



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NUMBER 47 OF 2004**

**IN THE MATTER OF THE ESTATE OF**

**JUSTUS WAINAINA NJOROGE.....(DECEASED)**

**SUSAN MUTHONI MWANGLI.....PETITIONER/RESPONDENT**

**VERSUS**

**RAHAB WANJIRU GATHWE.....OBJECTOR/APPLICANT**

**RULING**

1. This ruling is in respect of the application dated 14/2/2018. The orders sought are;

1. **Spent**

2. **Spent**

3. **THAT pending the hearing and determination of the Appeal the court be pleased to stay the execution the judgment delivered by court on 23<sup>rd</sup> January, 2018 together with all consequential orders thereof.**

4. **THAT costs of this application be provided for.**

2. The application is premised on six (6) grounds namely;

i. **THAT** aggrieved by the decision of the court the objector intends to appeal the same.

ii. **THAT** the applicant has filed a notice of appeal dated 30<sup>th</sup> January, 2018.

iii. **THAT** if the orders are not granted the petitioner will proceed with execution to the detriment of the objector who will suffer irreparably and the appeal be rendered nugatory.

iv. **THAT** there has been no delay in filing this application and the appeal has merits.

v. **THAT** the petitioner will not suffer any prejudice if the application is allowed.

vi. **THAT** it is in the wider interest of justice that this application be allowed as prayed.

3. It is also supported by the affidavit of Rahab Wanjiru Gathwe sworn on 14/7/2018.

4. The gist of the application is that the applicant is aggrieved by the decision of the court in its judgment of 23/1/2018. The applicant has since filed a notice of appeal in respect of the matter. The notice is exhibited.

5. It is the applicant's case that unless a stay is granted, she is likely to suffer as the respondent would cause the sale, disposal, alienation or lease of the subject matter being Nakuru/Subukia/Subukia Block 1/1423 (Mihango) to the applicant's prejudice.

6. It is urged that should execution proceed, the appeal shall be overtaken by events. The said appeal is said to be arguable and with highest possibility of success.
7. The application is opposed and in replying affidavit, Susan Muthoni Mwangi (respondent) has stated she has not threatened to evict the applicant neither is she intending to act in any adverse way to affect LR No. Nakuru/Subukia/Subukia/Block 4/1423 (Mihango).
8. She adds that the court should allow her to continue using her land while the applicant continues living there.
9. The application was canvassed by way of written submissions.
10. I have had occasion to consider the application, the affidavit evidence and submissions by counsel.
11. To succeed, an applicant in an application for stay of execution pending appeal must satisfy two (2) conditions provided for under **Order 42** of the **Civil Procedure Rules**. **Order 42 (2)** provides;  
  
**“Order 42(2) No order for stay of execution shall be made under sub-rule (1) unless**  
  
**i. The court is satisfied that substantial loss may result to the applicant unless the order is made that the application has been made without unreasonable delay; and**  
  
**ii. 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.”**
12. It is trite law that a successful litigant ought to enjoy the fruits of his judgment. (See MACHIRA T/A MACHIRA & CO. vs. STANDARD NEWSPAPERS).
13. It is thus incumbent upon the court to satisfy itself that there exists tangible reasons to deny a successful litigant the fruits of his judgment.
14. In our instant suit, while I am satisfied that the application is filed timeously, the court within the meaning of **order 42(2)** of the **Civil Procedure Rules** must be satisfied that substantial loss is likely to be suffered by the applicant should the stay not be granted. The court must also ensure that the interests of successful litigant are secured.
15. The court has already found in favour of the respondent in its judgment. It follows then that any aspects of execution of the judgment that would not cause substantial loss to the applicant must be allowed to continue.
16. On the material before court, the only aspect that would cause the applicant substantial loss would be if the respondent was to evict the applicant from her current residence or dispose by way of sale of the subject matter.
17. In the circumstances of this case, therefore, I am persuaded that a stay of execution is merited but limited to staying of any sale or eviction of the applicant from the land but at the same time balancing the interests of the parties by allowing the respondent use of the land pending the hearing and determination of the appeal.
18. I find the notice of motion dated 14/2/2018 partially successful and make the following orders;

**A stay of execution is to issue on terms;**

- a) **THAT the petitioner/respondent is not to dispose off by way of sale land parcel number Subukia/Subukia Block 4/1423 pending the hearing and determination of the appeal.**
- b) **THAT the petitioner/respondent shall be at liberty to take possession and use including by way of lease to 3<sup>rd</sup> parties land reference number Subukia/Subukia Block 4/1423 pending the hearing and determination of the appeal.**
- c) **THAT the petitioner/respondent shall not evict the objector applicant from her current residence on the land pending the hearing and determination of the appeal.**
- d) **THAT the applicant shall bear half the costs of this application.**

**Dated and Signed at Nakuru this 24<sup>th</sup> day of January, 2019.**

**A. K. NDUNG’U**

**JUDGE**