



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC APPEAL NO. 43 OF 2021

FATMA SWALEH.....1ST APPELLANT

ABDULHALIK MAZRUI.....2ND APPELLANT

VERSUS

HASSAN ABDULKADIR AZIZ.....RESPONDENT

RULING

On the 8th February 2022 the respondent raised a preliminary objection on the notice of motion dated 10th December 2021 that the same is res judicata contrary to section 7 of the Civil Procedure Act 2010 and that this court lacks jurisdiction to grant the orders prayed for. The respondent submitted that this application is res judicata as this court has dealt with the issue of stay pending appeal in the application dated 21st September 2021 and a ruling delivered on the 8th December 2021.

This court has considered the preliminary objection and the submissions herein. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

“..... consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”

In the same case, Sir Charles Newbold said:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”.

J.B. Ojwang, J (as he then was) in the case of Oraro vs. Mbajja [2005] eKLR had the following to state regarding a ‘Preliminary Objection’.

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that, “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”.

The issue as to whether or not this application is res judicata is therefore properly raised as a Preliminary Objection and the court will consider the same first. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Section 7.

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

The application dated 21st September 2021 was brought under Section 1A, IB and 3A of the Civil Procedure Act (CAP 21) Laws of Kenya and under Order 42 Rule 6 of the Civil Procedure Rules seeking the following orders;

1. That this Application be certified as urgent and be heard in the first instance.
2. That pending hearing and determination of this Application, this Honorable Court be pleased to issue an order for stay of execution of the Decree and Judgement in CMCC NO. 1117 OF 2017 HASSAN ABDULKADIR AZIZ VERSUS ABDULHALIK MAZRUI 8s FATMA SWALEH delivered on the 1ST of July 2021.
3. That pending hearing and determination of this Appeal, this Honorable Court be pleased to issue an order for stay of execution of the Decree and Judgement in CMCC NO. 1117 OF 2017 HASSAN ABDULKADIR AZIZ VERSUS ABDULHALIK MAZRUI & FATMA SWALEH delivered on the 1st July 2021.
4. That costs of this Application be granted to the Appellants.

It is based on the grounds that the Trial Court issued judgment against the Appellants whereby it inter alia ordered that the Appellants do demolish their house and other developments from Plot Number 842/II/MN within three months failure of which the Respondent would be at liberty to evict the Appellants from the property. That aggrieved by the said decision, the Appellants have filed an appeal to contest the judgement and have requested for certified copies of proceedings for purposes of the appeal. That the effect of the said judgement has substantial and serious implications of enabling the Respondent to demolish the Appellants' house which is situated on the suit property and which the Appellants have owned and have been in possession of since the year 2001 i.e. for a period of 21 years. That the time period of three months which the Respondent would be at liberty to execute the Court's judgement and be able to evict the Appellants and demolish their property expires on the 30th September 2021 which is nine days away. That the gist of the case before the Trial Court was that the Respondent filed suit against the Appellants claiming that the Appellants, who are Tenants on the subject property whereon they own a house, erected an illegal structure and sunk a borehole without the Respondent's consent. That for the said reason, the Respondent filed suit in the main seeking for vacant possession of the property pursuant to the said allegations. That one of the issues in contention during trial was whether the Respondent was a Landlord on the land and therefore whether he had the capacity to raise issues with respect to the Appellants' tenancy on the land. That the above issues notwithstanding, the Trial Court in its judgement went ahead to unilaterally terminate the Appellants' tenancy and grant the Respondent vacant possession of the land despite the fact that at no point was the tenancy terminated. That the Appellants therefore impugn the judgement on the basis that the Honourable Magistrate unilaterally issued serious orders for vacant possession and removal of the Appellants' entire house despite the fact that the termination of the Appellants' tenancy was never an issue which was neither pleaded nor contended during trial. That despite the pendency of the appeal, the Respondent shall be at liberty to execute the Decree by the 30th of September 2021 should there be no orders to stay the execution. That should the Respondent be allowed to execute this Honourable Court's loss by losing their entire house and the whole substratum of the appeal will be destroyed and/or rendered nugatory. That should the Respondent in the circumstances be allowed to execute this Honourable Court's judgement and the Decree thereof, then the Appellants shall be denied their unalienable constitutionally entrenched right of appeal. That the Appellants have an arguable appeal as are raising substantial issues than need revisiting by this Honourable Court. That in the circumstances surrounding this matter, the Appellants stand to be greatly prejudiced should the protective orders for stay of execution not be granted. That it is crucial that imminent protective orders are granted pending inter parties hearing of this Application and the Appeal so that the Appellants are not prejudiced. That it is in the great interest of justice that the subject

Application be allowed as prayed.

The instant application is dated 10th December 2021 and is brought under Section 1A, IB and 3A of the Civil Procedure Act (CAP 21) Laws of Kenya; Under Order 42 Rule 6 of the Civil Procedure Rules seeking the following orders that;

1. This matter be certified as urgent and be heard in the first instance.
2. Pending inter-partes hearing and determination of this Application, there be an injunction restraining the Respondent whether by himself, his servants, agents and/or any person claiming under him from demolishing the Appellants' house, from evicting the Appellants or from interfering with the Appellant's quiet and peaceful possession of the Appellants' house situated on Plot Number 842/II/MN.
3. Pending the lodging, hearing and final determination of an intended appeal to the Court Appeal against the ruling of this Honourable Court rendered on the 8th December 2021, there be an injunction restraining the Respondent whether by himself, his servants, agents and/or any person claiming under him from demolishing the Appellants' house, from evicting the Appellants or from interfering with the Appellant's quiet and peaceful possession of the Appellants' house situated on Plot Number 842/II/MN.
4. Costs of this Application be provided for.

It is based on the grounds that the Magistrates Court issued judgment against the Appellants whereby it inter alia ordered that the Appellants do remove their house and other developments from Plot Number 842/II/MN ("hereinafter the subject property") within Three months failure of which the Respondent would be at liberty to evict the Appellants from the property. That aggrieved by the said decision, the Appellants filed the instant appeal to contest the judgement of the Trial Court. That the Appellants also filed an Application dated the 21st September 2021 seeking for orders for stay of execution against the judgment of the Trial Court pending determination of the Appeal. That this Honourable Court on the 8th December 2021 however dismissed the said Application. That consequently, the Appellants do not have any protective order and face eviction and demolition of their house despite the pendency of this Appeal. That aggrieved by the said decision, the Appellants intend to lodge an appeal before the Court of Appeal and has together with this Application, filed a Notice of Appeal. That the Appellants are therefore facing the danger of having their house demolished and evicted from the subject parcel of land despite the pendency of this Appeal and the intended Appeal before the Court of Appeal. That the same would effectively render the instant appeal and the intended appeal before the Court of Appeal as moot despite their outcome. That should the Respondent in the circumstances be allowed to execute the Trial Court's judgement and the Decree thereof, then the Respondent shall be denied their unalienable constitutionally entrenched right of appeal. That the Appellants have an arguable appeal as are raising substantial issues than need revisiting by the Court of Appeal. That in the circumstances surrounding this matter, the Applicants stand to be greatly prejudiced that the Plaintiff should the protective orders for stay of execution not be granted. That it is crucial that imminent protective orders are granted pending inter partes hearing of this Application so that the Applicants are not prejudiced. That it is in the great interest of justice that the subject Application be allowed.

I concur with the respondent's submission that both applications are brought under Order 42 Rule 6 seeking to stay execution in this matter. The grounds for the application are similar and basically stay to await the results of the appeal and more recently the decision of the Court of Appeal. I find this application is frivolous and an abuse of the court process. No new evidence has been adduced before me to review my earlier decision. I find the preliminary objection is merited and I strike out this application with costs to the respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF MARCH 2022.

N.A. MATHEKA

JUDGE



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