



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 231 OF 2012**

**DIANA AKINYI ODHIAMBO.....APPELLANT**

**VERSUS**

**CHARLES NJOROGE.....1<sup>ST</sup> RESPONDENT**

**JOYCE KABURU.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The appellant/applicant in this instance has brought the Notice of Motion dated 18<sup>th</sup> June 2018 supported by the grounds set out in its body and the facts deponed in the supporting affidavit. The applicant sought for the substantive order for stay of execution of the orders made by Hon. Mr. Justice Msagha Mbogholi on 17<sup>th</sup> May, 2018 pending the hearing and determination of the appellant's Intended Appeal in the Court of Appeal.
2. The respondent opposed the Motion by filing the replying affidavit sworn by 1<sup>st</sup> respondent, Charles Njoroge on 11<sup>th</sup> July 2018.
3. The parties were directed to file written submissions but at the time of writing this ruling the applicant had not file her submissions. I have considered the grounds set out on the face of the motion dated 8<sup>th</sup> June 2018 and the facts deponed in the rival affidavits.
4. A brief background of the matter is that the respondent instituted a suit against the applicant vide the plaint dated 5<sup>th</sup> August 2009 and sought for vacant possession, permanent injunction, aggravated damages and an order for demolishing any structures on the suit property.
5. Upon hearing the parties, judgment delivered on 12<sup>th</sup> April 2012 Was entered in favour of the respondents. Being aggrieved by the aforementioned decision the applicant appealed to this court against the lower court judgment.
6. In its judgement delivered on 17<sup>th</sup> May 2018, this curt dismissed the appellant's appeal. Being aggrieved by the dismissal order, the appellant filed a notice of appeal to express her intention to appeal against the same to the Court of Appeal.
7. In her affidavit filed in support of the motion dated 8/6/2018, Ms. Diana Akinyi Odhiambo stated that there are eviction orders in place which were granted by the lower court and that she will suffer irreparable loss and damage if the same is executed.
8. She avers that her advocates have been unable to lodge the intended appeal since they have not been supplied with a certified copy of proceedings and judgment to enable them prepare a record of Appeal to be filed in the Court of Appeal.
9. She contends that if the order for stay of execution of the judgment delivered on 17<sup>th</sup> May, 2018 is not granted the intended appeal will be rendered nugatory.
10. She further stated that the respondents have not demonstrated what prejudice they will suffer if the order for stay of execution pending appeal is granted.
11. In response, Mr. Charles Njoroge stated that the orders sought cannot be maintained as the appeal herein filed is in respect of an appeal against a judgment that arose out of undefended proceedings at the lower court.
12. It is the submission of the respondent that the appellant/ applicant has not demonstrated the substantial loss she would suffer if the order for stay is denied. It is also argued that the applicant has not offered any form of security for the due performance of the decree. The respondent's counsel relied on the case of *Global Tours and Travels Limited Nairobi High Court Winding up Cause No.43 of 2000*.

13. He further submitted that no evidence of execution has been placed before this court.

14. I have considered the grounds stated on the face of the application, the affidavits both filed in support and against the application plus, the submissions filed as well as the authorities cited and relied upon.

15. The principles guiding the grant of an application for stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the **Civil Procedure Rules** which provides as follows:

***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.***

16. On the issue of substantial loss, which is the cornerstone in an application for stay. The appellant in this matter avers that the suit property has been her home together with her children for decades and that they might be evicted without being heard.

17. It is the submission of the respondents that the appellant has not demonstrated the substantial loss she would suffer if the order is denied since there is no evidence that execution will follow.

18. Having considered the rival submissions, it is clear to me that this court issued a negative order which is not capable of execution hence there is nothing to stay save for recovery of costs which is yet to be assessed vide taxation proceedings. The applicant has specifically sought to stay the order issued by Justice Mbogholi, dismissing the appellant’s appeal. The applicant failed to seek for an order for stay of execution of the decree and or judgment of the trial court.

19. In the end, I find no merit in the appellant’s application. The same is dismissed with costs.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 28TH DAY OF OCTOBER, 2021.**

.....

**J. K. SERGON**

**JUDGE**

**IN THE PRESENCE OF:**

..... **FOR THE APPELLANT**

..... **FOR THE RESPONDENT**