



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

HCCC NO. 21 OF 2011

LINDA NEWMAN.....PLAINTIFF/RESPONDENT

=VERSUS=

STEPHEN MKARE MULEWA.....DEFENDANT/APPLICANT

R U L I N G

1. The Application before me is the one dated 31st May, 2013 brought under Order 51 Rule 1, Order 22 Rule 22 and Order 42 Rule 6 of the Civil Procedure Rules, 2010.
2. The Defendant's/Applicant's Application is seeking for the following reliefs:-
 - a. **THAT the Honourable Court be pleased to grant orders of stay of execution of the Judgment and Decree of the court given on 19th April, 2013 pending Appeal.**
 - b. **THAT costs be in the cause.**
3. The Application is premised on the grounds that the Defendant intends to appeal against the Judgment of this court dated 19th April 2013; that the Plaintiff has continued to enjoy the usage of the property from the inception of this suit and that she should continue using the property without having it transferred in her name.
4. The Application is supported by the Defendant's/Applicant's Affidavit who has deponed that he has filed a notice of appeal and requested for proceedings for the purpose of filing the Record of Appeal.
5. According to the Applicant, there is imminent danger that the Judgment and Decree of this court may be executed before the intended appeal is heard and determined; that he has not delayed in the making of the Application and that he has prepared the Memorandum of Appeal and he is only waiting for the proceedings in order to lodge the appeal.
6. The Plaintiff/Respondent filed her Grounds of Opposition on 20th June, 2013 and stated that the Defendant/Applicant is guilty of laches and that the Defendant/Applicant has not complied with the conditions under Order 42 Rule 6 of the Civil Procedure Rules.
7. The Plaintiff/Respondent has further stated in her Grounds of Opposition that the application has been made in bad faith and is meant to deny and frustrate the Plaintiff/Respondent from enjoying the fruits of her Judgment and that this court is no longer seized of this matter.
8. Order 42 Rule 6 (1) of the Civil Procedure Rules provides that the court appealed from may for sufficient cause order stay of execution of a decree or order pending the hearing and determination of the appeal.
9. This court is therefore not *functus officio*, as argued by the Plaintiff's/Respondent's advocate to entertain the Application for stay of execution pending the hearing of the Appeal.

10. In an application for a stay of execution pending appeal, an applicant must satisfy the court that he may suffer substantial loss unless the order is granted and the application must have been made without unreasonable delay. The Applicant is also required to furnish security for the due performance of the decree.
11. The Applicant submitted that the suit property was his and that he had used a lot of energy in developing the property. The Applicant submitted that he will suffer loss in the event that the judgment was executed. The Applicant blamed his advocates for not representing him well.
12. The Applicant did not inform the court the loss he will suffer in the event the suit property is transferred to the Respondent as ordered by the court.
13. The Applicant has admitted in the Supporting Affidavit that he has not been using the property since the inception of this suit. Indeed, the Applicant has stated in his Application as follows:-

“THAT the Plaintiff is in occupation and utilization of the property to the full and no interference has been occasioned on her in any way.

THAT the plaintiff has continued to enjoy the property from inception of this suit and can comfortably continue on such occupation pending the hearing and determination of the appeal even if the property is not transferred to her name.”

14. The above averment by the Defendant/Applicant clearly shows that he will not suffer any loss if the Judgment of the court is not stayed. To the contrary, it is the Plaintiff who would not be able to use the suit property optimally for the business that it was intended for if the Judgement is stayed. I therefore do not find any merit in this application on that ground alone.
15. Though the Application was filed within reasonable time, the Applicant has not offered any security for the due performance of the decree in the event he loses the appeal.
16. In the circumstances, and for the reasons I have given above, I dismiss the Defendant's Application dated 31st May, 2013 with costs.

Dated and Delivered in Malindi this **16th** day of **July**, 2013

O. A. Angote

Judge