



REPUBLIC OF KENYA



**KENYA LAW**  
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**Omar v Juma; Juma (Appellant) (Environment and Land Appeal  
33 of 2022) [2023] KEELC 194 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 194 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL 33 OF 2022  
NA MATHEKA, J  
JANUARY 26, 2023**

**BETWEEN**

**ABDULRAHMAN MOHAMED OMAR ..... RESPONDENT**

**AND**

**KHAMIS JUMA ..... DEFENDANT**

**AND**

**AZIZA KHAMISI JUMA ..... APPELLANT**

**RULING**

1. The application is dated August 12, 2022 and is brought under order 42 rule 6 and order 50 rule 1 of the *Civil Procedure Rules* section IA, 1B and 3A of the *Civil Procedure Act* cap 21 Laws of Kenya seeking the following orders;
  1. This Application be certified as urgent and be heard ex- parte in the first instance.
  2. The Honourable court be pleased to grant leave for an order that the application be heard during the current vacation as it is extremely urgent.
  3. There be a temporary order of stay of execution of the Judgment and Decree of the Honourable Court in RMCC No. 1367 OF 2014 between Abdulrahman Mohamed Omar and Khamis Juma given on 26<sup>th</sup> February, 2016 pending the hearing of this application inter-partes.
  4. There be a stay of execution of the Judgment and Decree of the Honourable Court in RMCC NO. 1367 of 2014 between Abdulrahman Mohamed Omar and Khamis Juma given on 26<sup>th</sup> February, 2016 pending the hearing and determination of the Appeal herein.
  5. The Honourable Court be pleased to grant such relief as it may deem fit to grant.



6. Cost of this application be in the cause.
2. It is based on the grounds that the Honourable Court delivered electronically in RMCC No. 1367 OF 2014 between Abdulrahman Mohamed Omar and Khamis Juma on August 4, 2022 its Ruling disallowing the Applicant' s/Applicant' s application dated 4<sup>th</sup> May 2022 seeking for the striking out of the suit without granting a stay of execution. The Appellant/Applicant is aggrieved by the Ruling of the Honourable Chief Magistrate J. B. Kalo delivered on August 4, 2022 and the Applicant/Appellant has filed this Appeal. There is an impending threat of execution by the Respondent against the estate of the deceased Defendant as the Respondent had already extracted the Decree and Warrant to the Court Bailiff to Give Possession and he will at any time now proceed to take possession and demolish the residential premises of the deceased Defendant which premises currently house the widow of the deceased Defendant and some of the heirs to the deceased Defendant. That the estate of the deceased Defendant and the unheard heirs of the Defendant will suffer substantial loss unless an order of stay of execution is made.
3. The Respondent stated that the Appeal does not raise any weighty issue with overwhelming chance of success since orders to strike out a suit is not a matter of right and the magistrate exercised his discretion to observe the exception to the rule and judicial authorities based on the conduct of the Appellant whose hands were unclean when they approached the court having taken the same court for a ride by non-disclosure of death which duty was placed upon their advocates who had entered appearance and actively participated in the proceedings until the judgement and extraction of the decree that was perfected,
4. That the Respondent is the registered proprietor of plot number 4379/1/MN Title Number CR.19749 measuring 0.6247HA =1.544acres registered in the name of the Respondent (annexed is a copy of the certificate of postal search as in 2022 marked "AMO 1"). That the Appellants therefore have no proprietary rights on the plot number 4379/1/MN and have not even displayed any title documents and hence are trespassers on the property belonging to the Respondent having been entitled to pay ground rent to the Respondent and hence a tenant cannot seek relief from the court to challenge a valid title of the proprietor of the land and in fact cannot therefore plead substantial and irreparable loss without any evidence of ownership of the suit premises. That the appeal shall not be rendered nugatory in view of failure to display any title documents to the suit property and in a nutshell they are not owners of the suit land that belongs to the Respondent. That the Appeal is a non-starter and doomed to fail since the prerequisite condition of the Appellant would be a display of the registered document being the title deed which they do not have and hence they are not the owners of the suit property and the Appeal is a waste of the court's precious time. That with regard to security of Kshs.100,000/= is inadequate since the value of the property is more than 100 Million and the Appellant ought to deposit the equivalent sum within the court if not a joint account of both the advocates pending the hearing of the Appeal since the Appellant has encroached into the Respondent's land hence denying him the daily, monthly & annual mesne profits that he would be earning. That an order of stay of execution against the Respondent shall occasion the proprietor of the land substantial loss in loss of income & rents running to millions of shillings occasioned by the trespasser Appellant and the court ought to consider the plight of the Respondent also and the Appellant's remedy would be to attempt to negotiate with the registered owner of the property with an offer to purchase since the court cannot override the title of the proprietor that the court recognizes being a sanctity of ownership that cannot be overridden or nullified and the Appellant being a trespasser not recognized in law is a candidate of immediate eviction.
5. This court has carefully considered the application and the submissions herein. The Applicant states that the Court delivered a ruling in RMCC NO. 1367 OF 2014 between Abdulrahman Mohamed



Omar and Khamis Juma on 4<sup>th</sup> August 2022 its Ruling disallowing the Applicant' s/Applicant' s application dated 4<sup>th</sup> May 2022 seeking for the striking out of the suit without granting a stay of execution. The Applicant stated that there is an impending threat of execution by the Respondent against the estate of the deceased Defendant as the Respondent had already extracted the Decree and Warrant to the Court Bailiff to Give Possession and he will at any time now proceed to take possession and demolish the residential premises of the deceased Defendant which premises currently house the widow of the deceased Defendant and some of the heirs to the deceased Defendant. That the estate of the deceased Defendant and the unheard heirs of the Defendant will suffer substantial loss unless an order of stay of execution is made. That the said suit was filed way after the Plaintiff had died.

6. The principles for granting stay of execution are provided for under order 42 rule 6 (1) of the [Civil Procedure Rules](#) as follows:

“No appeal or a second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order, but the Court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred, shall be at liberty, on an application being made, to consider such application and to make such orders thereon as may to it seem just, any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have the orders set aside.”

Order 42, rule 6 states:

“No order for stay of execution shall be made under sub-rule (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.”

7. The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and
3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

8. The principles governing the exercise of the court’s jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicant must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of *Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd* – Civil Appl. No. Nai. 93/02 (UR), thus:

Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-



1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,
  2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”
9. The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in *Chris Munga N. Bichange vs Richard Nyagaka Tongi & 2 Others* eKLR where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus;
- “ ..... . The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”
10. In the case of *Mohamed Salim T/A Choice Butchery vs Nasserpuria Memon Jamat* (2013) eKLR, the court stated that;
- “ That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right .....”
11. We are further guided by this court’s decision in *Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others* Civil Appeal No. 291 of 1997, at Page 4 as follows:
- “ . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . . the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”
12. The Respondent submitted that he is the registered proprietor of plot number 4379/1/MN Title Number CR.19749 measuring 0.6247HA =1.544acres and the Applicant has no proprietary rights on the plot number 4379/1/MN. Be that as it may, the Applicant has produced evidence that the said original Plaintiff was deceased at the time of filing the suit. They aver that the Respondent was aware of this. That the Applicant is one of the administrators of the Deceased estate and may be evicted when they were never aware of the said suit. That the suit property currently houses the widow of the deceased Defendant and some of the heirs to the deceased Defendant. That the estate of the deceased Defendant and the unheard heirs of the Defendant will suffer substantial loss unless an order of stay of execution is made. I find that the intended appeal is arguable and is not frivolous. Secondly, I am persuaded that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the applicant has fulfilled the above mentioned grounds to enable me grant the stay. I find the application dated 12<sup>th</sup> August 2022 is merited and I grant the same in terms of prayer 4. Costs to be in the cause.

It is so ordered.



**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26<sup>TH</sup> DAY OF JANUARY 2023.**

**N.A. MATHEKA**

**JUDGE**

