



**Bakari v Sheikh & another (Environment & Land Case 129 of 2021)
[2024] KEELC 13595 (KLR) (6 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13595 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 129 OF 2021
SM KIBUNJA, J
DECEMBER 6, 2024**

BETWEEN

ADIJA MOHAMED BAKARI PLAINTIFF

AND

ABDULWAHAB ABRAR SHEIKH 1ST DEFENDANT

THE COUNTY GOVERNMENT OF MOMBASA 2ND DEFENDANT

RULING

Notice of Motion Under Certificate of Urgency Dated the 5th November 2024

1. The plaintiff moved the court through the notice of motion dated 5th November 2024 seeking for “stay of execution of the judgement, decree and or order of 25th September 2024 pending the hearing and determination of the appeal herein.” The application is based on the seven grounds on its face marked (1) to (7) and supported by the affidavit of Yusuf M. Aboubakar, advocate, sworn on the 5th November 2024, inter alia deposing that the plaintiff has preferred an appeal through the notice of appeal dated 27th September 2024 on the judgement delivered on 25th September 2024; that the plaintiff has applied for certified copies of proceedings for purposes of preparing the record of appeal; that the plaintiff has an arguable appeal and unless the stay of execution order is granted, the appeal will be rendered nugatory.
2. The application is opposed by the 1st defendant through the replying affidavit of Abdulwahab Abrar Sheikh, defendant, sworn on the 12th November 2024, among others deposing that the plaintiff has not complied with the orders in the judgement of 25th September 2024; that the plaintiff has not provided evidence for payment of the certified proceedings; that the application is intended to prevent the 1st defendant from enjoying the fruits of his judgement; that the plaintiff has not met the threshold for stay of execution order to issue because she has not demonstrated she would suffer substantial loss if the stay order is not granted, and has not offered security for due performance of the judgement.



3. The court issued directions on 7th November 2024 for the application to be heard on the 3rd December 2024, when Mr. Aboubakar and Mr. Tolo, learned counsel for the plaintiff and 1st defendant respectively, tendered their oral submissions for and against the application, which the court has considered.
4. The following are the issues for the determinations by the court:
 - a. Whether the plaintiff has met the threshold for the order of stay of execution pending hearing and determination of the appeal to issue.
 - b. Who pays the costs?
5. The court has carefully considered the grounds on the application, affidavit evidence by both parties, oral submissions by the two learned counsel for and against the application and come to the following conclusions:
 - a. The application has invoked Order 42 Rule 6 of the Civil Procedure Rules, that inter alia provides under subrule 2 that:

“(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.”

The record confirms that the court delivered its judgement that is sought to be stayed on the 25th September 2024. In that judgement, the court inter alia ordered the plaintiff to pay the 1st defendant rent arrears totalling Kshs.74,000, and to continue paying monthly rent at Kshs.600 for any other additional period she remains on the plot until she vacates within ninety days or is evicted. The ninety days lapses on or about 25th December 2024.

- b. That from the affidavit evidence presented by the parties and submissions by the learned counsel, the plaintiff has not vacated from the suit property. She has also neither paid the rent arrears nor the monthly rent. The instant application dated 5th November 2024, was filed on the 6th November 2024, which was about 40 days from the date of the delivery of the judgement. As the court had directed the plaintiff to vacate in ninety days, I find the application was filed without unreasonable delay.
- c. The other test the plaintiff was expected to surmount is to show that she would suffer substantial loss if the stay of execution order was not granted. She has indicated that the 1st defendant may embark in evicting her after 25th December 2024. She further added such an occurrence



may result to her appeal being rendered nugatory. The learned counsel for the 1st respondent contended that the plaintiff has not shown that the 1st defendant has commenced the process of evicting her. That while it is indeed true that the 1st defendant is yet to commence the process of evicting the plaintiff, there is no guarantee or undertaking that he will not do so after the expiry of the ninety days that lapses on the 25th December 2024. The plaintiff's fears may not be taken as unreasonable, and if the 1st defendant was to carry out the eviction, it would definitely include demolishing the house without land thereon. Such a demolition will definitely be a substantial loss was the plaintiff to thereafter be successful on the pending appeal. The plaintiff has therefore established that test.

- d. On the question of security for the due performance of such decree or order, it is clear the plaintiff has not made an offer for the same through the application or submissions. The contention by the plaintiff's counsel in his submissions that security for due performance only applies in money decrees was vehemently opposed by the learned counsel for the 1st defendant. My reading of Order 46 Rule 2(b) of Civil Procedure Rules does not show that security for the due performance of decree or order as may ultimately be binding is limited to money decrees only as alleged by the Counsel for the Plaintiff. Also, the failure by the plaintiff to offer security for due performance of the decree/order does not mean the court cannot require her to provide a suitable security as a condition to the grant of the stay order. The court will therefore consider or fashion the appropriate order to issue to in a way, secure the performance of the decree/order.
- e. That having found merit in the application, and as under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya costs follow the events unless otherwise directed, the court is of the view the costs in the application will abide the outcome of the pending appeal.

6. Flowing from the above determinations, the court finds and orders as follows:

- a. That stay of execution in terms of prayer (2) of the notice of motion dated the 5th November 2024, is granted on condition that the plaintiff deposits, and continues depositing the amounts detailed here below, in an interest earning bank account in the joint names of the parties' counsel or with the Court within fourteen (14) days from today:
 - i. The whole rent arrears of Kshs.74,000.



- ii. Accrued monthly rent of Kshs.600 from October 2024 to December 2024.
- iii. Thereafter, continue depositing the subsequent monthly rent by the tenth day of each month.
- b. That should the plaintiff fail to comply with the above condition or default in the monthly rent deposits, the stay of execution order shall automatically lapse.
- c. The costs of the application to abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 6TH DAY OF DECEMBER 2024.

S. M. Kibunja, J.

ELC MOMBASA.

In the Presence of:

Plaintiff : Mr. Abubakar

Defendants : Mr Idd for Tolo

Leakey – Court Assistant.

S. M. Kibunja, J.

ELC Mombasa

