



REPUBLIC OF KENYA
HIGH COURT OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT KAPSABET

ELC APPEAL CASE NO. E 001 OF 2021

MICAH REUBEN ISIYE.....APPELLANT/APPLICANT

-VERSUS-

WINNY WAMULA SAISI.....1ST RESPONDENT

ALEXANDER ISIYA SAISI.....2ND RESPONDENT

JACKLINE GALO.....3RD RESPONDENT

RULING

1. Having filed a Memorandum of Appeal dated 16th September 2021, against the Judgment and Decree of the Honourable J. Orwa in Kapsabet SPMCC No. 70 of 2018 raising 11 grounds, the Applicant filed a Notice of Motion Application dated 2nd November 2021 seeking stay of execution orders.
2. It is this same Notice of Motion application that is subject of this ruling. At the Exparte stage the Court granted a temporary stay of execution pending interparte hearing.
3. The Respondent filed in opposition to the application a Replying Affidavit by the 1st Respondent. Thereafter parties filed their respective written submissions and now this ruling.
4. The grounds penned in support of the Application are interalia; that the Appeal has raised salient and/or pertinent issues of law and has overwhelming chances of success that is the Application has been made without unreasonable delay. Respondents would not suffer any prejudice if the orders sought are granted. The Application is further supported by Supporting Affidavit of Micah Reuben Isiye, who reiterates the grounds in support and has annexed the decree appealed from.
5. The decree appealed from is not a monetary decree, but a decree compelling the Plaintiff/Appellant to subdivide and transfer 0.1 acre out of Nandi/Kapkangani/522 in favour of the 1st Defendant (Respondent).
6. In Support of the Application, the Applicant submits and places reliance in the decision in **Built -vs- Rent Restriction Tribunal (1989)** stating the principles in a stay of execution application.
7. The Applicant further places reliance on the **decision G.N. Muewa PA (SIC) MT View Maternity & Nursing Home -vs- Miriam Maalim Bishar & Another (2018) eKLR.**
8. The Respondents oppose the application and have filed a Replying Affidavit through the 1st Respondent. In the said affidavit, the Respondent depones that the principles for grant of a stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules have not been demonstrated and that no substantial loss shall be visited upon the Applicant.
9. The Respondent further depones that as a successful litigant, she should not be deprived of the fruits of the judgment.
10. The principles of Grant of a stay of execution application in the High Court are substantially different from the principles of stay of execution in the Court of Appeal.

11. In the High Court the same are governed by Order 42 Rule 6 of the Civil Procedure Rules, while in the Court of Appeal by Rule 5 (2). For the High Court, Order 42 Rule 6 requires that the applicant must demonstrate the following;

- a) Substantial loss may result if the application and order was made.
- b) The application was made without unreasonable delay and
- c) 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. The Respondent has cited the decision in **Civil Appeal No. 107 of 2015, Masisi Mwita –vs- Damaris Wanjiku Ngeri**, where the Court quoted the **Halal and Another –vs- Thorton and Turpin Ltd**, where the Court held “*The High Court’s discretion to Order stay of execution of its Order or Decree is sufficient cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay. In addition the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakaalo –vs- Straman E. A. Ltd (2013).*”

13. On substantial loss, the Applicant has not demonstrated, any substantial loss that will occur to him, in his supporting affidavit. In his submissions the Applicant has cited the decision in **G. N. Mueni P/A (Sic) MT. Viezo Maternity and Nursing Home -vs- Miriam Maalim Bishai and Another (2018) eKLR** where the Court held that “*It was considered view of this Court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover such decretal sum would render his appeal nugatory if he or she was successful.*”

14. The decree herein commands the Appellant to transfer 0.1 acre to the Respondent, and if the Appellant were to be successful, he would be required to file for an application for restitution under Section 91 of the Civil Procedure Act. From the definition of substantial loss from the decision in the G. N. Mwema case above, the Court considers that as a substantial loss.

15. On the second principle of whether the application was filed timeously. The Memorandum of Appeal was filed on 29th September, 2021 and the instance application filed on 2nd November, 2021. It was thus filed in about 5 weeks and that was timeously without inordinate delay.

16. On the last principle of issue of security, the Applicant has not offered security for the performance of the decree, however the Court is able to order shall security to be furnished for performance of the decree on its own motion.

17. The Respondent vide paragraph 13 of the Replying Affidavit has equally called for the Court to balance of the interest of the appellant with her interests.

18. This Court is satisfied that the Appeal will be rendered nugatory if the application for stay is not granted and the application is hereby allowed in terms of prayer No. 3 thereof, and in order to preserve the suit property and balance the interest of the Respondent. The Land Registrar Nandi County is ordered to Register a restriction on Nandi/Kapkangani/522 within 14 days hereof and the appellant to deposit the original title of Nandi/Kapkangani/522 with the Deputy Registrar of this Court within 30 days hereof, failure to which the stay of execution orders lapse.

19. The restriction is to be registered pending hearing and determination of the Appeal, and the Deputy Registrar to have custody of the Original Title of Nandi/Kapkangani/522 as security for issuance of the stay of execution orders pending and determination of the Appeal.

20. Costs of the application in the cause.

25. Orders accordingly.

DATED at KAPSABET this 15th day of FEBRUARY, 2022.

HON. M. N. MWANYALE

JUDGE

In the presence of;

Mr. Melly for the Appellant/Applicant

Mr. Choge for the Respondent