



**Muhamed v Ali (Environment and Land Case Application
9 of 2014) [2015] KEELC 579 (KLR) (23 March 2015) (Ruling)**

Saladha Gaal Muhamed v Falsal Abdi Ali [2015] eKLR

Neutral citation: [2015] KEELC 579 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE APPLICATION 9 OF 2014**

P NYAMWEYA, J

MARCH 23, 2015

BETWEEN

SALADHA GAAL MUHAMED APPELLANT

AND

FALSAL ABDI ALI RESPONDENT

RULING

The Application

1. The application before the court is a Notice of Motion dated 10th April 2014 filed by the Appellant. The Appellant is seeking orders that this Court stays execution of the orders granted on the 4th of April 2014 in Wajir Principal Magistrates Civil Case No. 3 of 2014 by the Resident Magistrate Mr. Rogoncho until the Appeal lodged before this Court is heard and determined.
2. The Appellant's application is based on the grounds that the said trial Magistrate proceeded to hear and determine the Wajir Principal Magistrates Civil Case No. 3 of 2014 summarily without giving the Appellant an opportunity to defend herself. Further, that the disputed plot that is the subject matter of the appeal is registered under the name of the Appellant, which evidence would have been brought in the open during the full hearing of the case. Therefore, that the Appellant's former husband one Mr. Shueb had no legal right of ownership and he could therefore not transfer any right which he never possessed in the first instance.
3. The Appellant also alleges that the trial magistrate proceeded to issue judgment in totally disregard of the interest of the Appellant's children who have been residing on the disputed plot with the Appellant.
4. The Appellant in her supporting affidavit sworn on 10th April 2014 gave a detailed account of the genesis of the dispute herein. In summary her averment is that she was married to a Mr. Shueb Ibrahim Hussein, and that during the subsistence of their marriage they purchased a plot together where they



were residing and which was registered in the Appellant's name with the full knowledge and consent of her husband. However, that in the year 2008 Mr. Shueb divorced the Appellant and left her and their children to reside on the said plot peacefully until September 2013, when he came back and started threatening to dispose of the plot.

5. The Plaintiff averred that during maintenance proceedings for their children she agreed to pay her divorced husband his share of the plot of Ksh 350,000/=. However, that before she could complete payment within the agreed timeframe, her former husband proceeded to dispose of the whole plot without disclosing to the buyer that the plot was jointly owned by him and the Appellant. Further, that the buyer who is the Respondent herein then proceeded to file a civil case against the Appellant seeking to have her and her children evicted from the plot.
6. The Appellant stated that when the case came up for hearing she informed the court that her advocate was not present and requested the court to adjourn the matter to a later date, but that the trial Court proceeded to hear the Respondent and his witnesses, and gave judgment declaring the plot to belong to the Respondent without giving the Appellant an opportunity to state her case.

The Response

7. The Respondent despite being served severally upon directions by the Court, did not file any response to the Appellant's application.

The Issues and Determination

8. The Appellant's Advocate at the hearing of the application submitted that he would rely wholly on the Notice of Motion and supporting affidavit sworn by the Appellant, and would not make or file any submissions. I have read and carefully considered the pleadings filed by the Appellant herein. The issue to be determined is whether the ruling of the Resident Magistrate at Wajir dated 4th April 2014 in Wajir Principal Magistrates Civil Case No. 3 of 2014 should be stayed pending the hearing of this appeal. Order 42 Rule 6 of the Civil Procedure Rules provides for stay of execution pending appeal as follows:

6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(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.”

9. For a stay of execution to be granted, an applicant must satisfy the conditions stated in rule 6 (2) to the effect that:

- (a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;



- (b) the applicant must show that he or she will suffer substantial loss if the orders of stay is not granted, and
 - (c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.
10. The essence of an application for stay pending appeal is aimed at preserving the subject matter of litigation to avoid a situation where a successful appellant only gets a paper judgment.
 11. In the present appeal, the Appellant filed her application for stay without delay, the same having been filed on 10th April 2014 upon delivery of the ruling appealed from on 4th June 2014. It is also not contested that the Appellant will suffer substantial loss as she has brought evidence to show that the disputed plot allegedly sold by her former husband was allocated to her by the Wajir County Council, and of payments she made in this respect. Her averments that she and her children reside on the disputed property have also not been contested.
 12. The Appellant however has not pleaded that she will be able to provide security to satisfy any orders that may be made by the court. I however note that she has stated in her supporting affidavit that was in possession of an unspecified amount of money, and was willing to refund of her former husband's share of the disputed property. This Court will consider this averment also to be an indication of her willingness to provide security for any costs the Respondent may suffer as result of the stay.
 13. This Court accordingly allows the Appellant's Notice of Motion dated 10th April 2014 and hereby orders as follows:
 1. The execution of the orders granted on the 4th of April 2014 in Wajir Principal Magistrates Civil Case No. 3 of 2014 by the Resident Magistrate be and are hereby stayed for a period of one year pending the hearing and determination of the Appeal lodged before this Court by the Appellant.
 2. The Appellant shall within 30 days of the date of this ruling deposit in Court the sum of Ksh 300,000/= being security for the satisfaction of any orders the Respondent may be granted. Upon default order No. 1 given hereinabove for stay shall automatically lapse.
 3. The costs of the Appellant's Notice of Motion dated 10th April 2014 shall follow the appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF MARCH, 2015.

P. NYAMWEYA

JUDGE

