



**Mohamud v Osman & 7 others (Civil Application E044 of 2022)
[2022] KECA 1205 (KLR) (4 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1205 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E044 OF 2022
K M'INOTI, S OLE KANTAI & F TUIYOT'T, JJA
NOVEMBER 4, 2022**

BETWEEN

MOHAMED FEISAL MOHAMUD APPLICANT

AND

IBRAHIM MOHAMED OSMAN 1ST RESPONDENT

YASIN MOHAMED MAHAMUD 2ND RESPONDENT

RICHARD GUYA MEMBO 3RD RESPONDENT

DISTRICT LAND REGISTRAR, KISUMU 4TH RESPONDENT

RAMOGI CHEMISTS LIMITED 5TH RESPONDENT

HAFISIWA NAMUKHOSI MUHAMED 6TH RESPONDENT

MUSA MOHAMED 7TH RESPONDENT

ALI OKUMU MOHAMED 8TH RESPONDENT

(Being an application for stay of execution of the Judgment of the Environment and Land Court of Kenya at Kisumu (Ombwayo, J.) dated 11th March, 2022 in ELC Case No. 73 of 2016)

RULING

1. The applicant Mohamed Feisal Mohamud prays in the Motion brought under various provisions of law including rule 5 (2) (b) of the Court of Appeal Rules that pending the hearing and determination of the application and an intended appeal we stay execution of the decree/order/Judgment in Kisumu Environment and Land Court (ELC) Case No. 73 of 2016. In grounds in support of the Motion and in a supporting affidavit of the applicant it is stated amongst other things, that the applicant has filed a notice of appeal which raises arguable, plausible and serious grounds of appeal contained in a draft Memorandum of Appeal; that in the Judgment to be appealed the Judge (Ombwayo, J.) ordered the



applicant and his co-plaintiffs to vacate those parcels of land known as L.R. No. Kisumu Municipality/ Block 5/75 and 276 (the suit lands) within 60 days of 11th March, 2022; that the applicant and the co-plaintiffs in the suit have a genuine claim to the proprietary rights over the suit lands, having paid an agreed purchase price to the vendors; that the applicant and the said co-plaintiffs are in actual occupation of the suit lands where they have made heavy investments and would suffer substantial and immense damage should they be forced to vacate the suit lands before the appeal is heard and determined; that execution of the Judgment of ELC would render the appeal nugatory; that execution of the said Judgment would affect tenants in situ who would be evicted from the suit lands and premises demolished. The applicant says that the respondents would not suffer any substantial loss if stay is granted and that the application has in any event, been brought without undue delay.

2. A hearing notice was served on the parties by the Registrar on 4th July, 2022 at 3.39 p.m. giving notice of hearing and requiring the parties to file written submissions within specified time.
3. The 1st and 2nd respondents (Ibrahim Mohammed Osman and Yassin Mohammed Mohamud) did not file a replying affidavit. They say in written submissions that they fully adopt submissions filed on behalf of the applicant. They pray that the application be allowed.
4. In a replying affidavit on behalf of the 3rd and 5th respondents (Richard Guya Membo and Ramogi Chemists Limited) Richard Guya Membo says that he is also a director of the 5th respondent and that he believes that the intended appeal would not be rendered nugatory if stay of execution is not granted. Further, that the suit at ELC was dismissed; that the Court found in his and the 5th respondent's favour on a counter-claim and that they were entitled to possession of suit lands, mesne profits and costs. He further believes that stay of execution should not be granted because the title to the suit lands is in the name of the 5th respondent; that there is no evidence that the 5th respondent intends to dispose of the suit lands; that the suit lands are not in physical possession of the applicant but it is in the possession of tenants who pay rent to the applicant and his partners; that the suit lands had been sold to the 5th respondent. The 3rd respondent depones at paragraph 6 and 7 of the affidavit as follows:
 6. That the loss of the opportunity to collect rent and manage the suit property is indeed what the applicant will lose if we take possession. In this case our position is that the management and rental collection of the suit property should be given to an independent agent who shall collect the rent and deposit it in an escrow account opened in the name of counsel for the applicant and our advocates. In this way, the rental collected will be available to the winner after the full hearing and determination of the intended appeal.
 7. That the 2nd limb of the anticipated execution involves recovery of Kshs.680,000/- per month with effect from April, 2016 till full recovery. I am informed by Mr. Munyithia and which information I verily believe to be true that before execution can commence, the party and party bill of costs has to be assessed by the Deputy Registrar. As at this date, the Bill of costs has not been filed in court. Our suggestion on this is that the court should direct the Applicant to deposit this money in the same escrow account mentioned in paragraph 5 above. This is because, in their very own evidence, before the superior court at least Ksh.10 Million is held by the firm of Odhiambo Ouma & Co. Advocates since May, 2016. For that reason, at least a sum of Kshs.20 Million should be secured.”



5. The 6th, 7th and 8th respondents Hatisiwa Namukhosi Muhamed, Musa Mohamed and Ali Okumu Mohamed did not file a replying affidavit to the application. In written submissions filed on their behalf and that of the 3rd and 5th respondents it is said that the premises on the suit lands are commercial with third parties in occupation where the applicant and the 2nd and 3rd respondents receive monthly rental income estimated before ELC at Ksh.680,000 which as at April 2022 was Ksh.48,960,000. It is said that no eviction of tenants is contemplated and these respondents have no intention to demolish the premises erected in the suit lands. They say:

In view of the above, the applicant has not shown how the appeal will be rendered nugatory. That is why this court should impose conditions. ”

6. They cite various authorities to support that position.
7. The Motion came up for hearing before us on 19th July, 2022 on a virtual platform when learned counsel Mr. Richard Onsongo appeared for the applicant while learned counsel Mr. Muniyithia appeared for the 3rd – 8th respondents (save the 4th) while learned counsel Mr. Ouma appeared for the 1st and 2nd respondents. There was no appearance for the 4th respondent (District Land Registrar, Kisumu) represented by the Hon. Attorney General who had been served with hearing notice.
8. In reiterating written submissions Mr. Onsongo submitted that payment of security for performance of a Judgment is not one of the consideration in an application to this Court under rule 5 (2) (b) of our rules.
9. Mr. Ouma, in support submitted that the application should be allowed and pointed out that the other respondents (save the absent 4th) appeared to be conceding the application but asking that conditions be imposed. He submitted that the applicant and the 1st and 2nd respondents had paid purchase price of Ksh.45,000,000; that award of ELC of mesne profits was contested in the appeal.
10. Mr. Muniyithia did not agree. He stated that the purchase price had not been paid but was held by counsel for the 1st and 2nd respondents; that the applicant and the 1st and 2nd respondents were in control of the suit lands. According to him the admitted monthly rental income of Ksh.680,000 should be collected by an estate agent and deposited in an escrow account.
11. In a brief reply Mr. Onsongo submitted that the suit lands had been leased to the applicant at Ksh.150,000 per month and that the sum of Ksh.680,000 represented mesne profits which were contested in the appeal.
12. We have considered the application, the submissions both written and oral and the law.
13. The principles that guide consideration of an application of this nature are old hat. For an applicant to succeed he must, firstly demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that the same is not frivolous. The applicant must in addition show that the appeal would be rendered nugatory absent stay.
14. We have seen the 13 grounds of appeal set out in draft Memorandum of Appeal. The applicant intends to argue on appeal that dismissal of the suit was against the evidence and that the award of the counter-claim was not supported by the evidence. It is further proposed to be argued, amongst other grounds, that the Judge erred in law and fact in failing to find that the defendants acted in a fraudulent manner by receiving purchase price from both the applicant and the 1st defendant. These are not idle grounds, they are arguable and it has been held that an applicant needs only set out a single arguable point meriting consideration by the Court and need not demonstrate a multiplicity of arguable grounds – *Damji*



Pramji Mandaria v Sarah Lee Household and Body Care (K) Limited, Civil Application No. 345 of 2004 (ur).

15. On the nugatory aspect which an applicant must also demonstrate, we are satisfied that the premises may be demolished and be beyond the applicant's reach if the appeal succeeds.
16. As has been held by this Court in various cases such as *Butt v Rent Restriction Tribunal* [1982] KLR 417 and *Oraro & Rachier Advocates v Co-operative Bank of Kenya Limited* [2002] eKLR stay of execution may be granted where there are particular circumstances in a case warranting grant of stay. The special circumstances here are that the tenants may be evicted from the premises erected on the suit lands and those premises may be destroyed.
17. But because of the rival contestations made before us by the parties we are satisfied that the case calls for imposition of conditions to be met for stay of execution.
18. In the end we allow the Motion on condition that:
 - i. Ksh.150,000 per month be deposited by the applicant in an account in the joint names of counsel for the applicant and the 3rd, 5th, 6th, 7th and 8th respondents.
 - ii. Appeal (if not filed) be filed within 21 days of today.
 - iii. The appeal be fast-tracked for speedy hearing and disposal.
 - iv. Costs of the Motion will be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF NOVEMBER, 2022.

DEPUTY REGISTRAR

K. M'INOTI

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

