



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC APPEAL NO. 21 OF 2017

FIRDAUS ABDALLA KIBWANA APPELLANT/APPLICANT

-VERUS-

ABDULRAUF BIN NASSER RESPONDENT

RULING

1. For my determination is the amended notice of motion dated 22nd September 2017 brought under the provisions of Section 1A, 1B & 3A of the Civil Procedure Act and Order 42 rule 6 of the Rules together with article 159 of the Constitution of Kenya. The Appellant/Applicant seeks for orders:

1. Spent

2. Spent

3. That this Honourable Court be pleased to grant a stay of execution of the Ruling and Judgment that were delivered on 16th August 2017 and 21st July 2016 respectively in favour of the Respondent in Mombasa CMCC No. 1108 of 2013 (ABDULRAUF BIN NASSER =VS= FIRDAUS ABDALLA KIBWANA), and all other consequential orders emanating there from pending the hearing and determination of this appeal.

4. Spent

5. That this Honourable Court be pleased to reinstate the Appellant/Applicant back to the house on parcel Number MOMBASA/BLOCK XVII/508 pending the hearing and determination of this appeal.

6. That the costs of this application be provided for.

2. The application is supported by the grounds on the face of it inter alia;

a) The Defendant is totally aggrieved with the judgment of the Learned Senior Principal Magistrate that was delivered on 21st July 2016 in favour of the Respondent to have possession of the house on Parcel Number MOMBASA/BLOCK XVII/508.

c) The Respondent applied for and obtained a warrant of eviction of the Defendant for purposes of execution of the judgment that was delivered on 21st July 2016 by the Learned Senior Principal Magistrate.

h) The Appellant/Applicant is totally aggrieved by the ruling of the Learned Principal Magistrate that was delivered on 16th August 2017 dismissing the Appellant's Notice of Motion dated 8th September 2016 and allowing the Respondent's application dated 16th September 2016.

j) The Court signed a Warrant to give possession to the Court Bailiff on 28th August 2017 and on 15th September 2017; the Court Bailiff evicted the Appellant/Applicant from the house on parcel Number MOMBASA/BLOCK XVII/508.

k) The Appellant/Applicant has already preferred this appeal against the said ruling delivered on 16th August 2017 in Mombasa CMCC No. 1108 of 2013 (ABDULRAUF BIN NASSER =VS= FIRDAUS ABDALLA KIBWANA) by the Learned Principal Magistrate on 16th August 2017.

l) The Appellant/Applicant has been residing on the fore stated house for a period of thirteen (13) years together with her children and mother who is mentally ill and is undergoing treatment and cannot be left without supervision.

m) This appeal if successful will be rendered nugatory unless the Ruling and Judgment that were delivered on 16th August 2017 and 21st July 2016 respectively in Mombasa CMCC No. 1108 of 2013 (ABDULRAUF BIN NASSER =VS= FIRDAUS ABDALLA KIBWANA) and all other consequential orders emanating there from are stayed pending the hearing and determination of this appeal.

n) The Appellant/Applicant will suffer substantial loss unless the stay of execution is granted.

3. The application is supported further by the Applicant's affidavit sworn on 22nd September 2017 and the supplementary affidavit sworn on 10th November 2017. The application is opposed by the Respondent vide a replying affidavit sworn on 6th October 2017. The Respondent deposed that the applicant was indeed evicted on 15th September 2017 as is evidenced by the Court bailiff's report which he annexed as "1N – 1". That the request for re – instatement will prejudice him as the house is under repair. The Respondent also pleaded that the prayer for stay of execution is overtaken by events.

4. The parties filed written submissions which I have read and considered. From the pleadings filed, it is not in dispute that the eviction already took place. No wonder the applicant made a prayer for reinstatement into the suit premises under prayer Nos. 4 & 5 of the motion. This then defeats the purpose for an order seeking stay of execution of the ruling and judgement delivered on 16th August 2017 and 21st July 2016 respectively. The purpose of granting an order for stay of execution is well stated under Order 42 rule 6 as ***"the Court appealed from may for sufficient cause order stay of execution of such a decree."*** The grounds to be considered on whether to grant stay orders or not are listed under Order 42 rule 6 (2). In his submissions, the Applicant cited case law that deals with grounds for setting aside exparte judgment not when an appeal lies against an order while a Court is exercising its discretion. The cases are not relevant to this application as the matter before me for determination is the application not the main appeal.

5. The Applicant has not satisfied this Court on the twin limbs of suffering substantial loss and filing the application without unreasonable delay. It is my considered view the application was filed after unreasonable delay since the same was made one week after the evictions had taken place. The supplementary affidavit also dwelt on the merits of the decision which is the subject of this appeal rather than demonstrating the nature of the loss the Applicant suffers if the orders of stay is not granted.

6. On the prayer for re – instatement, I believe the same can only be issued after hearing the appeal on its merits. If I do so at this stage, it amounts to my varying the judgment as given without giving the Respondent an opportunity to be heard. In conclusion, I find the present application as failing to satisfy the requirements of Order 42 rule 6 to deserve an order of stay. Consequently I dismiss with costs and order that the costs shall abide the outcome of the main appeal.

Dated, signed & delivered at Mombasa this 14th June 2018

A. OMOLLO

JUDGE