



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELCA CASE NO. 43 OF 2021

ABDI ALI MOHAMED.....1ST APPELLANT

ABDULHALIK MAZRUI..... 2ND APPELLANT

-VERSUS-

HASSAN ABDULKADIR AZIZ.....RESPONDENTS

RULING

The application is dated 21st September 2021 and is brought under Section 1A, IB and 3A of the Civil Procedure Act (CAP 21) Laws of Kenya and under Order 42 Rule 6 of the Civil Procedure Rules seeking the following orders;

1. That this Application be certified as urgent and be heard in the first instance.
2. That pending hearing and determination of this Application, this Honourable Court be pleased to issue an order for stay of execution of the Decree and Judgement in CMCC NO. 1117 of 2017 Hassan Abdulkadir Aziz Versus Abdulhalik Mazrui 8s Fatma Swaleh delivered on the 1st of July 2021.
3. That pending hearing and determination of this Appeal, this Honourable Court be pleased to issue an order for stay of execution of the Decree and Judgement in CMCC No. 1117 Of 2017 Hassan Abdulkadir Aziz Versus Abdulhalik Mazrui & Fatma Swaleh delivered on the 1st July 2021.
4. That costs of this Application be granted to the Appellants.

It is based on the grounds that the Trial Court issued judgment against the Appellants whereby it inter alia ordered that the Appellants do demolish their house and other developments from Plot Number 842/II/MN within three months failure of which the Respondent would be at liberty to evict the Appellants from the property. That aggrieved by the said decision, the Appellants have filed an appeal to contest the judgement and have requested for certified copies of proceedings for purposes of the appeal. That the effect of the said judgement has substantial and serious implications of enabling the Respondent to demolish the Appellants' house which is situated on the suit property and which the Appellants have owned and have been in possession of since the year 2001 i.e. for a period of 21 years. That the time period of three months which the Respondent would be at liberty to execute the Court's judgement and be able to evict the Appellants and demolish their property expires on the 30th September 2021 which is nine days away. That the gist of the case before the Trial Court was that the Respondent filed suit against the Appellants claiming that the Appellants, who are Tenants on the subject property whereon they own a house, erected an illegal structure and sunk a borehole without the Respondent's consent. That for the said reason, the Respondent filed suit in the main seeking for vacant possession of the property pursuant to the said allegations. That one of the issues in contention during trial was whether the Respondent was a Landlord on the land and therefore whether he had the capacity to raise in issues with respect to the Appellants' tenancy on the land. That the above issues notwithstanding, the Trial Court in its judgement went ahead to unilaterally terminate the Appellants' tenancy and grant the Respondent vacant possession of the land despite the fact that at no point was the tenancy terminated. That the Appellants therefore impugn the judgement on the basis that the Honourable Magistrate unilaterally issued serious orders for vacant possession and removal of the Appellants' entire house despite the fact that the termination of the Appellants' tenancy was never an issue which was neither pleaded nor contended during trial. That despite the pendency of the appeal, the Respondent shall be at liberty to execute the Decree by the 30th of September 2021 should there be no orders to stay the execution. That should the Respondent be allowed to execute this Honourable Court's loss by losing their entire house and the whole substratum of the appeal will be destroyed and/or rendered nugatory. That should the Respondent in the circumstances be allowed to execute this Honourable Court's judgement and the Decree thereof, then the Appellants shall be denied their unalienable constitutionally entrenched right of appeal. That the Appellants have an arguable appeal raising substantial issues than need revisiting by this Honourable Court. That in the circumstances surrounding this matter, the Appellants stand to be greatly prejudiced should the protective orders for stay of execution not be granted. That it is crucial that imminent protective orders are granted pending inter parties hearing of this Application and the Appeal so that the Appellants are not prejudiced. That it is in the great interest of justice that the subject Application be allowed as prayed.

The respondent submitted that as a successful litigant he is entitled to enjoy the fruits of his Judgment which fruits are vacant possession of his Plot Number 842/11/MN. That the Respondent being a tenant and whose occupation on his property is subject to his consent and permission since he is the registered owner of PLOT NUMBER 842/11/MN situated at Mtopanga. That the expectation both in equity and in law is that if the consent or permission is withdrawn, the Appellant becomes a trespasser. The Appellant only owns the house but without the land and without any title document. And he is the owner of the parcel at Land which the Respondent erected on his parcel of Land. That indeed the trial Court issued Judgements against the Appellant to demolish their house and other development on PLOT Number 842/11/MN which property belongs to himself the registered owner. The Court indeed gave them a notice of 3 month so that he gets vacant possession of his property. The Trial Court determined that the Appellants have no right on his property and hence the need for them to be evicted since they are trespasses. Annexure D transfer of house without land is the only document that has been brought to the Court to show ownership of the house without land. The Court of Appeal pronounced itself clearly in Abdulrazak Khalifu Salimu =vs= Harun Rashid Khator & 2 Others (2018) eKLR in favor of a registered owner of the land and ordered that such a house ought to be removed forthwith. That being trespasser on his land, they cannot continue staying on his land without his consent.

This court has carefully considered the application and the submissions herein. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the Civil Procedure Rules as follows:

“No appeal or a second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order, but the Court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred, shall be at liberty, on an application being made, to consider such application and to make such orders thereon as may to it seem just, any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have the orders set aside.”

Order 42, rule 6 states:

“No order for stay of execution shall be made under sub-rule (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.”*

The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and
3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

The principles governing the exercise of the court’s jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR), thus:

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

- 1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,*
- 2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”*

The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in Chris Munga N. Bichange vs Richard Nyagaka Tongi & 2 Others eKLR where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus:-

“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

In the case of Mohamed Salim T/A Choice Butchery vs Nasserpuria Memon Jamat (2013) eKLR, the court stated that:-

“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right”

We are further guided by this court’s decision in Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997, at Page 4 as follows:

“ . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

From the grounds, in the application the applicants being aggrieved with the judgment delivered by the subordinate court on 1st July 2021 have filed a notice of appeal. That the appeal, if successful will be rendered nugatory and substantial loss will be suffered if the stay of execution pending appeal is not granted. That the Honourable Magistrate unilaterally issued serious orders for vacant possession and removal of the Appellants’ entire house despite the fact that the termination of the Appellants’ tenancy was never an issue which was neither pleaded nor contended during trial. However, no evidence was adduced on their part to show ownership of the suit land. Be that as it may, this court is not persuaded, that the appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, I am not persuaded that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the applicants have not fulfilled any of the grounds to enable me grant the stay. I find this application dated 21st September 2021 has no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 8TH DECEMBER 2021.

N.A. MATHEKA

JUDGE