



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 23 OF 2013**

**RISHARD ABDULREHMAN KHATOR (AKA RISHAD ABDULREHMAN**

**KHATOR) AND ALI BWANA BWANAADI (As administrators of the Estates of**

**Tima and Fatuma children of Ali Bashi (deceased) ).....PLAINTIFFS**

**VERSUS**

**IDHA MARIE AHMED.....1<sup>ST</sup> DEFENDANT**

**THE REGISTRAR, COAST.....2<sup>ND</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**RULING**

*(Application for stay pending appeal; principles to be applied; application to be filed without unreasonable delay; 14 days stay given after delivery of judgment pending the filing of a formal application for stay; application filed after lapse of 4 months; whether the lapse is unreasonable; explanation for the lapse being that the applicant suffered financial challenges thus the lateness in filing the application; whether this is an acceptable explanation; in any event the said financial challenges not substantiated; application dismissed for having been filed after unreasonable delay)*

1. The application before me is that dated 26 February 2020 filed by the 1<sup>st</sup> defendant. It is an application brought pursuant inter alia to the provisions of Order 42 Rule 6, and it will be noted that this provision of the law encompasses an application for stay pending appeal, which is precisely what this application is about.

2. To put matters into context, this suit was commenced by Rishard Abdulrehman Khator and Ali Bwana Bwanaadi as administrators of the estate of the late Tima Ali Bashir and Fatuma Ali Bashir (Tima and Fatuma) (deceased) children of Ali Bashir (deceased). They sued the applicant, Idha Marie Mohamed as 1<sup>st</sup> defendant, and the Land Registrar, Coast, and the Attorney General as the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The plaintiffs (respondents in this application) pleaded inter alia that the suit land, LR No. 1738/Section VI/Mainland North, was registered in the names of three groups of people. One is Rukiya Binti Soud (as administrator of Soud Ali Bashir) holding 1/6<sup>th</sup> share; the second being the respondents as administrators of Tima and Fatuma holding a 2/3<sup>rd</sup> share; and the third, Mohamed Bin Ali Bashir, holding a 1/3<sup>rd</sup> share. They averred that without any authority, the applicant proceeded to the suit land and erected a fence hence dispossessing the plaintiffs. They averred that the applicant proceeded to use the suit land as a parking yard for trucks and heavy commercial vehicles. They claimed this to be an act of trespass. They sought orders that it be declared that they hold a 2/3 undivided share in the suit land; that the transfer of the suit land in favour of the applicant be declared null and void; eviction of the applicant; an order to expunge from the register of the suit land any entry made in favour of the applicant; general damages; an order for accounts on income accruing to the applicant; and a permanent injunction. The applicant filed defence to the suit and pleaded inter alia that he purchased the suit land from Rukiya Binti Soud in the year 2000. Alternatively, he pleaded that he is entitled to the land through adverse possession.

3. I can see that the trial was protracted and the evidence showed the presence of two registers for the suit property. Apparently, the applicant became registered as proprietor of the whole land in one of the registers. The learned judge (Omollo J) found this to be erroneous, as all that the applicant had purchased was the 1/6<sup>th</sup> share of Rukiya Binti Soud. The learned judge inter alia adjudged that the applicant is a trespasser in 2/3rds of the suit land and ordered his eviction. The applicant was also ordered to pay to the respondents a pro rata 2/3<sup>rd</sup> share of the income accruing from his use of the suit land from 1 July 2012 until surrender of vacant possession. The court also directed a rectification of the register to reflect that the applicant only holds a 1/6<sup>th</sup> share of the suit land.

4. Aggrieved by the judgment, the applicant filed a Notice of Appeal and later the subject application seeking a stay of execution of the judgment pending appeal. In the application, the applicant contends that the respondents are keen to evict him from the suit land despite the court holding that he is entitled to a 1/6<sup>th</sup> share of the suit property. It is averred that his share cannot be determined on the ground until a surveyor demarcates it. He has stated that the respondents are now demanding rent from his tenant, one Francis Otieno, or he vacates immediately. He has averred that his affirmed 1/6<sup>th</sup> share is more than sufficient security in the event that he loses the appeal.

5. I can see that on 3 March 2020, Rashid Abdulrehman Khator filed a Notice to Act in person, which would in my view be irregular, as he was previously represented by counsel, and judgment has already been entered. This can only be done after an order of court pursuant to an application, or with the consent of the outgoing counsel, as provided for under the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010. He later appears to have appointed M/s Hezron Gekonde & Company Advocates, again without an order of court, and without any consent from the outgoing advocate. All this is irregular. I can see that the respondent has filed a replying affidavit (though titled supporting affidavit) drawn by M/s Hezron Gekonde & Company Advocates. This of course, as I have pointed out, is irregular. I cannot allow documents to be filed outside the clear provisions of Order 9 Rule 9. I have no choice but to proceed to expunge the Notice to Act in Person and the Replying Affidavit filed by M/s Hezron Gekonde & Company Advocates. As far as this court is concerned, it is M/s Stephen Macharia Kimani Advocate, who is still on record for the respondents, and unless the said counsel is properly removed from the record, this court will only accept documents filed by the said firm on behalf of the plaintiffs/respondents. The said firm has not filed anything and I am afraid that I cannot consider the replying affidavit filed by M/s Hezron Gekonde & Company Advocates. The same is hereby expunged from the record. I will thus only consider the application based on the material presented by the applicant.

6. I believe the applicant to be saying that he is in possession of the whole of the suit land and he cannot be evicted, because his share is unascertained on the ground, since no survey works have been done. He has questioned whether the land ought to be severed to demarcate his share. I guess these are questions to be determined on appeal. What the applicant needs to demonstrate for purposes of stay pending appeal is set out in Order 42 Rule 6 (2) which provides 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.*

7. I will start with the issue of unreasonable delay. Judgment was delivered on 31 October 2019 ; immediately after judgment, the applicant, through his counsel, orally applied for an interim stay of 14 days to enable the applicant make a formal application for stay pending appeal. Stay of 14 days was given pending the filing of a formal application as the applicant had requested. This application was then filed on 5 March 2020 which is just over 4 months after the judgment.

8. In his submissions, Mr. Njoroge, learned counsel for the applicant, has submitted that the delay is not inordinate. I am not convinced. I would have expected the application for stay to be filed either within, or very soon after, the lapse of the 14 days stay initially given by court, for the interim stay was given to enable the applicant to file a formal application. The 4 month period, to me, would constitute unreasonable delay, unless properly explained.

9. The applicant has stated that the delay has been caused by a lack of immediate funds to cater for the legal costs of seeking stay. He has also deposed in his supporting affidavit that he had instructed his advocate to try and negotiate a solution to the matter and that there were various attempts by his advocate to reach M/s S.M. Kimani Advocates, counsel for the respondents, in the month of December 2019 in vain. He has stated that on 19 December 2020, his advocate received a letter from M/s S.M. Kimani Advocates stating that he no longer has instructions to represent the respondents. Mr. Njoroge submitted that financial burdens in raising legal fees is not to be unexpected after a long trial. That may be so, but that statement by itself, is not the equivalent of good reason for delay.

10. The applicant does not in his affidavit explain his financial situation so that we can appreciate his exact financial position, and understand that the same could not allow him to instruct counsel to seek stay immediately, or shortly after the judgment was pronounced, so that he can be excused for not filing his application earlier. If the court was to accept a blanket statement of "lack of funds", for failure to file an application for stay pending appeal immediately or shortly after judgment, that to me, by itself, would be too low a threshold, and I can guarantee you that this is all that applicants will be saying when they delay in filing their applications for stay pending appeal. In my view, much more than a mere statement without the same being substantiated would be needed, that is if this, is ever going to be considered a valid ground to excuse the prompt filing of an application for stay pending appeal. On my part, I doubt if this was the true reason for not filing the subject application immediately. It in fact appears to me that the applicant was woken up from his slumber after the respondents threatened to execute the judgment and was not there before keen in making any application for stay pending appeal. I do not buy the excuse of the applicant.

11. Given the foregoing, I have no choice but to dismiss this application, solely on the ground of delay, and it is not therefore necessary for me to interrogate the other grounds under Order 42 Rule 6 (2).

12. The result is that this application is dismissed. I will however not make any orders as to costs, given that technically, the same was not properly opposed.

13. Orders accordingly.

**DATED AND DELIVERED THIS 10<sup>TH</sup> DAY OF JUNE 2020**

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA