



REPUBLIC OF KENYA



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Khan v Malik (Sued on Behalf of Board Members of Muslim Association, Mombasa) (Environment and Land Appeal E047 of 2024) [2024] KEELC 13610 (KLR) (6 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13610 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E047 OF 2024
SM KIBUNJA, J
DECEMBER 6, 2024

BETWEEN

NARGIS BEGUM KHAN APPELLANT

AND

AMJAD PARVEEZ MALIK RESPONDENT

**SUED ON BEHALF OF BOARD MEMBERS OF MUSLIM ASSOCIATION,
MOMBASA**

RULING

Notice of Motion Under Certificate of Urgency Dated 27th November 2024

1. The appellant filed the notice of motion dated the 27th November 2024 seeking for stay of execution of the order/ruling of 20th November 2024 and stay of further proceedings in Mombasa MCELC No. E130 of 2024, pending the hearing and determination of this appeal. The application is premised on the six grounds on its face marked (i) to (vi) and supported by the supporting and further affidavits of Nargis Begum Khan, the appellant, sworn on the 27th November 2024 and 3rd December 2024 respectively, deposing inter alia that the ruling delivered on the 20th November 2024 barred her from running her food joint within the building erected on Mombasa/XV11/11, and accessing the terrace pending the hearing and determination of the suit; that she was aggrieved by the ruling and filed the appeal through the memorandum of appeal dated 27th November 2024 that is annexed, and that she filed this application without unreasonable delay; that unless the orders of 20th November 2024 are stayed, she will suffer irreparable loss and damage as the food kiosk is her family's source of income; that she is apprehensive the respondent may rent out the space to another better paying tenant; that she had raised the issue of respondent's capacity to file the suit on behalf of the Muslim Association before the trial court; that the waste water she is accused off does not come from her premises, but from a water vendor on the same street; that the respondent had served her and other tenants with a notice of rent increment that is subject matter of Nairobi Rent Restriction Tribunal case No. E122 of 2024;



that the seven days she was given by the trial court was not sufficient to find another premises to move her business to, and moving the business would affect it; that she transferred her shares in the school mentioned by the respondent to a buyer vide a sale agreement dated 12th August 2024, and the food kiosk is her family's only source of income; that she was granted oral authority by the then chairman to operate the food kiosk.

2. The application is opposed by the respondent through the replying affidavit of Amjad Parveez Malik, Acting Chairman sworn on the 2nd December 2024, inter alia deposing that he has authority of the board members to swear the affidavit on its behalf; that the appellant who is their tenant in house No. 3 on Mombasa/XV11/11 has been running a food joint within the respondent's premises without the respondent's board authority; that the appellant has been discharging waste water from the food joint onto the public street causing nuisance to other tenants in the building and neighbours; that the Public Health officers had issued the respondent with a notice on the waste water discharged by the appellant and as she had not been authorised to run the food joint in the premises, the respondent filed the suit before the trial court; that the appellant has not met the threshold for the court to issue stay of proceedings order, and instead the suit should be allowed to be heard to conclusion, and the one not satisfied to file an appeal; that the appellant is yet to file a statement of defence before the trial court from which the court could get her interest in the suit property; that the application is vexatious, frivolous and meant to allow the applicant continue wasting the suit property; that the order of 20th November 2024 should not be stayed as it was meant to preserve the substratum pending the hearing and determination of the suit; that the appellant has not demonstrated that she will suffer substantial loss or offered a security as required under Order 42 Rule 6 of Civil Procedure Rules.
3. The court certified the application urgent on the 28th November 2024 and fixed it for hearing on the 3rd December 2024. On that date, the court heard both counsel on filing of a supplementary affidavit by the appellant and canvassing the application through written submissions. The court directed the appellant to file and serve supplementary affidavit, limited to new issues of facts in the replying affidavit and submissions before close of business on that date. The respondent was directed to file and serve their submissions before close of business on the 4th December 2024.
4. The learned counsel for the appellant and respondent filed their submissions dated the 3rd December 2024 and 4th December 2024 respectively, which the court has considered.
5. The following are the issues for the determinations by the court:
 - a. Whether the appellant has met the threshold for the court issue stay of execution order in respect of the ruling of 20th November 2024, pending the hearing and determination of the appeal.
 - b. Whether the appellant has met the threshold for the court to issue an order of stay of proceedings of the suit in the trial court pending the hearing and determination of the appeal.
 - c. Who pays the costs?
6. The court has carefully considered the grounds on the application, the affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon, and come to the following determinations:
 - a. That while the appellant contends that the respondent is without authority of the association to file the suit before the lower court, the respondent has insisted that he is indeed with



authority from the board. This issue was raised before the lower court, and the learned trial magistrate opined as follows:

“9. This seems to be a contentious issue and will require the parties to contend with it at the hearing. What I need to be convinced is that prima facie, the chairman of the association has no locus standi, but I cannot purport to make a determination of the competence or otherwise of the board resolution as at now more so when no board member has moved the court to that effect. To me, the legal capacity of the association is that it cannot act as a juristic person but rather, acts through its officials. Indeed, the defendant concedes that Mr. Amjaad Paviv is the acting chairman of the association and as such, even on concession by the defendant, an official can bring the suit upon a resolution to that effect. If the association feels that they have not granted the powers to him, I will leave that to them and/or at the substantive hearing of the matter unless toe [sic] court is moved otherwise. For now, I have no basis of assuming that prima facie, he lacks the requisite authority to file the suit.”

The learned trial magistrate declined to find the Amjad Parveez Malik to be without authority to file the suit and put that issue aside to be pursued later. I notice that issue has been raised at ground 2 and 3 in the memorandum of appeal, and I need not make any determination on it at this stage.

- b. That it is not disputed that the appellant is a tenant of the respondent at house No. 3. It is also not disputed that the appellant has been running a food eatery at the respondent’s premises. What is however, disputed is whether the appellant had authority or consent of the respondent to run the said food eatery. The appellant has alleged that she was verbally allowed to operate the food eatery by the former or previous acting chairman, which claim is disputed by the respondent. The respondent has indicated that the Public Health Department has served them with notice for the waste water being released onto the public street from the appellant’s food eatery, and attributed it as one of the reasons they filed the suit against the appellant and sought for the orders issued by the trial court. I have perused the ruling by the learned trial magistrate delivered on the 20th November 2024, in which he inter alia held as follows:

“15. I have perused the annexures in court and indeed, there is no proof that the defendant has been authorised to run the said business. Whereas the consent can be deduced from the conduct of the parties, its apparent that there is no express consent on their part for her to continue with the operations therein.

16. I am not sure I can order that the defendant therefore continues with the operations if the county government has frowned upon their hygiene. Much as the court would wish to sympathise with the defendant, on the face of it, the plaintiff seems to have a formidable case.”

The trial court also proceeded to address the issue of irreparable loss and eventually found that should the court “find for the tenant, damages for breach of tenancy agreement and loss of income would be easy to quantify and award.” And, on the test for balance of convenience held



in favour of the respondent before proceeding to issue the orders sought now subject matter of this appeal.

- c. Starting with the issue of whether or not the court should stay the proceeding before the trial court, I find the learned counsel for the appellant did not submit on it and I will take it as an indication they had abandoned that prayer. The respondent has opposed that prayer and their learned counsel has also submitted on it urging the court not to grant it. Even if the counsel for the appellant had submitted on the prayer, it is difficult to see the connection or nexus between the stoppage of proceeding before the lower court and the appeal before this court that is only dealing with the ruling of 20th November 2024. I therefore find no merit in that prayer.
 - d. This court has the power in its appellate jurisdiction to interfere with the trial court's decision where it is shown that the court considered extraneous or irrelevant matters in coming to the subject decision, but would not interfere with the trial court's discretion that has been exercised judiciously. With that in mind, I revert to the prayer for stay of execution of the order of 20th November 2024 stopping appellant from running her food eatery and accessing the terrace as the suit before the lower court is heard and determined. I have as indicated above perused the learned trial magistrate's ruling and highlighted parts of the findings therein. Though this application was filed without unreasonable delay, and without making or appearing to make conclusive determinations at this interlocutory stage, I do not find any basis upon which to stay the orders granted by the learned trial magistrate. As correctly observed by the learned trial magistrate, it will be easy to quantify and award any loss or damage that the appellant may have suffered in case the court finds in her favour at the conclusion of the trial. I therefore find the appellant has failed to meet the threshold for the stay of execution order to be issued. It is indeed advisable for the Appellant to make haste and file the statement of defence on the trial court to enable the suit be heard and determined without delay. Thereafter the party not satisfied may prefer an appeal.
 - e. On the issue of costs, I am of the view that it abides the outcome of the appeal the provisions of section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya notwithstanding.
7. In view of the foregoing determinations in respect of the notice of motion under certificate of urgency dated the 27th November 2024, the court finds and orders as follows:
- a. The application is without merit and is hereby dismissed.
 - b. The costs to abide the outcome of the pending appeal.

Orders accordingly.

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

S. M. Kibunja, J.

ELC MOMBASA.

In the Presence of:

Appellant : M/s Kahariri

Respondent : Mr Otieno.

Leakey – Court Assistant

S. M. Kibunja, J.

ELC MOMBASA.

