



**Omar v Sketty (Administrator of the Estate of Nassor Mohamed Nahdy - Deceased)  
(Civil Application E005 of 2021) [2023] KECA 70 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 70 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E005 OF 2021  
SG KAIRU, JW LESSIT & GV ODUNGA, JJA  
FEBRUARY 3, 2023**

**BETWEEN**

**ABDALLA SHARIFF AHMED OMAR ..... APPLICANT**

**AND**

**MUNIR MOHAMMED SKETTY (ADMINISTRATOR OF THE ESTATE OF  
NASSOR MOHAMED NAHDY - DECEASED) ..... RESPONDENT**

*(Being an application for injunction or stay of any further proceedings pending appeal from the Judgement of the Environment and Land Court of Kenya at Mombasa rendered by A. Omollo, J. dated 21st September 2020) in ELC 237 of 2010)*

**RULING**

1. The Applicant, Abdalla Shariff Ahmed Omar has brought this Notice of Motion application dated January 11, 2021. It is expressed to have been brought pursuant to Rules 5, 41, 46, 47 and 53 of the [Court of Appeal Rules](#) 2010, now Rules 5, 43, 48, 49 and 55 of the 2022 [Court of Appeal Rules](#) (hereinafter Rules). The application seeks:

“An order of injunction or stay of further proceedings in the Court below on such terms as are just, to preserve the defendant’s equity of expectation and thereby bar the legal representation of the deceased plaintiff, by himself or through his agents, servants, employees, proxies or otherwise howsoever, from evicting, retaking possession or collecting rent or otherwise howsoever interfering with the plaintiff and/or the occupant’s quiet possession of the land Mombasa Block XVI/30 Mombasa Island, pending the filing, hearing and determination of the intended appeal.”

2. The background to the application is that the applicant entered the premises in the land LR No 30/X/ MN as a tenant. In the amended Plaint dated July 12, 2010, the owner of the land, now deceased and represented in the matter by his personal representative, filed the suit against the applicant seeking



various declarations and orders. Among the orders sought was for mesne profit, damages for trespass and an injunction restraining the applicant from remaining in the premises. The complaint against the applicant was that upon entering the premises, the applicant pulled down the old structures and illegally constructed on the suit land, without the consent of the deceased.

3. The applicant in his defence and counterclaim maintained that pursuant to an agreement with the deceased, he carried out construction on the suit land and he expended large amounts of money towards the said construction; that his expenses ought to be reimbursed. The court was not convinced that the mentioned agreement existed. It was ordered that the applicant held the suit building in trust for the deceased, subject to recovery of the money expended in construction on the suit land; the deceased was given possession of the suit premises and/or that he evict the applicant once he recovered the expenses in putting up the structures on the suit land.
4. The applicant was dissatisfied with the decision rendered and filed a notice of appeal on September 30, 2020. In his supporting affidavit dated January 11, 2021, the applicant sets down the issues he will raise on appeal, which include that the ELC erred: for giving an award of special damages in the absence of evidence in support; giving an award of compensation that it was not pleaded; failure to address the locus standi of the respondent to institute the suit; and dismissing the applicant's counterclaim.
5. Learned Counsel Stephen Macharia Kimani for the applicant in his submissions unrelated to the application, cited Rule 85(2) of the Rules of this court and argued that the death of the respondent after the appeal was instituted prompted the instant application; that a notice of appeal can be amended because the case of *Anjuman v Ali* (1999) 1 EA did away with the concept of primary documents. Counsel maintained that the amendment of the notice of appeal would give effect to Rule 85 of the Rules of this court and that 7 days to file the amended notice is sufficient for him.
6. The respondent filed a replying affidavit in which the application is opposed. The respondent avers that the applicant did not have an arguable appeal; that if order sought is not granted the applicant has not demonstrated that his appeal will be rendered nugatory. It is averred that the applicant does not deserve the orders sought, as he had not accounted for the rent monies he collects from the suit premises as ordered by the ELC.
7. The application was heard on the virtual platform on the November 2, 2022. Present for the hearing was learned counsel Mr Aboubakar for the respondent. There was no appearance for the applicant despite service with the hearing notice, served on his advocate Mr Macharia Kimani advocates through email on the October 17, 2022.
8. Mr Aboubakar for the respondent opposed the application first by explaining that what was pending before the ELC were taking of accounts both on the rental income and the cost of construction, and that the parties have since exchanged accounts and are in the process of settling. Counsel urged that there was nothing left to stay.
9. In an application brought under Rule 5 (2) (b) of the Rules, this Court has to decide first, whether the applicant has presented an arguable appeal, and second, whether the intended appeal would be nugatory if these interim orders were denied. See Ruben & 9 Others v Nderitu & Another (1989) KLR 459
10. We have considered the application, the submissions of counsel both oral and written and the affidavits from both sides.
11. The applicant seeks injunction or stay of further proceedings in the Court below, to preserve his equity of expectation and thereby bar the legal representation of the deceased, from evicting, retaking possession or collecting rent or otherwise howsoever interfering with the plaintiff".



12. In the submissions of his counsel, Mr Kimani urges that the stay sought is to prevent the eviction of the applicant from the suit properties. He urged that eviction was imminent, as there has been a demand to the applicant for refund of rent, while on the other hand the applicant is yet to be compensated for the cost of construction as ordered by the ELC. With due respect to the counsel, those submissions were on points of fact which needed attestation by the applicant, which we noted is lacking. On this issue, apart from statement made from the bar that the parties are in the process of settling the matter as directed by the court, there is no mention of eviction in the replying affidavit.
13. The order of the learned ELC was as follows:
- “(b) an order is made that the plaintiff shall have possession of the said land and premises and/or eviction of the defendant from the suit premises once after the defendant has fully recovered the amounts expended in putting up the structures as stated in (a) above.”
14. The order of the ELC was clearly a conditional order, that eviction would not arise until the applicant had fully recovered the amounts he expended in putting up the structures. Mr Aboubakar in his submissions before us stated that the parties were exchanging documents as part of the process of complying with the impugned ELC order. Clearly, this application is premature. It does not meet the twin principles of granting an interim injunction or stay of proceedings.
15. We find that this application is for dismissal, which we hereby do, with costs to the respondent.

**DATED AND DELIVERED AT MOMBASA THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2023**

**S. GATEMBU KAIRU, FCIArb**

.....  
**JUDGE OF APPEAL**

**J. LESIIT**

.....  
**JUDGE OF APPEAL**

**G.V. ODUNGA**

.....  
**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

