



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 507 OF 2014

FRANCIS MAKUBA MUKANDAPLAINTIFF

VERSUS

FELIX SAKWA MUTSWENJE.....DEFENDANT

RULING

The application is dated 12th November 2020 and is brought under Article 50 (2) (q) of the Constitution 2010, Court of Appeal Rules order 12 seeking the following orders;

1. That this honourable court orders a stay of execution of its judgment dated 28th February, 2019 till an on-going appeal on the same case is heard and determined.
2. That costs of this suit be determined.

It is supported by the affidavit of Francis Makuba Mukanda and on the following grounds that he did not agree with the 29th February, 2019 judgment by this honourable court that awarded two acres of LP East Wanga/Malaha/1767, land parcel to the respondent. That he has since sought the leave of the court of appeal in Kisumu to appeal the verdict of this court in its totality. That he prays that this honourable court stays the execution of the 28th February, 2019 order relating to the afforested land parcel until this appeal is heard and determined. That the defendant herein has through his Counsel Barusi & Smart Advocates served him with his intention to execute the 28th February, 2019 order. That his appeal case stands high chances of success at the Court of Appeal.

The second application is dated 9th November 2020 and is brought under Sections 1A, 1B and 3A of the Civil Procedure Act; Order 9 rules 9 & 10 of the Civil Procedure Rules, 2010 seeking the following orders;

1. That the firm of Balusi & Smart advocates be deemed to have come on record for the defendant in place of J.J. Mukavale Advocates.
2. That Deputy Registrar of this honourable court to execute the relevant mutation forms, transfer form and all necessary documents on behalf of the plaintiff/respondent for purposes of having a portion measuring two (2) acres be hived off from land parcel number E/Wanga/Malaha/1767 and be transferred to the defendant/applicant as the absolute owner.
3. That the plaintiff/respondent to bear the costs of this application.

It is based upon the following grounds that there is a duly executed consent to change of advocates dated 10th March, 2020 permitting the firm of Balusi & Smart Advocates to take over the conduct of the defendant's case in place of the firm of J.J. Mukavale Advocates. Vide the judgment delivered on 28th February, 2019, this honourable court decreed that the defendant/applicant herein is the owner of a portion measuring 2 acres out of land known as E/Wanga/Malaha/1767 (the suit land) and ordered the plaintiff to transfer the said portion to the defendant/applicant. The plaintiff/respondent has refused to comply with the aforesaid judgment despite a demand letter having been issued to him and despite him being fully aware that there exist no orders staying the implementation of the said judgment. The plaintiff/respondent failed to file a substantive appeal challenging the judgment of this honourable court hence the Notice of Appeal stands withdrawn under the law. The only pragmatic way to have the judgment of this honourable court implemented following the plaintiff's refusal to co-operate is to empower the Deputy Registrar of this court to sign ever document required to be signed by the plaintiff for purposes of carrying out the subdivision of the suit land and transferring the decreed portion to the defendant/applicant.

The third application is dated 22nd February 2021 and is brought pursuant to Article 50 (2) (q) of the Constitution 2010, Court of Appeal Rules order 12 seeking the following orders;

1. That the plaintiff herein be deemed to be appearing in person after dispensing with the services of his counsel Malala and Company Advocates.
2. That this honourable court orders a stay of execution of its judgment dated 28th February, 2019 till a request to file an appeal out of time is decided on by the Court of Appeal in Kisumu.
3. That costs of this suit be determined

It is supported by the affidavit of Francis Makuba Mukanda and based on the grounds that he did not agree with the 29th February, 2019 judgment by this honourable court that awarded two acres of LP East Wangi/Malaha/1767, to the respondent. Court of Appeal rules allow for an appeal that comes after the mandatory 30 days. That he has since sought the leave of the Court of Appeal in Kisumu to appeal the verdict of this court in its totality. That he prays that this honourable court stays the execution of the 28th February, 2019 order relating to the afforested land parcel until the permission to file an appeal out of time is decided on by the Court of Appeal of Kenya in Kisumu. That he is informed that the Court of appeal in Kisumu is not in session at the moment.

The defendant/respondent opposes the application dated 22nd February, 2021 on the grounds that the application dated 22nd February, 2021 is sub-judice, duplex and vexatious because the relief sought for therein as well as the preferred ground are material identical or similar to those contained in an earlier application dated 12th November, 2020. The bringing of the said application dated 22nd February, 2021 constitutes an abuse of the court process designed to waste judicial time.

This court has carefully considered the application and the submissions herein. The first and third applications are ones for stay pending appeal. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the Civil Procedure Rules as follows:

“No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”

Order 42, rule 6 states:

“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; 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.”*

The appellant needs to satisfy the Court on the following conditions before he can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and
3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

The principles governing the exercise of the court’s jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of *Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR)*, thus:

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

- 1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,*
- 2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”*

The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in *Chris Munga N. Bichange vs Richard Nyagaka Tongi & 2 Others eKLR* where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus:-

“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

In the case of Mohamed Salim T/A Choice Butchery Vs Nasserpuria Memon Jamat (2013) eKLR, the court stated that:-

“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right”

We are further guided by this court’s decision in Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997, at Page 4 as follows:

“ . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

From the grounds, the applicant who was dissatisfied with the judgement delivered on 29th February, 2019 and has appealed against the said judgement. That the said appeal has high chances of success. Be that as it may, this court is not persuaded, that the appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, I am not persuaded that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the applicant has not fulfilled any of the grounds to enable me grant the stay. I find the application dated 12th November 2020 and the one dated 22nd February 2021 have no merit and I dismiss them with costs. The second application dated 9th November 2020 is one for the execution of the said judgement dated 28th February 2019. I find that there being no stay of the judgement the application it is merited and I grant the same as prayed.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 24TH MARCH 2021.

N.A. MATHEKA

JUDGE