



**Hassan v Savage & another; Chief Land Registrar (Interested Party) (Environment & Land Petition E052 of 2022) [2024] KEELC 7481 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7481 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E052 OF 2022  
AA OMOLLO, J  
NOVEMBER 7, 2024**

**BETWEEN**

**AMINA MOHAMMED HASSAN ..... PETITIONER**

**AND**

**PAUL JAMES SAVAGE ..... 1<sup>ST</sup> RESPONDENT**

**MONA HUSSEIN DUALE ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**CHIEF LAND REGISTRAR ..... INTERESTED PARTY**

**RULING**

1. For determination is the application dated 4<sup>th</sup> June, 2024 brought under the provisions of order 42 rule 6 and Order 51 of the Civil Procedure Rules as well as section 1A, 1B and 3A of the [Civil Procedure Act](#). The 1<sup>st</sup> Respondent/Applicant prays for Orders;
  - i. That this court be pleased to stay any further proceedings pending the hearing and determination of his intended appeal.
  - ii. Costs of the application be provided for.
2. The application is based on grounds (a) – (r) listed on its face. Inter alia;
  - a. The suit property is the same suit property that was adjudicated upon by the High Court in HCCC No. 50 of 2008 (O.S) between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and subsequently in Court of Appeal Civil Appeal No. 350 of 2017 between the same parties and the Petitioner herein was joined on the basis of her application claiming interest via a lease given to her of one of the two houses on the suit property; the Petitioner herein has, however, now filed the Petition before the court, which the court initially found that it however, upon application for review,



it now states that it has jurisdiction to hear the dispute; the Petitioner did not tender the said evidence before the Court of Appeal and she has now abandoned her supporting affidavit for the application for joinder in the Court of Appeal and purports to change the narrative on acquisition of the property.

- b. Unless the stay of further proceedings is granted, this Honourable Court will re-adjudicate on an issue that has already been heard and determined by the Court of Appeal which has awarded the 1<sup>st</sup> Respondent 70% of the suit property and 30% of the suit property to the 2<sup>nd</sup> Respondent; if there is any dispute pertaining to the said decision, the Petitioner and the 2<sup>nd</sup> Respondent ought to have lodged an appeal against the same before the Supreme Court.
- c. The intended appeal grounds that merit judicial consideration within the meaning of the rule in *Sango Bay Estates and Another V Dresdner Bank (1971) EA 17* namely;
  - i. The effect of the order made herein on 30<sup>th</sup> April, 2024 is to retry the entire suit despite the judgment of the Court of Appeal in Court of Appeal, Civil Appeal No. 350 of 2017: in that appeal, the Court of Appeal held that the 1<sup>st</sup> Respondent was entitled to 70% of the suit property including the bigger maisonette whilst 30% of the suit property with the smaller maisonette was awarded to the 2<sup>nd</sup> Respondent;
  - ii. The court struck out the 1<sup>st</sup> Respondent's replying affidavit despite the fact that the Petitioner introduced new evidence not previously tendered and denied the 1<sup>st</sup> Respondent a chance to respond to the same; the right to a fair trial provided under Article 50(1) of *the Constitution* is non-derogable under Article 25 of *the Constitution*; further, the court allowed an application for striking out of the 1<sup>st</sup> Respondent's further affidavit despite the fact that it was supported by an advocate, not the Petitioner.
  - iii. The Petitioner herein has in essence introduced a new or inconsistent cause of action from the one she initially submitted to the Court of Appeal in a bid to change the judgment from the Court of Appeal;
3. It is further premised on the facts set out in the supporting affidavit of the Applicant sworn on 4<sup>th</sup> June, 2024. Mr. Savage deposed that he has filed a notice of appeal and applied for proceedings to enable him lodge the appeal against the ruling. He pleaded to the details of the subject matter in HCC No. 50 of 2008 (O.S). For instance, he deposes that the dispute initially was filed by 2<sup>nd</sup> Respondent against him in the Family Court as the suit property – LR 1/1298 – was matrimonial property. It was instituted in HCCC No. 50 of 2008 (OS) where the court held that the property was to be divided 50:50. The Applicant annexed a copy of the judgment in HCCC No. 50 of 2008(OS).
4. That the Petitioner was joined as an Interested Party and fully participated including filing of submissions which her advocate highlighted at the hearing of the appeal. That She did not adduce any evidence as to the alleged sale of land and large dollar transfer before the Court of Appeal. The Applicant avers the Court of Appeal held that he was entitled to 70% of the suit property together with the bigger maisonette and ordered that the eviction be immediate from maisonette 1 as it recognized that he had been excluded from the property since 2008.
5. The Applicant avers the filing of this Petition is an abuse of the court process for seeking similar reliefs in this court and before the Court of Appeal.
6. The Petitioner/Respondent opposed the application by swearing a replying affidavit dated 24<sup>th</sup> June, 2024. She deposed that the application is a nullity in law as the court is functus officio. She denied that



the impugned ruling seeks to re-open the Court of Appeal Judgment. She deposes that she was not a party to the matrimonial causes action and that the Applicant has not tendered any evidence of proof of purchase in countering the petition.

7. The Petitioner avers this application is intended to derail the speedy hearing of her petition. That the 1<sup>st</sup> Respondent is afraid to respond to her petition and to provide all facts in support to acquisition and had instead resorted to forum shopping by seeking to stay further proceedings for fear of contradiction. That the contradiction is pointed out in his supporting affidavit on question of whether the Petitioner was gifted the leasehold and now fresh allegations at Paragraph 16 & 17 of his supporting affidavit of the alleged failure to pay the balance of the purchase price.
8. She urged the court to dismiss the application to allow the petition to proceed.

**Determination:**

9. The parties herein has discussed in detail whether or not the petition before this court amounts to abuse of court process and an attempt to litigate a matter that has already been litigated and determined before the Court of Appeal. It is settled by precedence that stay of proceedings is a grave judicial action which interferes with the right of a litigant and impinges on the right to access justice; right to be heard without delay and the right to a fair trial. With this in mind, for my determination is whether or not I should grant an order staying these proceedings. Consequently, I shall consider if the application for stay meets the threshold.
10. The Applicant has cited several case laws in his supporting affidavit some of which have discussed the grounds for granting stay of execution. For example, in the case of Kenya Power & Lighting Company Ltd Vs. Esther Wanjiru Wokabi (2014) eKLR, it was held thus;
  - “To my mind, the courts discretion in deciding whether or not to grant stay of proceedings, these are the guiding principles;
    - i. Whether the application was filed expeditiously,
    - ii. If sufficient cause has been shown.”
11. I have reviewed the grounds pleaded in support of the application and the opposition made thereto. One of such grounds is that the trial judge erred in reinstating the petition which according to the applicant amounts to re-opening the judgment by the Court of Appeal. The Petitioner/Respondent denies this assertion. Consequently, it becomes an issue that can be resolved through the appeal lodged against the ruling which re-instated the Petition.
12. The decision of the Court of Appeal is likely to have a bearing on the life of this petition, and this infers the Applicant has demonstrated a prima facie case and or sufficient cause to warrant the orders sought. The ruling appealed against was delivered on 30<sup>th</sup> April, 2024 and this application filed one month later. Hence it was filed expeditiously in accordance with the requirements of order 42 rule 6 of the Civil Procedure Rules, 2010.
13. In the renowned case of Butt vs Rent Restriction Tribunal (1982) KLR 417, the Court of Appeal held that the general principle in granting or refusing stay is if there is no overwhelming hindrance, a stay must be granted so that the appeal is not rendered nugatory should that appeal reverse the judge’s discretion.
14. In this instance, in the event the appeal fails, the Petitioner/Respondent would still get an opportunity to prosecute her case save for the delay. In the event the appeal succeeds, time and cost of prosecuting



the petition would have been saved. In exercise of my discretion, I hold that the better risk is to stay the proceedings to allow the appeal lodged be heard and determined so that it is not rendered nugatory.

15. In the result, I find the application dated 4<sup>th</sup> June, 2024 is merited and it is allowed. An order for staying of proceedings is granted pending the determination of the Applicant's appeal. The costs of this application abide the winner of the said appeal.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> NOVEMBER, 2024.**

**A. OMOLLO**

**JUDGE**

