



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT NAIROBI**

**ELC NO 459 OF 2012**

**JOSEPHINE EGWA MBELA (SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF**

**ERIC WILLIAM MBELA (DECEASED).....PLAINTIFF/APPLICANT**

**VERSUS**

**ELIZABETH WANJIKU MUCHIRA.....1ST DEFENDANT/ RESPONDENT**

**KILINCHI LIMITED.....2ND DEFENDANT/RESPONDENT**

**RULING**

**1.** This Is The Notice Of Motion Dated 21<sup>st</sup> December 2022 Brought Under Order 42 Rule 6 Of The Civil Procedure Rules, 2010 And All Enabling Provisions Of The Law.

**2.** It Seeks Orders:-

**1. Spent**

**2. Spent**

**3. That The Execution Of This Honourable Court's Order Given On The 11<sup>th</sup> November 2021 And Dated 18<sup>th</sup> November, 2021 Be Stayed Pending The Hearing And Determination Of The Intended Appeal; And**

**4. That Costs Of This Application Be Provided For.**

**3.** The Grounds Are On The Face Of The Application And Are Set Out In Paragraphs 1 To 10.

**4.** The Application Is Supported By The Affidavit Of Josephine Egwa Mbela, The Plaintiff/Applicant Herein, Sworn On The 21<sup>st</sup> December 2021.

**5.** The Application Is Opposed. There Is A Replying Affidavit Sworn By Elizabeth Wanjiku Muchira, The 1<sup>st</sup> Defendant/Respondent Sworn On The 22<sup>nd</sup> February 2022. There Is Also A Replying Affidavit Sworn By Adan Sheikh Ahmed, The 2<sup>nd</sup> Defendant/Respondent On The 22<sup>nd</sup> February 2022.

**6.** The Application Was Canvassed By Oral Submissions On The 1<sup>st</sup> March 2022.

**7.** Before I Embark On This Ruling. I Wish To Clarify On The Date Of The Judgment. During The Submissions By Counsel It Came To The Attention Of This Court That The Judgment Was Dated 18<sup>th</sup> November 2021.

**8.** I Have Gone Through The Court Record And It Is Clear That Judgment Was Delivered On 11<sup>th</sup> November 2021. The Date 18<sup>th</sup> November 2021 Is Clearly A Typographical Error. Under Section 99 Of The Civil Procedure Act I Took The Liberty To Amend The Date Of The Judgment To Read 11<sup>th</sup> November 2021.

9. It Is The Plaintiff's/Applicant's Submission That The Orders Of Stay Granted By The Court On 11<sup>th</sup> November 2021 Will Expire On 18<sup>th</sup> March 2021. She Stated That She Has Been Living On The Suit Property Since 2003 And She Has Nowhere To Go If She Is Evicted. She Also Stated That She Is Ready And Willing To Abide By Any Conditions Given By This Court As Regards Furnishing Security For The Due Performance Of The Decree. Further That The Appeal Has High Chances Of Success And The Same Will Be Rendered Nugatory If These Orders Were Not Granted.

10. The 1<sup>st</sup> Defendant/Respondent Submitted That She Legally Transferred The Suit Property To The 2<sup>nd</sup> Defendant. That On Delivery Of Judgment The Plaintiff Was Given One Hundred And Twenty (120) Days To Find Alternative Accommodation. Further That She Has Not Demonstrated That She Has No Means Of Securing Alternative Accommodation. She Prays That The Application Be Disallowed.

11. The 2<sup>nd</sup> Defendant/Respondent Submitted That The Plaintiff/Applicant's Application Has Not Satisfied The Conditions Set Out In Order 42 Rule 6(2) Of The Civil Procedure Rules. Further That The Plaintiff Was Given 120 Days To Vacate The Suit Property But She Has Not. That The Plaintiff/Applicant Has Not Filed An Appeal Long After The Delivery Of The Judgment. It Is Further His Submission That He Has Suffered Enormously For The Ten (10) Years The Plaintiff/Applicant Has Been In The House. He Prays That The Application Be Dismissed With Costs.

12. I Have Considered The Notice Of Motion And The Affidavit In Support. I Have Considered The Affidavits In Response, The Rival Submissions And The Authorities Cited. The Issues For Determination Are:-

***(I) Whether This Application Is Merited.***

***(ii) Who Should Bear Costs Of This Application?***

13. **Order 42 Rule 6** Of The Civil Procedure Rules Provides That:-

***“(1.) No Appeal Or Second Appeal Shall Operate As A Stay Of Execution Or Proceedings Under A Decree Or Order Appealed From Except In So Far As The Court Appealed From May Order But, The Court Appealed From May For Sufficient Cause Order Stay Of Execution Of Such Decree Or Order, And Whether The Application For Such Stay Shall Have Been Granted Or Refused By The Court Appealed From, The Court To Which Such Appeal Is Preferred Shall Be At Liberty, On Application Being Made, To Consider Such Application And To Make Such Order Thereon As May To It Seem Just, And Any Person Aggrieved By An Order Of Stay Made By The Court From Whose Decision The Appeal Is Preferred May Apply To The Appellate Court To Have Such Order Set Aside.***

***(2) 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.***

***(3) Notwithstanding Anything Contained In Subrule (2), The Court Shall Have Power, Without Formal Application Made, To Order Upon Such Terms As It May Deem Fit A Stay Of Execution Pending The Hearing Of A Formal Application.***

***(4) For The Purposes Of This Rule An Appeal To The Court Of Appeal Shall Be Deemed To Have Been Filed When Under The Rules Of That Court Notice Of Appeal Has Been Given.***

***(5) An Application For Stay Of Execution May Be Made Informally Immediately Following The Delivery Of Judgment Or Ruling.***

***(6) Notwithstanding Anything Contained In Subrule (1) Of This Rule The High Court Shall Have Power In The Exercise Of Its Appellate Jurisdiction To Grant A Temporary Injunction On Such Terms As It Thinks Just Provided The Procedure For Instituting An Appeal From A Subordinate Court Or Tribunal Has Been Complied With.”***

It Is Clear From Sub Rule (2) That The Applicant Must Meet Specific Conditions Before Orders Of Stay Of Execution Pending Appeal Can Be Granted.

14. The Principles That Guide A Court In Exercising Discretion In An Application For Stay Of Execution Pending Appeal Are Now Well Settled.

1. That The Application Has Been Brought Without Undue Delay.

2. That Unless Stay Is Granted The Applicant Shall Suffer Substantial Loss.

3. That The Applicant Has Furnished Security For The Due Performance Of The Decree.

15. In The Case Of **Feissal Amin Janmohammed T/A Dunvia Fowards Vs Shami Trading Co Ltd, [2014] Eklr**, Kasango J Stated As

Follows;

***“It Is Trite Law Therefore That A Stay Of Execution Is Generally Granted If The Applicant Has Successfully Demonstrated That A Substantial Loss May Result To Him Unless The Order Is Made; That The Application Was Made Without Unreasonable Delay And That The Applicant Has Offered Proper Security”.***

16. Similarly In The Case Of **Vishram Ravji Halai Vs Thornton & Turpin [1963] Ltd [1990] Klr 365** It Was Held That In Granting Stay Of Execution, The High Court’s Discretion Is Fettered By Three Conditions:-

***“Firstly, The Applicant Must Establish Sufficient Cause; Secondly, The Court Must Be Satisfied That Substantial Loss Would Emerge From A Refusal To Grant A Stay; And Thirdly The Applicant Must Furnish Security. The Application Must, Of Course, Be Made Without Unreasonable Delay”.***

17. It Is The Defendant’s/Respondent’s Submissions That This Application Has Been Filed After An Inordinate Delay. It Should Be Noted That On Delivery Of The Judgment The Plaintiff/Applicant Was Given 120 Days To Vacate The Suit Property. The Said 120 Days Are Due To Expire On 18<sup>th</sup> March 2022. This Application Was Filed On 21<sup>st</sup> December 2021. I Find That The Same Has Been Filed Without Unreasonable Delay.

18. It Is The Plaintiff’s/Applicant’s Submissions That She Will Suffer Substantial Loss If These Orders Are Not Granted. The Defendants/Respondents On The Other Hand Submitted That She Has Failed To Demonstrate What Loss She Will Suffer.

19. It Is The Plaintiff’s/Applicant’s Case That She Has Resided On The Suit Property Since 2003 And That She Has No Alternative Accommodation. In The Case Of **Antoine Ndiaye Vs African Virtual University [2015] Eklr**, Gikonyo J Cited The Holding In **Andrew Kuria Njuguna Vs Rose Kuria (Nairobi) Civil Case No 224 Of 2001 (Unreported)**, Where It Was Held As Follows:-

***“Coming To The Substantial Loss Likely To Be Suffered By The Applicant If T The Stay Order Is Not Granted, She Was Bound To Place Before The Court Such Material And Information That Should Lead This Court To Conclude That Surely She Stood A Risk Of Suffering Loss Moneywise Or Other, And Therefore Grant The Stay”.***

20. I Am Not Satisfied That The Plaintiff/Applicant Has Demonstrated That She Has No Means Of Securing An Alternative Accommodation. No Material Has Been Placed Before This Court To Show That The House Has Been Modified To Fit A Person With Special Needs.

21. The Plaintiff Applicant Has Been On The Suit Property For Ten (10) Years Since The Same Was Sold To The 2<sup>nd</sup> Defendant. Surely She Must Have Known That One Day She Will Be Required To Vacate. In The Case Of **Machira T/A Machira & Co. Advocates Vs East African Standard (No 2) [2002] Klr 63**. It Was Held That:-

***“.....To Be Obsessed With The Protection Of An Appellant Or Intending Appellant In Total Disregard Or Flitting Mention Of The So Far Successful Opposite Party Is To Flirt With One Party As Crocodile Tears Are Shed For The Other, Contrary To Sound Principle For The Exercise Of Judicial Discretion. The Ordinary Principle Is That A Successful Party Is Entitled To The Fruits Of His Judgment Or Of Any Decision Of The Court Giving Him Success At Any Stage. That Is Trite Knowledge And Is One Of The Fundamental Procedural Values Which Is Acknowledged And Normally Must Be Put In Effect By The Way Applications For Stay Of Further Proceedings Or Execution Pending Appeal Are Handled. In The Application Of That Ordinary Principle, The Court Must Have Its Sight Firmly Fixed On Upholding The Overriding Objective Of The Rules Of Procedure For Handling Civil Cases In Courts Which Is To Do Justice In Accordance With The Law And To Prevent Abuse Of The Process Of The Court”.***

22. The Plaintiff/Applicant Merely States That She Is Willing To Abide By Any Conditions To Be Given By This Court As Regards Security.

23. I Find That The Plaintiff/Applicant’s Application Does Not Meet The Requirements Set Out Under Order 42 Rule 6(2) Of The Civil Procedure Rules.

24. I Find No Merit In This Applicant And The Same Is Dismissed With No Orders As To Costs.

It Is So Ordered.

**Dated, Signed And Delivered Nairobi This 24<sup>th</sup> Day Of March 2022.**

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**L. KOMINGOI**

**JUDGE**

**In The Presence Of:-**

Mr. Mabachi For Mr. Mitey For The Plaintiff

Mr. Nyanjwa For Mr. Mumia For The 1<sup>st</sup> Defendant

Mr. Havi For The 2<sup>nd</sup> Defendant

Steve - Court Assistant