



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MALINDI**

**ELC CASE NO. 205 OF 2014(OS)**

**1. KADZO ANGORE KAZUNGU**

**2. SAFARI KAZUNGU CHOME.....PLAINTIFFS**

**VERSUS**

**ABDALLA SALIM OMAR.....DEFENDANT**

**RULING**

1. By their Notice of Motion dated 4<sup>th</sup> December 2019, Kadzo Angore Kazungu and Safari Kazungu Chome (the Plaintiffs/Applicants) pray for an order of stay of execution of the Judgment delivered herein on 20<sup>th</sup> September 2019 pending the hearing of an Appeal preferred in the Court of Appeal.

2. The application which is supported by an affidavit sworn jointly by the two Plaintiffs is based on the grounds: -

***a) That the Applicants have filed a Notice of Appeal against the Judgment;***

***b) That the Decree-holder is likely to evict the Applicants from the suit property and thereby render the Appeal nugatory and an exercise in futility;***

***c) That it is necessary to stay execution of the Judgment in the interest of justice to give the Applicants an opportunity to have their day in the Court of Appeal; and***

***d) That the Defendant/Decree holder will not be prejudiced because he is not in occupation of the suit property.***

3. The application is however opposed. By his Replying Affidavit sworn and filed herein on 10<sup>th</sup> January 2020, Abdalla Salim Omar (the Defendant) avers that the Plaintiffs have not brought the application within reasonable time considering the date of the Judgment.

4. The Defendant avers that he is self-employed as a businessman and hence he will be able to refund the costs of the suit in the event the intended appeal succeeds. He accordingly denies that the Plaintiffs will suffer any irreparable loss.

5. I have perused and considered the Plaintiff's application and the response thereto by the Defendant. I have equally perused and considered the rival submissions and authorities as placed before me by the Learned Advocates for the parties.

6. Order 42 Rules 6 (2) of the Civil Procedure Rules provides as follows: -

***“No order for stay of execution 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 that the application has been made without unreasonable delay;***

***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.”***

7. I think it is now widely accepted that the purpose of an application for stay of execution is to preserve the subject matter in dispute so that

the right of the appellant who is exercising his undoubted right of appeal are safe- guarded and the appeal if successful is not rendered nugatory.

8. For such a stay to be granted however, the Applicant must first and foremost satisfy the Court that he or she stands to suffer substantial loss unless the Orders of stay are granted. According to the Defendant, the execution of the Judgment herein cannot lead to any substantial loss to the Plaintiffs as the only execution process that can arise is for the payment of costs of the Plaintiffs' suit.

9. I note however that the Plaintiffs reside on the suit property wherein they claim to have made some developments. They came to Court seeking to be declared as the owners of the portions of the suit property that they occupy and in the circumstances, it is clear to me that they stand to lose their residence unless the Orders sought herein are granted.

10. In the premises, I am satisfied that the Plaintiffs stand to suffer substantial loss unless stay orders are issued. Accordingly, I hereby grant Prayer No. 3 of the application but on condition that the Plaintiffs do deposit the sum of Kshs 100,000/- in Court as security for the due performance of the decree.

11. The said sum to be so deposited within 45 days from the date hereof failure to which the application shall stand dismissed.

**Dated, signed and delivered at Malindi this 29<sup>th</sup> day of January, 2021.**

**J.O. OLOLA**

**JUDGE**