



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC. NO. 424 OF 1996**

**1. SAIFUDEEN ABDULLA BHAI**

**2. HUSSEIN ABDULLA BHAI.....PLAINTIFFS**

**VERSUS**

**ZAINAB MWINYI.....DEFENDANT**

**RULING**

1. By a Notice of Motion dated 20<sup>th</sup> February, 2019, the Plaintiffs moved the court under Section 1A and 3A of the Civil Procedure Act, Article 40 of the Constitution and Order 22 Rule 28 (5) and 29(1) of the Civil Procedure Rules seeking an order to demolish the structures of the suit property and for the defendant to be evicted therefrom, as well as an order directing the officer commanding Police Division, Central to provide security to the plaintiff's while executing the orders herein. The application is premised on the grounds on the face of the motion and supported by the affidavit of Saifudeen Abdulla Bhai the 1<sup>st</sup> Plaintiff sworn on 25<sup>th</sup> February 2019. The applicants aver that in the judgment delivered herein on 17<sup>th</sup> January 2019, the court ordered the defendant to give vacant possession of the suit premises. That the defendant sought for and by consent was given 30 days stay which lapsed on 18<sup>th</sup> February 2019, but the defendant has not vacated and demolished the suit premises. The applicants therefore seek the orders herein to enable them demolish the said structures and evict the respondent from the suit property at the respondent's cost.

2. In opposing the application, the respondent filed a replying affidavit sworn by herself on 17<sup>th</sup> May 2019 in which she deposes that when judgment was delivered on 17<sup>th</sup> January 2019, stay orders were granted by this court and as such the judgment could not be executed. That the stay order granted to the defendant was not only selective to the defendant vacating the premises but to the judgment in totality. The respondent states that the applicants cannot purport to demolish the structures of the suit property where the respondent has exercised her right of appeal and has filed a notice of appeal and an application for stay of execution. The application for stay of execution is the subject of a separate ruling. The respondents aver that the present application was filed on 25<sup>th</sup> February, 2019 and served on the respondent's advocate on record on 9<sup>th</sup> May, 2019 when it was due for hearing on 20<sup>th</sup> May 2019. The respondent argues that this clearly depicts that the application is a red-herring, in bad faith and an abuse of the court process and as such should be dismissed with costs.

3. The application was canvassed by way of written submissions. The plaintiffs filed their submissions on 20<sup>th</sup> August 2019 which reiterated the grounds in support of the motion. The plaintiffs have submitted that the defendant is in contempt of the consent order entered herein on 17<sup>th</sup> January 2019 with regard to stay and that she ought not be granted a hearing before cleansing herself of the contempt. It is the plaintiffs submission that they are highly prejudiced having been denied the use of the suit premises since 1991 and that during this period the defendant has been staying on the property for free. That it is not demonstrated that the defendant has any or high chances of success on the appeal.

4. In her submissions filed on 20<sup>th</sup> August 2019, the defendant submitted that she has filed an application for stay of execution pending the hearing and determination of the intended appeal and which has not been determined as such the orders sought herein cannot stand. That the application lacks merit and is brought in bad faith. The defendant further submitted that the intended appeal has high chances of success and that granting the orders sought herein will render the intended appeal nugatory in the event it is successful. That it would be an academic exercise and an exercise in futility as the suit property would be extinct thus prejudicing the defendant who is in possession and owns the suit property which is 'House without land'. That no prejudice will be suffered by the applicants if the orders sought are not granted.

5. I have considered the application and the submissions made. The court finds that the issue for determination is whether the applicant should be granted the orders sought. In this matter, the court delivered judgment in favour of the plaintiffs as against the defendant. The defendant's counter-claim was dismissed. The defendant was inter alia, ordered to demolish and remove all structures erected and standing on the plaintiffs' PLOT NO. MOMBASA/XVI/27 and in default, the plaintiffs to undertake the demolition at the cost and expense of the defendant. Further, the defendant was to deliver vacant possession of the suit property to the plaintiff's. There is no dispute that the defendant has not complied with the decree herein. The defendant has submitted that she has filed notice of appeal and that the intended appeal may be rendered nugatory if the orders sought herein are granted. However, I note that there is no order for stay of execution in force. The defendant's application dated 6<sup>th</sup> June, 2019 which is seeking for stay pending the hearing and determination of the intended appeal has been

considered by the court in a separate ruling and the court has found that it has no merit and has been dismissed. In my considered view, there is nothing stopping the plaintiffs from executing the decree herein as ordered by the court. In my view, the intended appeal will not be rendered nugatory as submitted by the defendant. The structures standing on the plaintiffs land can be valued and compensated by way of damages in the event the appeal succeeds.

6. The upshot is that I find that the application dated 20<sup>th</sup> February 2019 has merit and the same is allowed with costs.

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 4<sup>th</sup> day of February, 2020.**

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**C. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Nyabuti holding brief for Mr. Anyanzwa for plaintiff

Ms. Naliaka holding brief for Khatib for defendant

Yumna Court Assistant

**C.K. YANO**

**JUDGE**