



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELCA.NO. 47 OF 2019**

**ABUD MBARAK ABU..... APPELLANT**

**VERSUS**

- 1. WAKF COMMISSIONERS OF KENYA**
- 2. MOHAMED ABDALLA HASSAN**
- 3. OMAR ABDALLA HASSAN**
- 4. NURU ABDALLA HASSAN**
- 5. KHADIJA ABDALLA HASSAN**
- 6. ASMA ABDALLA HASSAN**
- 7. MUNAA ABDALLA HASSAN**
- 8. SWABAH ABDALLA HASSAN**
- 9. FLORA COMPANY (K) LTD**
- 10. COUNTY LAND REGISTRAR.....RESPONDENTS**

**RULING**

1. The application for consideration is the Notice of Motion dated 14<sup>th</sup> November 2019 and stated to be brought under Section 1A and 3A of the Civil Procedure Act and Order 51 of the Civil Procedure Rules. In the application, the Appellant/Applicant seeks for orders:

**1. Spent**

**2. The court is pleased to order a stay of any further proceedings, initially for 14 days and thereafter for as long as the court may order in Mombasa CMCC ELC No. 19 of 2019 – Abud Mbarak Abud –v- Wakf Commissioners of Kenya & 9 Others pending the hearing and determination of the Appeal on such terms as are just; to avoid this appeal being rendered nugatory;**

**3. An injunction be issued staying any further proceedings in Mombasa CMCC ELC No. 19 of 2019 – Abud Mbarak Abud – v- Wakf Commissioner of Kenay & 9 Others consolidated with Mombasa CMCC No. 400 of 2019 pending the hearing and determination of the appeal;**

**4. Directions on admission of this appeal are given, to expedite hearing at the earliest date available;**

**5. The costs of this application are provided for.**

2. The application is supported by the affidavit of Abud Mbarak Abud sworn on 14<sup>th</sup> November 2019 in which he deposes that he has been in possession of PLOT MOMBASA BLOCK XVI/1511 where he carries out business of a timber yard. That he has been running the

business for over 10 years, the plot having been initially leased to him by the father to the 2<sup>nd</sup> – 8<sup>th</sup> respondents and later by the 2<sup>nd</sup> – 8<sup>th</sup> respondents and their mother. The applicant states that he woke up two months ago to find his timber yard demolished by the 9<sup>th</sup> respondent executing a decree in Mombasa CMCC No. 400 of 2019 which emanated from a default judgment because the applicant has not been served with the summons to enter appearance. The applicant states that he obtained a reinstatement order on 11.10.19.

3. The applicant states that he filed an application seeking to stay execution of the decree and to set aside the default judgment and that the application was supposed to be heard before Hon. Ndegwa who had delivered the judgment, but the file was irregularly transferred to another court on the request of the 9<sup>th</sup> respondent. The applicant further states that the 9<sup>th</sup> respondent filed an application seeking to consolidate Mombasa CMCC ELC No. 19 of 2019 with CMCC No. 400 of 2019. The applicant states that he filed a notice of grounds of opposition opposing the consolidation on grounds that a decided suit could not be consolidated with an ongoing suit and secondly, that the proper court with jurisdiction to transfer land case file from one court to another is the High Court or the Environment and Land Court. Relying on advise, the applicant states that his intended appeal will raise substantial legal issues with a high probability of success as the appellate court will be invited to decide whether the subordinate courts have the jurisdiction to transfer land case file from one land court to another and that the same time consolidate the two files in light of the conflict between Articles 162 and 169 of the Constitution 2010. The applicant states that on 11.10.19, the court through the ruling and order of Hon. Kyambia, SPM, transferred and consolidated Mombasa CMCC ELC No. 19 of 2019 with Mombasa CMCC No. 400 of 2019 and slated for pre-trial directions on 20.11.19. He states that it will not be possible to resist the pre-trial and fixing of a hearing date unless this court interposes by way of stay, hence this application.

4. I have considered the application and the submissions filed. This application is for stay of proceedings in Mombasa CMCC ELC No. 19 of 2019 consolidated with Mombasa CMCC No. 400 of 2019 pending the hearing and determination of the appeal herein. The appeal arises out of the subordinate court's decision to consolidate the two suits.

5. Stay of proceedings pending appeal is purely a matter of judicial discretion that is exercised in the interests of justice depending on the justice of each case. It has been stated that stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore the test for stay of proceeding is high and stringent.

6. In the case of in the matter of Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000 (unreported), Ringera J (as he then was) persuasively stated thus:

**“As I understand the law, whether or not to grant a stay of proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice..... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”**

7. In the instant case, the applicant has stated that the consolidated suits have been fixed for pre-trial directions. Both cases are before the subordinate court and are over the same subject matter. It is my considered opinion although the application has been timeously, it would not be in the interest of justice to exercise the court's discretion and grant stay of proceedings as it will only serve the purpose of delaying the matters that are pending in the lower court. I am not satisfied that the applicant has demonstrated that he has an arguable appeal to warrant the issuance of the orders being sought. The ruling appealed against was only in respect of the order for consolidation. The main issues in the lower court cases are yet to be determined. Accordingly, the application is devoid of merit and is dismissed with costs to the respondents.

8. It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 20<sup>th</sup> day of July 2020.**

**IN THE PRESENCE OF:**

Yumna Court Assistant