



**Mussaji & another v Mussaji (Environment & Land Case
149 of 2019) [2025] KEELC 4864 (KLR) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4864 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 149 OF 2019**

**YM ANGIMA, J
JUNE 26, 2025**

BETWEEN

SHABBIR IBRAHIM MUSSAJI 1ST PLAINTIFF

ONALI EBRAHIM MUSSAJI 2ND PLAINTIFF

AND

MOIZ EBRAHIM MUSSAJI DEFENDANT

RULING

A. Defendant's application

1. By a notice motion dated 15.11.2024 expressed to be filed pursuant to Sections 1A, 1B and 3A of the *Civil Procedure Act* (Cap 21), Order 40 Rule 2 of the Civil Procedure Rules (the Rules) and all other enabling provisions of the law the defendant sought two main orders, namely;
 - a. A stay of execution of the decree of the court dated 17.05.2022 together with all consequential orders pending appeal.
 - b. A stay of further proceedings pending the hearing and determination of Civil Application No. E110 of 2024 before the Court of Appeal at Mombasa.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the defendant on 15.11.2024. The defendant deposed that his delay in seeking a stay of execution of the decree and stay of proceedings was occasioned by his previous advocates and that they were also at fault for failing to file the intended appeal to the Court of Appeal within the prescribed period.
3. The defendant contended that unless the orders sought were granted his intended appeal to the Court of Appeal shall be rendered nugatory. He further stated that he was willing to abide by any terms and conditions the court may impose if the application is granted. The defendant further stated that he



intended to appeal against the contempt of court proceedings which were initiated against him hence a stay of those proceedings ought to be granted pending appeal.

B. Plaintiffs' response

4. The plaintiffs filed grounds of opposition dated 17.01.2025 opposing the application on the following grounds;
 - a. That the application offends the provisions of Order 9 Rule 9(a) of the Civil Procedure Rules.
 - b. That the instant application is based on malice to defeat the rights of the plaintiffs' accrued rights in the judgment dated 17.05.2022.
 - c. That by virtue of the defendant having been found to be in contempt of the court's orders, the instant application offends the provisions of Rule 43 of the practice directions on proceedings in the Environment and Land Court, Gazette Notice No.5178.
 - d. That the defendant's conduct and the instant application offend the provisions of Section 29 of the *Environment and Land Court Act*.
 - e. That by dint of the aforesaid, the said application dated 15.11.2024 is frivolous and vexatious and made in abuse of the process of the court.

C. Directions on submissions

5. When the application was listed for directions it was directed that the same shall be canvases through written submissions. The parties were thus granted timelines within which to file and exchange their respective submissions. The record shows that the plaintiff's submissions were filed on 26.03.2025 but the defendant's submissions were not on record by the time of preparation of the ruling.

D. Issues for determination

6. The court has perused the defendant's motion dated 15.11.2024, the plaintiffs' grounds of opposition as well as the material on record. The court is of the view that the main issues for determination herein are as follows;
 - a. Whether the defendant has made out a case for stay of execution of the decree pending appeal.
 - b. Whether the defendant has made out a case for a stay of proceedings pending appeal.
 - c. Who shall bear costs of the application.

E. Analysis and determination

a. Whether the defendant has made out a case for stay of execution of the decree pending appeal.

7. The court has considered the material and submissions on record on this issue. Order 42 Rule 6 (2) of the Rules on stay of execution of a decree or order stipulates as follows;

“No order for stay of execution shall be made under sub-rule (1) unless:-

- i. 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



- ii. 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 court has noted from the material on record that the impugned decree was passed on 17.05.2022 but the defendant did move the court for stay until 15.11.2024 which was more than 2 years after the date of judgment. The court does not find the explanation by the defendant credible or convincing at all. Blaming one’s previous advocates cannot be a panacea for all ills. There is no affidavit or letter from the previous advocates on their alleged mistakes. There is no indication on record to show that the defendant diligently followed up on the matter after delivery of judgment.
9. It is also evident from the judgment dated 17.05.2022 that the court only granted the following orders in favour of the plaintiffs;
 - a. An order that the Plaintiffs be deemed to be Landlords in respect all tenancies that currently exist and ones which shall in the future exist on the suit properties and the Plaintiffs be equally entitled to all rents and other income being derived from the suit properties, i.e.
 - i. Parcel of land of Title Number Mombasa/Block XVI/252;
 - ii. Parcel of land of Title Number Mombasa/Block XVI/253;
 - iii. Parcel of land of Title Number Mombasa/Block XVI/1388;
 - iv. Parcel of land of Title Number Mombasa/Block XVI/1390
 - b. An order that the Plaintiffs shall equally together with the Defendant have equal rights with the Defendant to possession and all other dealings involving the suit properties, and should the Defendant do anything without the consent and permission of the Plaintiffs, then the Defendant’s actions shall be void and of no consequence in law.
 - c. No orders as to costs.
10. The court is of the view that the defendant has not demonstrated what substantial loss he shall suffer if he complied with the decree. There is no evidence to demonstrate that his intended appeal shall be rendered nugatory unless the stay sought is granted. The court is of the opinion that the defendant may still recover the revenues the plaintiffs may have received from the suit properties in the event of the intended appeal being successful. In the event, the court is not satisfied that the defendant has made out a case for the grant of a stay pending appeal.
 - b. Whether the defendant has made out a case for stay of proceedings pending appeal
11. The defendant similarly claimed that he was unaware of the contempt of court proceedings until much later due to the fault of his previous advocates. For reasons given in the earlier part of the ruling, the court does not believe that the defendant’s excuse is credible. The material on record shows that despite becoming aware of the decree passed on 17.05.2022 the defendant has not made effort to comply therewith. Even at the time of making the instant application he had not attempted to comply.
12. It is also evident from the material on record that despite being convicted of contempt of court and being fined Kshs. 50,000 on 25.09.2024 he has made absolutely no effort either to pay the fine or to purge the contempt. It would appear that the defendant has treated the decree of the court with utter contempt whilst at the same time seeking to stay further proceedings herein. It would appear that further the defendant’s hope is that the court should lend him a hand in further disregard of the decree and the subsequent order for contempt of court.



13. The court agrees with the plaintiffs' submissions that the defendant's conduct is not deserving of the order of stay of proceedings sought. He has come to court with unclean hands. The material on record also shows that the defendant has a similar application for stay pending before the Court of Appeal. It is evident that the defendant is gambling with the judicial process by filing similar applications before two different courts simultaneously. That is a classic exemplification of abuse of the court process. For all the foregoing reasons, the court finds that the defendant is not deserving of the order for stay of proceedings sought in the application.
- a. Who shall bear the costs of the application
14. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As such, the defendant shall bear costs of the application.

F. Conclusion and disposal orders

15. The upshot of the foregoing is that the court finds no merit whatsoever in the defendant's application for stay of the decree and of the proceedings. As a result, the court makes the following orders for disposal of the matter;
- a. The notice of motion dated 15.11.2024 is hereby dismissed with costs to the plaintiffs.
- b. The suit shall be mentioned on 02.10.2025 to confirm payment of the fine for contempt of court.

Orders accordingly.

RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 26TH DAY OF JUNE, 2025.

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Y. M. ANGIMA

JUDGE

In the presence of:

Gillian - Court assistant

Mr. Gathu for the plaintiffs

Mr. Iddi for the defendant

