



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC CASE NO. 1 OF 2016**

**REBECCA MWIKALI JACOB.....PLAINTIFF**

**VERSUS**

**PETER NICHOLAS MUTUKU.....1<sup>ST</sup> DEFENDANT**

**STELLAMARIS NZILANI MUTUKU.....2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR MACHAKOS COUNTY.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion dated 23<sup>rd</sup> February 2021, the Plaintiff/Applicant sought for stay of execution of the order issued on 24<sup>th</sup> April 2020 pending hearing and determination of the appeal.

2. The application is supported by grounds on its face as well as the affidavit of **REBECCA MWIKALI JACOB**, the Plaintiff/Applicant. The applicant avers that judgment was delivered on 24<sup>th</sup> April 2020; that she is aggrieved by the said judgment; that she has filed a Notice of Appeal; that the record of appeal is ready for filing; that the appeal has high chances of success; that she stands to suffer as she has been in occupation of the suit land with her family for the last 37 years where she has extensively developed and established a home and that the Respondents have conceded to having never occupied the land since 1983.

3. The application is opposed. The 1<sup>st</sup> Defendant filed a replying affidavit sworn on 17<sup>th</sup> March 2021 where he deposed that the application lacks merit, is an afterthought and was filed 10 months after entry of judgment and the same is intended at denying the 1<sup>st</sup> and 2<sup>nd</sup> Defendant from enjoying the fruits of their judgment; that stay of execution cannot be granted pending a non-existing appeal; that the issue of the Plaintiff's occupation of the suit land for 37 years is a matter already determined by this court and the same is *res judicata*.

**SUBMISSIONS**

4. The applicant's counsel filed their submissions on 18<sup>th</sup> October 2021 and submitted that if the Applicant is evicted from the suit land, she stands to suffer irreparable injury as she has resided thereon for the last 50 years and therefore the appeal will be rendered nugatory yet it has high chances of success.

5. Counsel pointed out that the Applicant had annexed photographs showing developments and residential houses on the suit land. Counsel argued that the Respondents admitted never having occupied the suit land.

6. Counsel also submitted that the question as to whether the 2<sup>nd</sup> Respondent bought the suit land by a verbal agreement without grant of letters of administration in respect of the deceased husband is a matter that needs to be determined on appeal. Counsel contended that the Applicant had a right of appeal and his right of appeal should not be hindered. Counsel placed reliance on the case of **Samvir Trustee Ltd vs Guardian Bank Ltd Nairobi Milimani HCC 795 of 1997**.

7. Counsel emphasized that demolition of the Applicant's home and destruction of her farm produce will result in substantial loss.

8. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their submissions on 27<sup>th</sup> September 2021. They submitted that the application herein lacks merit, is an afterthought and was filed 10 months after judgment and 8 months after the Defendant's filed application for execution dated 7<sup>th</sup> July 2020; and the same ought to be dismissed. Counsel argued that stay can only be granted for sufficient cause. Counsel relied on the cases of **Vishram Ravji Halai vs Thornton & Turpin Civil Application No. Nai 15 of 1990 [1990] KLR 365**, **Victory Construction vs BM (a minor suing through next friend one PMM) [2019] eKLR**, **Suleiman vs Amboseli Resort Limited [2004] 2KLR 589**, **Velji Shahmad vs**

**Shamji Bros. and Popatlal Karman & Co [1957] E.A 438, James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR and Berber Alibhai Mawji vs Sultan Hasham Lalji & 2 Others [1990–1994] EA 337.**

9. Counsel argued that there cannot be a stay of execution pending a non-existent appeal. Counsel also argued that the argument that the applicant has been on the suit land for 37 years has been determined by this court hence the same is *res judicata*.

10. It was contended for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that they stand to suffer extreme prejudice should stay of execution be granted.

#### **ANALYSIS AND DETERMINATION**

11. I have carefully considered the application, the response and submissions of parties. The issue that arise for determination is whether the applicant has met the threshold for grant of stay pending appeal.

12. The law governing grant of stay pending appeal is provided for in Order 42 Rule 6(1) and (2) of the Civil Procedure Rules 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 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 of 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.”**

13. Principles for grant of stay pending appeal are well settled. In the case of ***Vishram Ravji Halai vs Thornton & Turpin [1990] KLR 365***, the court held that the jurisdiction of the High Court to grant stay pending appeal is fettered by three conditions as follows;

a. that there is sufficient cause

b. evidence that the applicant shall suffer substantial loss if stay is not granted

c. that the applicant shall furnish security; and

d. that the application must be made without unreasonable delay.

14. Essentially therefore this court’s discretion to grant stay of execution pending appeal is wide, but, the court must be satisfied that there is sufficient cause for grant of stay, that the applicant stands to suffer substantial loss if stay is not granted and that security is provided. Fundamentally, in considering whether to grant stay pending appeal, the court should balance the interests of both the applicants and the respondents and strive to deliver justice to both parties bearing in mind the overriding objective under Section 3 of the Environment and Land Court Act as well as Sections 1A and 1B of the Civil Procedure Act, without hindering the Applicant’s right of appeal.

15. In the instant application, I note that the Applicant has demonstrated that she is in occupation of the suit property, where she has established a home, by producing photographs to that effect attached to the supporting affidavit. This fact has not been denied by the Respondent, who has argued that the allegation of occupation has been determined by this court. The order made against the Applicant is an order of eviction, which order she has appealed against, therefore should eviction orders be executed, she stands to suffer substantial loss. A right of appeal is a fundamental right which the Applicant should be allowed to exercise. I have perused the record and I note that the Applicant filed a Notice of Appeal upon obtaining leave to appeal out of time. Though the Respondent has argued that the Applicant delayed in filing the application for stay, I note that an application to file an appeal out of time was prosecuted first before this application was heard. Since the applicant was granted leave to file appeal out of time on 6<sup>th</sup> November 2020 and proceeded to file the Notice of Appeal on 13<sup>th</sup> November 2020 and the instant application was filed on 23<sup>rd</sup> February 2021, it is my considered view that the application for stay pending appeal was filed without unreasonable delay. In the premises, I am satisfied that the Applicant has met the threshold for grant of stay pending appeal.

16. The upshot is that the application dated 23<sup>rd</sup> February 2021 is merited. I hereby grant stay of execution of the judgment entered on 24<sup>th</sup> April 2020 pending hearing and determination of the appeal.

17. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 16<sup>TH</sup> DAY OF MARCH 2022 THROUGH MICROSOFT**

**TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of:**

Mr. Wasonga for 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents

Mr. Tamata for the Plaintiff/Applicant

Ms Josephine Misigo- Court Assistant.