



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC CASE NO. 62 OF 2017**

**JOSEPH MUTUA ZAKAYO.....PLAINTIFF/RESPONDENT**

**VERSUS**

**1. THE COUNTY GOVERNMENT OF MAKUENI.....DEFENDANT**

**2. THE COUNTY SECRETARY, COUNTY GOVERNMENT OF MAKUENI.....DEFENDANT**

**3. THE MINISTER OF LANDS, MINING & PHYSICAL PLANNING**

**COUNTY GOVERNMENT OF MAKUENI.....DEFENDANT**

**4. THE CHIEF OFFICER LANDS, MINING & PHYSICAL PLANNING**

**COUNTY GOVERNMENT OF MAKUENI.....DEFENDANT**

**5. THE DIRECTOR, LANDS MINING & PHYSICAL PLANNING**

**COUNTY GOVERNMENT OF MAKUENI.....DEFENDANT**

**6. THE MAKUENI COUNTY LAND REGISTRAR.....DEFENDANT**

**7. THE CHIEF LAND REGISTRAR, NAIROBI.....DEFENDANT**

**8. THE CHAIRMAN NATIONAL LAND COMMISSION.....DEFENDANT**

**9. NATHAN MAKENZI.....DEFENDANT/APPLICANT**

**10. NELLY NDUKU MUTUA.....DEFENDANT/APPLICANT**

**RULING**

1. The application for determination is dated 3<sup>th</sup> July, 2020 filed by the 9<sup>th</sup> and 10<sup>th</sup> Defendants/Applicants under certificate of urgency on even date. It is brought under Order 42 Rule 6 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the Law.

2. The Applicants seek the following Orders: -

**i) Spent.**

**ii) Spent.**

**iii) That pending the hearing and determination of the intended appeal herein, an order be granted staying execution of the orders made by this Honourable Court on 28<sup>th</sup> May, 2020.**

iv) *That this Honourable Court makes appropriate orders to preserve the subject matter of the intended appeal herein.*

v) *That the costs of this application be provided for.*

3. The application is supported by the affidavit of Nelly Nduku Mutua sworn on her own behalf and that of the 9<sup>th</sup> Defendant on 1<sup>st</sup> July, 2020. The basis of the application is that judgment was entered in favour of the Plaintiff/Respondent on 28<sup>th</sup> May 2020 against the 1<sup>st</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants. That the Applicants are dissatisfied with the Judgment and that they have filed a Notice of Appeal against it. That they stand to suffer irreparable damage and that the intended appeal will be rendered nugatory if the orders sought are not granted.

4. The application is opposed by Joseph Mutua Zakayo, the Plaintiff/Respondent vide the replying affidavit sworn on 4<sup>th</sup> August, 2020. He has deposed that the Defendants/Applicants have not demonstrated that they will suffer substantial loss should the stay of execution of the judgment herein not be granted. The Respondent further urges that application is frivolous and prays that the same be dismissed with costs.

5. The parties duly filed their respective submissions as per the directions issued on 6<sup>th</sup> July, 2020. It is common ground from the parties' submissions that the prerequisite conditions for a grant of the orders sought herein are well spelt out under Order 42 Rule 6 (2) of the Civil Procedure Rules (2010). These are: -

i) **That substantial loss may result to the Applicant unless the order is made;**

ii) **That the application has been made without unreasonable delay;**

iii) **That security has been given by the Applicant for the due performance of the decree as may ultimately be binding on him.**

6. On substantial loss, the Defendants/Applicants maintain that they are apprehensive that the Plaintiff/Respondent will be unable to either pay back the decretal amount or return the suit property in the event that the intended appeal succeeds. They further argue that the Plaintiff/Respondent has begun construction of the suit property and that the appeal may be rendered nugatory if the property is not preserved. The Applicants have cited and annexed two authorities in support of the application namely: -

Ø Mohamed Omar -Vs- Mohamed Abubakar Ali [2017] eKLR; and

Ø National Industrial Credit Bank Ltd -Vs- Francis Wasike & another[2006] eKLR

7. In his submissions, the Plaintiff/Respondent asserts that the Defendants/Applicants have not demonstrated any substantial loss that they stand to suffer. No factual particulars or evidence has been annexed to the Defendants'/Applicants' supporting affidavit and as such there is no basis to find any substantial loss.

8. On the aspect of delay, it is noted that judgment herein was delivered on 28<sup>th</sup> May, 2020. Sixty (60) days stay of execution was granted. The Defendants/Applicants then filed a Notice of Appeal on 10<sup>th</sup> June 2020 and the application herein was filed on 3<sup>rd</sup> July, 2020. That is a span of about five weeks.

9. On security, the Plaintiff/Respondent has noted no willingness by the Defendants/Applicants to commit themselves to a specified amount for the due performance of the decree. As such, it is submitted that the Defendants/Applicants have not demonstrated sufficient cause to warrant the exercise of this Court's discretion in the Defendants'/Applicants' favour. The Respondent relies on the following authorities:

Ø Gladys Kemunto Aunga -Vs- Agnes Kemunto Mose [2020] eKLR;

Ø Kiraita Abuta -Vs- Richard Nyandika Nyangoya [2019] eKLR; and

Ø Equity Bank Limited -Vs- Taiga Adams Company [2006] eKLR;

10. On whether the Defendants/Applicants have satisfied the requirements of Order 42 Rule 6 (2) of the Civil Procedure Rules 2010, this Court's discretion is guided by the Court of Appeal decision in Butt -Vs- Rent Restriction Tribunal [1982] KLR 417 where it was held as follows: -

***“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.***

***2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.***

**3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**

**4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.**

**5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”**

11. In my view, the length of time from the date of judgment to filing the formal application herein was five weeks. I also note that I had granted temporary stay of execution for 60 days which was set to lapse on 28<sup>th</sup> July, 2020. The application was thus made in sufficient time when the threat of execution became apparent to the Applicants.

12. On substantial loss, I find that the Defendants/Applicants have not demonstrated in clear terms the nature of substantial loss they are likely to suffer should execution of the judgment herein proceed. In fact, the Defendants/Applicants have merely repeated that they stand to suffer substantial loss without discharging the evidentiary burden attached thereto. I am minded to agree with Platt Ag. J.A. (as he was then) when he held as follows in Kenya Shell Ltd -Vs- Kibiru [1986] KLR 416:

**“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented.”**

13. It is a misapprehension to maintain that the suit property, which I have already determined in the Plaintiff's/Respondent's favour as rightfully his, is at any danger of being wasted. Additionally, no evidence has been tendered to justify that the Plaintiff/Respondent is a man of straw and that he will be unable to repay the decretal amount. Lastly, the Defendants/Applicants have not expressed their willingness in the supporting affidavit annexed to the application that they would be willing to abide by such order for security as this Court will order. I can only agree with the Plaintiff's/Respondent's submission that the application is being made in bad faith with an intention to hamper valid execution of the judgment.

14. Given the above findings, it is my view that there is no sufficient cause to inhibit the Plaintiff's/Respondent's right to enjoy the fruits of his judgment. The application is hereby dismissed with costs to the Plaintiff/Respondent.

Signed, dated and delivered at Makueni via email this 9<sup>th</sup> day of **February, 2021**.

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**MBOGO C.G.**

**JUDGE**

**Court Assistant: Mr. Kwemboi**