



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL NO. 11 OF 2019

CHARLES O. OMONDI..... APPELLANT

-VERSUS-

MAURICE NYANGINDE OKOYO..... RESPONDENT

RULING

BRIEF FACTS

CHARLES O. OMONDI the Appellant herein filed a Notice of Motion Application under Certificate of Urgency seeking for the following orders:

1. That the Application be certified urgent and heard on a priority basis (*spent*).
2. That the Honourable Court be pleased to issue a stay of execution of the Judgement delivered on the 5th day of May 2021 pending the hearing of this Application (*spent*).
3. That the Honourable Court be pleased to issue a stay of execution of the judgment issued on the 5th day of May 2021 pending the hearing and determination of the Appeal filed by the Appellant against the judgment/decree issued on the 5th day of May 2021.
4. That the costs of this application be in the cause.

The Application was based on grounds that the Appellant is currently residing on the subject property together with his family and that he was never informed of the entry of judgment of the court by his previous Advocates on record. That if the Appellant was made aware of the entry of the Judgment, he would have instructed his advocate to seek stay and file an Appeal. It was stated that the mistake of the Advocate should not be visited upon the litigant.

That the Respondent has obtained orders in Ukwala PMCC ELC NO. 8 OF 2018 where the OCS has been ordered to assist in evicting the Appellant.

The Application was supported by the Affidavit of CHARLES O. OMONDI who relied in the grounds of the Application.

On 20th December 2021, the court gave orders that the Respondent to file a reply within 7 days of service and parties to exchange submissions within 10 days of service.

MAURICE NYANGINDE OKOYO the Respondent herein filed a Replying Affidavit on 18th January 2022 where he stated that the Appellants Appeal KISUMU ELC APPEAL NO. 11 OF 2019 was dismissed and therefore there is no reason for stay of execution .That this Honourable Court can only grant stay pending the filing of or determination of an Appeal arising out of its judgment and the Application for stay is an afterthought by the Appellant who is guilty of latches and cannot shift blame to his former Advocates.

He further stated that the firm of Lugano & Lugano Advocates are not properly on record as they have failed to file a Notice of change of Advocates. That the Application is filed with an aim of preventing the Respondent from enjoying fruits of his Judgment.

Analysis and Determination

I have perused the court file and do confirm that parties failed to file their submissions as per the orders issued by this court on 20th December 2021.

The Application was to be canvassed by way of written submissions. I do find that the Appellant has failed to demonstrate seriousness in prosecuting his case however, I will proceed and determine the application on merit and apply the threshold set out in **Order 42 Rule 6 of the Civil Procedure Rules**.

The issues for determination in an application for stay of execution pending appeal are as provided for under **Order 42 rule 6 of the Civil Procedure Rules, 2010** which provide as follows;

“.....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 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 of stay shall be made under sub rule (1) unless-

a The court is satisfied that substantial/ loss may result to the applicant unless the order is made and 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 ultimate/y be binding on him has been given by the applicant.

The purpose of stay pending appeal is to preserve the substratum of the case especially in land matters where the character of the suit property may be changed while the appeal is pending. The applicant must establish the he/or she will suffer substantial loss if the order of stay is not granted.

In the circumstances of this matter judgment was entered on the 5th of May 2021 and yet the application is made after the lapse of more than six months and therefore is guilty of unreasonable delay. The applicant has not demonstrated to the court that he is likely to suffer substantial loss. The applicant relies on the mistake of counsel but does not tell the court that he attempted to reach his counsel for any inquiry before or after judgment and therefore the Application dated 20th December 2021 is not merited and is hereby dismissed with costs.

DATED AT KISUMU THIS 18th DAY OF MARCH, 2022.

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE