



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

E.L.C.A NO 11 OF 2014

FORMERLY KERUGOYA E.L.C.A. 56 OF 2014

MUSA NYAGA NJERU.....1st APPELLANT

PETER RUTERE NJERU.....2nd APPELLANT

VERSUS

JOHN NIRU KINANI.....RESPONDENT

RULING

1. This is an application for stay of execution pending the hearing and determination of the appeal. The application was brought by way of notice of motion dated 16th October, 2014 which is supported by an affidavit. The appellants have filed an appeal in this court
2. According to the appellants' supporting affidavit, the subordinate magisterial court granted orders which effectively evicted them from the suit land. They have also deposed that the intended appeal raises serious issues to be considered during the hearing and determination of this appeal.
3. In their grounds in support of the notice of motion, the appellants have stated that they have an arguable appeal with a high probability of success. They have further stated that unless an order of stay is granted, the intended appeal will be defeated and rendered nugatory.
4. Finally, they have stated that the application has been made without unreasonable delay and that the respondent will not be prejudiced if an order of stay of execution is granted.
5. The respondent has opposed the application. He has stated through his counsel that the application is *res-judicata* according to his grounds of opposition dated 18th November, 2014. He has further stated that the appellants are not entitled to any relief from this court as they have clearly demonstrated that they do not obey orders of the court.
6. According to him this application is an abuse of the court process. The reason for this is that a similar application was heard before the subordinate court and determined.
7. The law governing stay of execution pending an appeal is found in **Order 42 rules 6 of the 2010 Civil Procedure Rules**. The provisions of that order have been judicially approved by the Court of Appeal in the case of **Butt v. Rent Restrictions Tribunal 1982 KLR 417**. According to that case, the power to grant

or refuse an application for stay of execution is a discretionary power, which should be exercised in such a way as not to prevent an appeal.

8. Secondly, the general principle to be considered in granting or refusing stay is that stay must be granted so that an appeal may not be rendered nugatory should the appeal be successful. And the court is required to consider the special circumstances of the case including its unique circumstances

9. I have considered the affidavit evidence, the grounds of opposition and the authorities cited by both counsel. I find that the appellants have an arguable appeal. I also find that unless stay of execution is granted, the appeal may be rendered nugatory.

10. In the circumstances I hereby grant an order of stay of execution pending hearing and determination of this appeal. Costs of this application shall be costs in cause.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **21st** day of **APRIL 2015**.

In the presence of Ms. Muriuki holding brief for Mr Mungai for the applicants and Ms Ndorongo for the respondent.

Court clerk Mr Muriithi

J.M. BWONWONGA

JUDGE