



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBSA

ELC NO. 16 OF 2021

MOHAMED IDHA MBARAK.....APPELLANT/APPLICANT

VERSUS

AHMED ALI SAID..... 1ST RESPONDENT

SALIM ALI SAID..... 2ND RESPONDENT

RULING

1. What is before the Honorable Court for determination is the Notice of Motion application dated 9th August, 2021 by the Appellant/Applicant and filed on the same date. The said application was brought under the provisions of Order 42 rule 6 (1), (2) & (6) of the Civil Procedure Rules, Order 22 rule 22 of Civil Procedure Rules Order 51 of the Civil Procedure Rule it seeks for the following order:-

a) Spend

b) That this Hon. Court be pleased to stay any further proceedings in Mombasa CM ELC No. 12 of 2020 – Ahmed Ali Said & Salwa Mbarak pending the hearing of this application inter-partes.

c) That this court be pleased to issue a stay of proceedings in Mombasa CM ELC No. 12 of 2020 – Ahmed Ali Said & Salwa Ali Said –VS- Mohamed Idha Mbarak pending the hearing and determination of the Appeal, filed against the ruling delivered by the Trial Court on 12th February, 2021.

d) That the Costs of this application be provided for.

2. The said application is premised on the grounds, annexures and the 20 Paragraphed Supporting Affidavit of MOHAMMED IDHA MBARAK sworn and on the dated 9th August 2021 and filed in court on the same date. He deposed that he was a tenant in the suit property being Land Registration No. MOMBASA/BLOCK/XLX/129 (Hereinafter referred as the (“Suit Property”) situated within the County of Mombasa. He stated that in the year 1985 he entered into a 99 years lease agreement with the 1st and 2nd Respondents father where it had been agreed that the rent payable for the tenancy occupation would be at a sum of Kenya Shillings Two Hundred (Kshs. 200) payable in six (6) months from the 1st day of the month of January and July of every year, he annexed a copy of the said tenancy agreement.

He deposed having resided onto the suit property and constructed residential property on it where his family and himself resided.

3. He stated that the 1st and 2nd Respondents instituted the suit at the sub-ordinate trial court being CM. (Mombasa) No. 12 of 2020 - Ahmed Ali Said & Salwa Ali Said – VS - Mohamed Idha Mbarak against him alleging and accusing him of non-payment of rent for the past 15 years and hence sought for orders of eviction from the suit property. He stated that in response to the suit, he filed a notice of Preliminary Objection dated 1st October, 2020 seeking to have the said suit struck out for being in contravention of the Provision of Section 4(1) of the Limitation of Actions Act which provided for a six (6) years limitation from the time the action accrued in the instant case it having been brought to court fifteen (15) years after the alleged cause of action and breach of contract had arisen.

4. He deposed that on 12th February, 2021 the trial court through its ruling dismissed the Preliminary Objection holding that the same had no merit. Being dissatisfied by the said decision, he instituted this appeal seeking to set aside the said decision. He sought for orders to allow the preliminary objection consequently dismissing the entire suit for being time barred. He sought for certified copies of typed proceedings and the Ruling.

5. He deposed that the proceedings in the lower court were still going on and if not stayed pending the hearing and determination of the

Appeal he was likely to suffer substantial and irreparable loss. In saying so he cited several reasons which included, the appeal would be mere academic exercise and a waste of the precious time of the court and resources of the parties; the trial would have been completed, the execution commenced and an award of damages would not be sufficient to compensate him for the losses and damages that would have been occasioned to him taking that the suit premises was his family home having lived there for decades.

6. He indicated that and based on the advice gotten from his Advocates he had a good and an arguable appeal with a high chance of success and stood to suffer irreparable damage and which would render the appeal nugatory if the orders of stay of execution were not granted mainly for the reason that the Respondents' suit at the lower court offended the provisions of Section 4(1) (a) of the Limitation Act Cap 22 having been instituted 15 years after the Contract had been duly executed and hence when the cause of action arose.

7. He deposed that the 1st and 2nd Respondents would not likely to suffer any prejudice or loss should the orders sought be granted. He averred that any loss suffered could be monetarily compensated in the unlikely event the Appeal failed. In the long run he urged Court to allow the process of the court to be followed. He felt there was need to avoid any embarrassment by giving a chance to the Appellate Court to address the issue whether the suit was time barred or not and in the unlikely event that the Appeal was dismissed, parties would resume back to the Trial Court in order to proceed on with the matter. He urged to have the application and the prayers sought allowed with costs.

II. THE RESPONDENT'S CASE

8. The Notice of Motion application by the Appellant was opposed by the 1st and 2nd Respondents. On 9th September, 2021 the Respondents' Advocates the Law Firm of Messrs. Stephen Odiaga & Company Advocates filed a 13 Paragraphed Replying Affidavit dated sworn by Ahmed Ali Said the 1st Respondent and dated, 1st September, 2021. He deposed that, the Appellant had filed a similar application for stay of execution before Applicant the lower court but which was dismissed for lack of merit. He held that in as much as the Appellant/Applicant was entitled to pursue an appeal against the 1st and 2nd Respondents they also had the right for their case to be heard expeditiously and a decision made.

9. He observed that court had the responsibility to balance the interest of the parties and act fairly and that there would be no prejudice to be occasioned to the Appellant/Applicant in the event the application was denied. He held that the Appellant/Applicant had been enjoying continuous possession of the suit property and now intended to frustrate this work by prolonging the period of stay on the suit property without paying anything by staying the court proceedings before the trial sub-ordinate court. He stated that the application had been filed merely as a tactic to stall the process of the 1st and 2nd Respondents to explore justice – as should the orders sought be granted then the court would be barring the Respondents from proceedings with a suit intended to evict and get vacant possession of the suit property therein. Yet there was no good reason for granting the orders they argued. He held that court had a wide discretion in law guided by Pre-conditions for granting stay orders to the Appellant. As a sign of good faith, he ought to have stated that he was ready to provide security for costs which was not the case. He urged court to have the said application dismissed with Costs and a ruling date reserved for 1st December, 2021.

III. THE SUBMISSIONS

10. On 20th September in the presence of all the parties in court, directions were taken to the effect that the notice of motion application dated 9th August 2021 by the Appellant/Applicant be disposed by way of written submissions. Pursuant to this, all parties fully complied accordingly and a ruling date reserved for 1st December, 2021.

A. THE SUBMISSIONS BY THE APPELLANT/APPLICANT

11. On 30th September, 2021 the Advocates for the Appellant/Applicant – the Law Firm of Messrs. Khalid Salim & Co. Advocates filed their written submissions dated 30th September, 2021. They submitted urging for the need to be granted the orders pursuant to the Provisions of Order 42 Rule (6) (1) and (6) of the Civil Procedure Rules 2010. They argued that the Appellant/Applicant the application and the appeal had a prima facie case merit in the interest of Justice by holding that the ruling by the sub-ordinate court of 12th February 2021 erroneously dismissed its preliminary objection despite of the fact that the cause of action emanated from a contract dated 9th September 1985 which clearly had been barred by limitation of time. They held that the ruling occasioned them a lot of prejudice. They stressed that there was a pertinent issue to be considered in the appeal whether the Respondent's suit before the trial sub-ordinate court was time barred by virtue of the provision of Section 4 (1) (a) of the Limitation of Action Act Cap 22 of the Laws of Kenya. This was issue to be decided in the appeal and would ultimately be concluded there and then as to whether or not the 1st and 2nd Respondents had a claim against the Appellant or not. For these reasons, therefore the Appellant argued that there existed a high likelihood for a meritorious appeal.

13. Further, the Appellant/Applicant submitted that he had constructed a permanent structure on the suit land where he and his family had resided for the past 30 years. He was apprehensive that the Respondents would execute the decree at any time hence likely to cause great and substantial loss and damage.

To buttress their point on this aspect they relied on the decision of *Sichnan Huashi Development Company Ltd. –VS- Remax Realton Ltd. [2020] eKLR & Niafous (Kenya) Ltd. –VS- Churia Road & Bridge Corporation (Kenya) Ltd. (Milimani HCCC No. 126 of 1999.*

On the Security for costs, the Appellant/Applicant strongly opposed the Respondents proposal for the deposit of a sum of Kenya Shillings Five Million (Kshs. 5,000,000/=) which was actually the value of the suit property as the same was on higher side on unfair and unreasonable yet the application was not made under Order 42 (2) (b) taking the suit was still pending hearing and determination before the trial court. In any case if the appeal was dismissed then he would be compensated by way of costs.

14. Further, they submitted that the application was filed at a very reasonable time without undue delay. The Ruling was delivered on 12th February 2021. On the 4th March, 2021 the Appellate/Applicant filed his Memorandum of Appeal and on 8th March, 2021 an application for

stay of proceedings was filed before the trial sub-ordinate court which unfortunately was dismissed before filing the instant one.

He urged court to allow the application and the prayers sought thereof.

B. THE RESPONDENTS SUBMISSIONS

15. On 13th October, 2021 the 1st and 2nd Respondent's Advocates the Law firm of Messrs. Stephen Odiaga Advocates filed their written submissions dated 12th October, 2021. They submitted on the Principles underlying the rule for granting stay of execution under Order 42 Rule 6 (2) & (6) of Civil Procedure Rules 2010 and the powers and jurisdiction bestowed unto this court. To support their point of these aspect they relied on several case law being "*Global Tours & Travel Ltd. HCCC No. 43 of 2000, Ezekiel Mule Musembi –VS- H. Young & Co. (E.A. Ltd. Com. Appeal No. 24 of 2018 (2019) eKLR David Morton Silvester –VS- Abongo Chesoni Civil Appeal No. (NAI) 189 of 2001 (2002) eKLR (2001) E.A. 296 & Kenya Wildlife Services –VS- James Mutembei 2019 (eKLR)*

IV. ANALYSIS AND DETERMINATION

16. I have carefully read through all the pleadings, including the well-articulated written submissions, the cited authorities and relevant provisions of the law in relations to the Notice of Motion Application dated 9th August, 2021 by the Appellant/Applicant hereof. In order to arrive at an informed, fair and just decision, I have framed the following issues as a guide:-

a) Whether the Appellant/Applicant is entitled to be granted the order of stay of execution of the Judgment delivered in favour of the Respondent on 12th February, 2021 as set out under Order 42 Rule 6 (1) (2) & (6) of CPR?

b) Who will bear the costs?

Brief facts

17. Prior to embarking on the analysis of the matter at hand, I feel it significant I provide brief facts on the subject matter. From the pleadings, this is supposedly a case of Tenancy agreement based on the duly executed terms and conditions stipulated thereof. The Appellant/Applicant was a tenant of the suit property. The 1st and 2nd Respondents the current registered trustees of the land. On 9th September, 1985, the Appellant/Applicant and the Respondent's father - Ali Said Abdulrahan (now deceased) entered into a 99 years lease agreement where for a rental income would be payable at a sum of Kenya Shillings Two Hundred (Kshs. 200) accumulated in six (6) months from the 1st day of the month of January and July every year, a copy of the said tenancy agreement was annexed. The Applicant constructed and owned a house on the land based on the concept of "**house without land**" a common phenomenon and parlance within the Kenyan Coastal region. That is where his family and him resided. In the course of time, the Respondents instituted the suit at the trial court being CM. (Mombasa) No. 12 of 2020 - Ahmed Ali Said & Salwa Ali Said – VS - Mohamed Idha Mbarak against him alleging non-payment of rent for the past 15 years and sought for orders of his eviction from the suit property. In response to the suit, he filed a notice of Preliminary Objection dated 1st October, 2020 seeking to have the said suit struck out for being in contravention of the Limitation of Actions Act having been brought to court 15 years after the alleged cause of action and breach of contract arose. On 12th February, 2021 the trial court delivered its ruling dismissing the Preliminary Objection holding it had no merit. Being dissatisfied by the said decision, he instituted this appeal seeking to have it set aside and for orders to allow the preliminary objection essentially dismissing the entire suit for being time barred.

He stated that the proceedings in the lower court were still going on and if not stayed pending the hearing and determination of the appeal he was likely to suffer substantial and irreparable loss.

ISSUE NO. a). Whether the Appellant/Applicant is entitled to be granted the order of stay of execution of the Judgment delivered in favour of the Respondent on 12th February, 2021 as set out under Order 42 Rule 6 (1) (2) & (6) of CPR?

18. Ideally, the purpose of an application for stay of execution by any Applicant is to preserve the subject matter in dispute so that the right of the Applicant is safeguarded. See the case of *Consolidated Marine – Versus - Namprijad & Ano. Civil Appeal No. 93 of 1989* Nairobi where court held that:-

"The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.

In saying so, it is imperative to critically assess the legal spectrum of this aspect. The legal substratum for granting stay of execution is anchored in these provisions of law. These are:-

Order 42 Rule (6) (1) of the Civil Procedure Rules entitled "**Stay in Case of Appeal**" hold inter alia:

"No appeal or 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 application being made to consider such an application and to make such order thereon as may to it seem just and 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 such order set aside".

While the provisions of Order 42 rule (6)(6) of the Civil Procedure Rules which provides:-

“Notwithstanding anything contained in Sub-rule (1) of the rule the High Court shall have power in exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from the sub-ordinate Court or tribunal has been complied with.

19. Regarding the granting of stay of execution pending appeal, there are plethora of decided cases and hence a well set out principles based on precedents. For instance, below are the leading ones. In the Civil Appeal *No. 107 of 2015 – Masisi Mwita –VS_ Damaris Wanjiku Njeri [2016] eKLR* where the court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of “Halal & Another –VS- Thornton & Turpin Ltd. where the Court of Appeal Gicheru J.A., Chesoni & Coker AG 1A) held that: “The High Courts discretion to order stay of execution of its order or Decree is fettered by three (3) conditions namely:- Sufficient Cause, substantial loss would ensue from a refusal to grant stay the Applicant must furnish security, the application may be made without unreasonable delay. In addition the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakolo –VS- Straman E.A. Ltd.[2013]* as follows:-

“In addition the Appellant must prove that if the orders sought are not granted and his Appeal eventually succeeded them the same shall have been rendered nugatory”. These twin principles go hand in hand and failure to prove one dislodges the other. The court notes with great humility the Plaintiff/Applicant agrees with it by citing the case of *Vishram Rouji Halal –VS- Thrornton & Turpour Civil Appeal No. 15 of [1990] KLR 365,*

And in the *Canvass manufacturers Ltd. –VS- Stephen Reuben Korunditu Civil application No. 158 of 1994 [1994] LLR 4853* – where the court held that:-

“Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised” Further in the case of *“Stephen Wanjiku –VS- Central Glass Industries Ltd. Nbi) HCC No. 6726 of 1991* the court held that:-

For the court to order a stay of execution there MUST be:-

- i. Sufficient cause;**
- ii. Substantial loss**
- iii. No unreasonable delay.**
- iv. Security and the grant of stay is discretionary.**

20. It is evident from the above provisions of law that the court has discretion to issue an order of stay of execution. However, the said discretion must be exercised judicially and not capriciously. In exercising its discretion, court should therefore always opt for the lower rather than the highest risk of injustice. The court is to weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that the successful party is not impeded from enjoying the fruits of judgement. Always, there is need for equal level footing or playing ground.

Despite of these principles, courts have also argued that the four (4) principles above are not binding on this court in view of the overriding principles (or what has been termed as the Oxygen rule) being the courts inherent powers as founded under the provisions of Sections 1, 1A, 3, 3A of the CPA and Section 3 of the Environment and Land Court Act No. 19 of 2012. These inherent powers emphasize on having land dispute being justly, expeditiously, proportionately and assessible determination of dispute without impeding on to undue technicalities. While considering whether to grant the orders for stay court has to weigh all these considerations without taking the risk of leading to undesirable or absurd outcome.

21. Furthermore, based on the above clear four (4) principles, this court will then proceed to determine whether the Applicant herein has satisfied the required standard for granting of stay orders pending appeal as follows:-

Firstly, the Applicant must show that they will suffer substantial loss. Apparently, this seem to be the main issue out of the four set out principles. There must be empirical or documentary evidence of the substantial loss to support the contention and not just in face value.

22. On matters pertaining to this case, while making a determination of the Appellant/Applicant application dated 9th August, 2021, I reiterate that it has taken into account that it is not the practice of the courts to deprive the 1st, and 2nd Respondents, being the successful litigant of the fruits of their litigation from the judgment entered in their favour by the trial Magistrate Court.

As indicated, on 12th February, 2021, the trial Sub – ordinate court rendered its ruling against the Appellant/Applicant. Through his Learned Advocates, he held that the filed Appeal ran the risk of being rendered nugatory and otiose unless the stay of execution orders were granted as prayed in the application. At this juncture, court has noted that indeed the Appellant has had a tenancy agreement from 1985 for 99 years and had constructed a residential house on the suit land where he lives with his family. From these facts, the court is fully satisfied and convinced that the Appellant/Applicant may suffer any substantial loss if the orders sought are not granted.

23. Secondly, the Applicant must satisfy court that the notice of motion application was made without **undue and unreasonable delay**. This court has noted with from the time the of delivery of Ruling by the Sub -ordinate court was on 12th February, 2021, the Appellant/Applicant filed the Memorandum of Appeal on 4th March, 2021 and an application for stay of execution on 8th March, 2021 before the trial Magistrate Court but which was dismissed. Thereafter, they filed the instant application of 9th August, 2021. That has been quite reasonable and no undue delay cause at all as envisaged in law.

24. Thirdly, on the issue of security for costs, it is noted that the bone of contention is rental arrears from a tenancy agreement. Nothing has been placed before court on the details pertaining to the rental outstanding rent arrears. The proposal by the Respondents that the Appellant/Applicant deposits a sum of Kenya Shillings Five Million (Kshs. 5,000,000/=) as Security of Costs was strongly opposed as being the value of the suit property and hence would be on the higher side unfair and unreasonable. We totally concur taking that the monthly rental income was for a sum of Kenya Shillings Two Hundred (Kshs. 200/=) payable in lump sum of six (6) months. Suffice it say, this Hon. Court has noted that the Appellant/Applicant has undertaken to place some reasonable security for costs which is a good gesture persuading the court to grant it the orders sought.

DETERMINATION

From the foregoing, therefore, and for avoidance of any doubts,

I order as follows:-

- a) **THAT the notice of motion application dated 9th August, 2021 by the Appellant/Applicant is meritorious and the same is and hereby allowed.**
- b) **THAT the Appellant/Applicant is directed to deposit a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1, 500, 000.00) as security for Costs in an escrow joint bank account of both the law firm firms of Messrs. Khalid Salim & Company Advocates and Messers Stephen Odiaga Advocates within the next thirty (30) days from today**
- c) **THAT there be an order of stay of proceedings in Mombasa Chief Magistrate ELC No. 12 of 2020 – “Ahmed Ali Said & Salwa Ali Said –VS- Mohamed Idha Mbarak” pending the hearing and determination of the Appeal, filed against the ruling delivered by the Trial Court on 12th February, 2021.**
- d) **THAT the Appellant/Applicant is directed to have the Appeal fixed for hearing within the next ninety (90) days from this date. The matter to be mentioned on 25.1.2022 for taking direction on the appeal pursuant to the provisions of Section 79B of the Civil Procedure Act and Order 42 Rule 11 of the Civil Procedure Rules and fix a hearing date thereof.**
- e) **THAT failure to comply with any of the above conditions then the Notice of Motion application dated 9th August, 2021 will automatically stand dismissed thereof.**

ISSUE No. 3 Who will bear the costs

25. Pursuant to the provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21, the costs follow events. In this case, the costs of this application will be in the cause.

IT IS SO ORDERED.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 1ST DAY OF DECEMBER, 2021.

HON. JUSTICE L.L. NAIKUNI

JUDGE

(ELC- MOMBASA)

In the presence of:-

M/s. Yumna – the Court Assistant

M/s. Nafula Advocate for the Appellant.

M/s. Mwainzi for the Respondent