



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELCA NO. 17 OF 2020**

**KIHARA KIUNJURI.....APPLICANT/APPELLANT**

**VERSUS**

**HARRISON MACHARIA WAITHAKA.....1<sup>ST</sup> RESPONDEENT**

**JAMES MAHINGE MWANGI.....2<sup>ND</sup> RESPONDENT**

**WANGENYE KURIA.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Notice of Motion filed by the Applicant on the 8/12/2020 seeks orders for stay of execution of the judgement delivered on the 16/10/17 in SPMCC No 18 of 2014 pending the hearing and determination of the Appeal.
2. The application is premised on the annexed grounds and supported by the affidavit of the Applicant sworn on the same date and dated the 28/10/2020. In it the Applicant depones that he has filed an Appeal against the judgement of the SPM Court, which Appeal stands a high chance of success. That the Applicant stands to suffer substantial loss if the property on the suit land is demolished and that he is ready and willing to give such security as ordered by the Court in the due performance of the decree. Further that the application has been brought without any delay.
3. On the 9/12/2020 the parties elected to canvass the application by way of written submissions but as at the time of writing this Ruling, it is only the Applicant who did file written submissions.
4. In his submissions the Applicant reiterated the grounds in the application and further added that the Applicant has operated his business on the suit land since 1969 and any demolition before he is afforded the opportunity to exhaust all legal remedies available will occasion him substantial loss.
5. The application is not opposed. However, I shall proceed to determine it on its merits.
6. The issues for determination are; whether the orders of stay of execution should be granted; who meets the cost of the motion.
7. Stay of execution is guided by Order 42 Rule 6 of the Civil Procedure Rules, thus:-

“(1) No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except Appeal case of 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.”

8. Stay of execution is an equitable relief, which is exercised at the discretion of the Court. Like all discretionary reliefs, it must be exercised judiciously and within the confines of the law. It must not be extensively callous or whimsical. For one to succeed in an application for stay of execution, the following must be satisfied, that:-

(a) The application was brought without delay;

(b) Substantial loss may result to the Applicant unless the stay is granted; and

(c) Security for the due performance of the order or decree has been provided.

9. Going by the record the judgment complained of was delivered on the 16/10/19. On the 15/10/2020 the Court granted leave to the Applicant to file an Appeal out of time. This application was filed on the 24/8/2020 and therefore there is no delay in bringing this application.

10. In respect to the 2<sup>nd</sup> requirement of proof of substantial loss, the Applicant has contended that he has been operating his business on the premises since 1969 and allowing demolition before the Appeal is exhausted will occasion him substantial loss. I concur that the demolition of the building amounts to substantial loss.

11. In respect to the requirement of security of costs, Order 42 (6) (2) (b) states that it is the Court that orders the nature of the security the Applicant should give as may ultimately be binding on the Applicant. This is to ensure that the discretion bestowed on the Court is not fettered.

12. I find and order that the Applicant do deposit the sum of Kshs 100,000/- being security for the due performance of the decree.

13. In the upshot the motion dated the 28/10/2020 is allowed subject to the following terms;

a. Stay of execution is hereby granted pending the hearing and the determination of the pending Appeal.

b. The Applicant to provide security for the due performance of the decree in the sum of Kshs. 100,000/- (One Hundred Thousand only) within 30 days from the date of the ruling which sum should be deposited in an interest earning account in the joint names of both Advocates of the parties or a bank guarantee of a similar amount.

c. I make no orders as to costs

**14. It is so ordered.**

**DATED, SIGNED & DELIVERED AT MURANGA THIS 11<sup>TH</sup> DAY OF FEBRUARY 2021.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Mukuna Ndungu Kimani for the Applicant

Kirubi HB for Mbuthia for the 1<sup>st</sup> – 3<sup>rd</sup> Defendants

Court Assistant; Njeri