



**Suri v Kaur alias Mandeep Kaur (Civil Application  
E077 of 2021) [2022] KECA 654 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KECA 654 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E077 OF 2021  
AK MURGOR, S OLE KANTAI & A MBOGHOLI-MSAGHA, JJA  
JULY 8, 2022**

**BETWEEN**

**AVTAR SINGH SURI ..... APPLICANT**

**AND**

**PARAMJIT KAUR ALIAS MANDEEP KAUR ..... RESPONDENT**

*(Being an application for stay of execution of the Ruling and Order  
of the Environment and Land Court at Nairobi (K. Bor, J.) delivered  
on the 10th December 2020 in Nairobi ELC Cause No.738 of 2013)*

**RULING**

1. This application arises out of a suit in the High Court where the respondent, Paramjit Kaur Alias Mandeep Kaur filed a claim against the applicant, Avtar Singh Suri, seeking orders for a permanent injunction to restrain the applicant from dealing with her half share of the property known as L.R No. 4275/44 (the suit property); an order of specific performance directed to the applicant to honour the lease and issue the respondent with her half share of the accumulated rent proceeds from the suit property, and an order nullifying all lease agreements entered into between applicants and the tenants of the suit property. The respondent also sought an order for the subdivision of the suit property into two halves and that separate title deeds be issued for the subdivided portions and for general damages as well as costs of the suit. In response, the applicant filed a defence and counterclaim.
2. Before the suit was heard, the parties entered into a consent dated 4<sup>th</sup> March 2014, which was recorded before Nyamweya, J, (as he then was). But in a sudden turn of events, the applicant denied having ever agreed to enter into the consent with the respondent, asserting instead that it was recorded without his knowledge and authority. He later sought to have it set aside. In a ruling dated 10<sup>th</sup> December 2020, the trial judge dismissed the application to set aside, upon finding that the consent order was properly recorded. Undeterred, the applicant filed for a review of the trial court's decision which application was also dismissed.



3. The applicant was aggrieved, and intends to appeal against that decision. In the meantime, he has brought this Notice of Motion dated 5<sup>th</sup> March 2021 premised on order 42 rule 6, and section 3A of the *Civil Procedure Act* and Article 48 and 50 of the *Constitution* wherein he seeks orders that;
  1. This Court do issue a stay of execution of the order of the trial court on 10<sup>th</sup> December 2020 pending the hearing and final determination of the applicant's intended appeal.
  2. The consent Order recorded by Nyamweya, J. on 4<sup>th</sup> March 2014 be set aside.
  3. The costs of this application be provided for.
4. The motion is brought on 18 grounds and is supported by the affidavit of Avtar Singh Suri, sworn on 3<sup>rd</sup> March 2021. In his grounds in support of the motion, the applicant contends that he has an arguable appeal with a high probability of success, and that if a stay of the execution of the trial court's orders of 10<sup>th</sup> December 2020 is not granted, the intended appeal will be rendered nugatory and he will suffer irreparable damage; that the applicant is willing to deposit such sums into an escrow account as this Court may order, in the joint names of the applicant's and the respondent's advocates; that the period ordered by the court for the applicant to account for all rents received from the suit property from August 2015 to date is short and he requires that time to be extended by 120 days; that he is apprehensive that if the time frame ordered by the court is not extended, he stands to be cited for contempt.
5. It was further contended that the applicant was prejudiced by the consent order dated 4<sup>th</sup> March 2014 recorded by A. I. Onyango & Company Advocates without his knowledge; that the consent order prematurely and summarily concluded the suit with finality without affording him an opportunity to prosecute his Defence and Counterclaim.
6. In a further affidavit sworn on the 24<sup>th</sup> April 2021, the applicant further averred that he has been condemned to pay the respondent Kshs. 19,050,986.50 without being heard.
7. In a replying affidavit sworn in opposition to the application on 14<sup>th</sup> April 2021 by Virinder Goswami, Advocate for the respondent, it was deposed that the ruling of 5<sup>th</sup> May 2020 found that the consent order of 4<sup>th</sup> March 2014 was recorded properly and in so finding, the judge declined to set aside the orders; that applicant applied for a review of the ruling which application was dismissed; that this application is merely an attempt to avoid payment to the respondent of the sums due to her.
8. In their submissions, learned counsel for the applicant Bryan Moturi & Associates Advocates submitted that the intended appeal is arguable with a high chance of success and if the orders sought were not granted, the appeal will be rendered nugatory as the applicant's property will be subdivided, and one portion will be transferred to the respondent together with the rental income collected by the applicant, without the applicant being heard on the merits of his defence.
9. In response, learned counsel for the respondent Sobhag H. Shah and v Goswami Advocates, reiterated the contents of the respondent's replying affidavit and added that the respondent had not been served with the Notice of Appeal as prescribed by rule 77 of the *rules of this Court*.
10. At the outset, we begin by observing firstly that, the application before us is for stay of execution and is premised on order 42 rule 6 of the *Civil Procedure Rules* instead of rule 5 (2) (b) of the *Court of Appeal rules*. But since the citing of wrong rules is not considered to be fatal to the pleadings, and it is evident that what the applicant is seeking is an order of stay of execution of the ruling of the trial court, we will proceed and determine the application in accordance with rule 5 (2) (b) of this *Court's rules*.



11. Secondly, the applicant is also seeking an order to set aside the consent order. As this matter goes to the merits of the intended appeal, we consider that the issue is not properly before us, and as such, we decline to address the issue in this application.
12. That said, in so far as applications filed under rule 5 (2) (b) of this *Court rules* are concerned, the threshold requirement to be satisfied are amplified in the case of *Republic v Kenya Anticorruption Commission and 2 others* [2009] eKLR thus;

“The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, the appeal or intended appeal is not frivolous, that is to say, that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds their results or success could be rendered nugatory”.
13. Turning to consider the first limb, whether the intended appeal is arguable, we have gone through the application, the supporting and further affidavits and are unable to find a draft memorandum of appeal. Neither are we able to discern from the pleadings the applicant’s complaints against the ruling of the trial court. Throughout the pleadings and the submissions, the applicant merely repeats that the intended appeal has a high chance of success, but has done nothing to place before this Court any grounds upon which the intended appeal will be mounted. Given these circumstances, the Court is in no position to ascertain whether or not the appeal is arguable.
14. Consequently, the applicant having failed to satisfy the first limb of the requirements for a rule 5 (2) (b) application, there is no need for us to consider whether the nugatory aspect has been met.
15. Therefore, the Notice of Motion dated 5<sup>th</sup> March 2021 is unmerited and is dismissed. Costs shall abide by the outcome of the intended appeal.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2022.**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**A. MBOGHOLI MSAGHA**

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**JUDGE OF APPEAL**

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

**Signed**

**DEPUTY REGISTRAR**

