interest in the suit property and that she continues to undertake a business that is prohibited in the lease, i.e selling alcohol. He has deposed that to take it that the only interest of the plaintiff in the suit property is rent is to have a narrow view of the plaintiff's interest in the property. He deposed that the applicant has not demonstrated substantial loss and that it is actually the plaintiff who is suffering substantial loss due to the continued illegal occupation of the premises by the applicant. He has further averred that the application has been filed after delay of 2 months without giving sufficient reason.

6. Farida and Salma did not participate in this application.

7. I have considered the application alongside the submissions of counsel and the authorities that they provided. This is an application for stay pending appeal and therefore the provisions of Order 42 Rule 6 (2) apply. The same provide 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.*

8. The first issue, which is really a threshold point, is delay. In his submissions, Mr. Oluga, learned counsel for the applicant, referred me to the case of *Charles Nyamwega vs Asha Njeri Kimata & Another (2017) eKLR*, where the court stated that “*what constitutes delay varies from the circumstances of each case.*” I agree. Judgment in this matter was delivered on 16 July 2020. This application was filed on 29 October 2020 which is just above 3 months after delivery of the judgment. I had given 3 months to the applicant to give vacant possession and one would have expected such application to be filed at the latest, within this 3 month window. The explanation for the delay is that Farida and Salma, had indicated that they were also aggrieved by the judgment and had filed a notice of appeal, and had given the applicant a verbal undertaking not to evict her from the premises. Whereas in his submissions, Mr. Khalid, learned counsel for the plaintiff thought that this is not a good reason, I will give benefit of doubt to the applicant.

9. The next point is whether the applicant stands to suffer substantial loss if the order is not given. It emerged in evidence that the applicant purchased the suit property for Kshs. 60 million which is certainly a colossal amount of money. She operates a business on the suit premises no doubt in an attempt to try and recoup her investment. Although it is the strong argument of the plaintiff that her continued stay in the premises is illegal and contrary to the terms of the lease, I guess that is exactly what she wants to contest at the Court of Appeal. The plaintiff has further raised the issue that continued sale of alcohol would be offensive. Again, I do not know what the Court of Appeal will decide on this point. They may very well hold that the applicant ought to continue in the premises conducting her business. That business was running before this suit was filed. If I balance the injury to the principles of faith of the plaintiff and the injury that the applicant stands to suffer if she stays out of business for the duration of the appeal, I think the scales tilt in favour of the plaintiff. Given the massive investment that she has put in place, I think substantial loss will be occasioned to her, if she is evicted or if she is forced to change the nature of her business pending appeal. Indeed, it may be impossible to pick the pieces and start all over again, even if she succeeds on appeal.

10. The last issue is security. I see no issue here. The applicant can continue paying rent as stipulated in the lease as the appeal is being heard.

11. It will be seen that I am persuaded to allow this application. Let the execution of it be stayed pending the hearing and determination of the appeal. The applicant however to pay any rents to the plaintiff in accordance with the terms of the lease pending conclusion of the appeal.

12. The costs of this application shall be costs in the appeal.

13. Orders accordingly.

**DATED AND DELIVERED THIS 21ST DAY OF OCTOBER 2021**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA.**