



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

APPEAL CASE NO. 1 OF 2021

HINDIA IBRAHIM ADAN.....1ST APPELLANT/APPLICANT

COUNTY GOVERNMENT OF WAJIR.....2ND APPELLAN/APPLICANT

VERSUS

ABDI HASSAN SAMATAR.....RESPONDENT

RULING

This application is dated 15th January, 2021. It states that it has been brought to court under order 42 rule 6 and Order 51 of the Civil Procedure rules 2010, section 3A Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of the law. It seeks the following orders:

- 1) **THAT** this application be certified urgent and service be dispensed with in the first instance.
- 2) **THAT** an order of stay of execution be issued pending the hearing and determination of the appeal.
- 3) **THAT** costs be provided for.

The application is supported by the affidavit of Hindia Ibrahim Adan who avers that the Respondent herein sued her in ELC suit No. 8 of 2018 claiming the suit plot herein. It is her case that she is the bona fide owner of the subject plot having being in occupation of the same from the year 1992 and was lawfully allocated the same by the County Government of Wajir.

It is his averment that the lower Court ruled in favour of the Respondent, which decision she alleges was without consideration of important material facts, and in total disregard of her evidence culminating in an erroneous judgment and miscarriage of justice.

In addition, she avers that the imminent eviction from the subject plot would cause her irreparable damage, disinherit her of the property and render her destitute unless this court issues the sought orders herein.

Further, she avers that her appeal raises triable issues and substantive issues with high probability of success and therefore urged the court to allow the instant application as in any event the Respondent will not suffer any prejudice if the orders sought are granted.

Vide their written submissions dated 15th March, 2020 and filed on 17th March, 2020 the applicant submitted that she has met the grounds for grant of stay of execution by this court, in that she has an arguable appeal with high probability of success, that the instant application was filed without delay and that if the application is denied the appeal would be rendered nugatory as the Respondent would alter with the status of the suit property and the issue of security does not arise as the decree is not in monetary and quantifiable terms. The applicants relied in the following authorities of **Nken vs Holder U.S 418(2009)**, **Moi High School Kabarak and another VS Malcolm Bel SC Application No. 12 & 13 of 2013**, **Peter Ondande T/A Spreawett Chemis v Josphine Wangari Karanja (2016) eklr and Singh VS Runda Estates Ltd (1960) EA 263**.

In response to the application, the Respondent filed a Replying affidavit sworn by Abdi Hassan Samatar dated 16th February, 2021. He opposed the instant application averring that the suit land is his property as confirmed by the 2nd appellant herein, and that the trial court arrived at the proper determination of the matter based on facts and evidence and the law.

In addition, he avers that the applicant will not suffer any irreparable loss as she is not in occupation of the suit land as the subject land is unoccupied as per the photographs produced. Further, he averred that the appeal does not raise triable issues and that the court ought to exercise its discretion by disallowing the application.

In sum, he urged the court to dismiss the instant application as unmerited as the same is made in bad faith and amounts to an abuse of the court process as no security has been offered.

Through their filed written submissions dated 19th March, 2021 and filed on 22nd March, 2021 the Respondent submitted that the appellant application is grounded on Rule 5(2)(b) of the Court of Appeals Rules which do not apply in the instant case, as the instant application is based on Order 42 Rule 6. It is their submissions that the applicant ought to have demonstrated that she will suffer substantial loss if the court fails to issue the sought stay orders.

They submit that the applicant has failed to demonstrate and lay basis to justify her apprehension that she could suffer substantial loss in the event that the sought orders are not granted. It is their position that no plausible reason has been tendered except the allegation that she has filed an appeal which in her estimation has high chances of success and therefore the court should disallow the application. They relied in the cases **Mutera ‘m Limbutu vs M’Imathiu Mwaricha(2005) eKLR**, **Glencoe Grain Limited VS Kabansora Millers Ltd Misc Civil Case No. 400 of 2002 (UR)** and **Kenya Shell Ltd vs Benjamin Karuga Kibiru & Others (1982-88)1 KAR 1018**.

Determination

The Court has carefully considered the whole proceedings and the said Judgment issued by the Subordinate Court herein. The Court has also considered the written submissions, the cited authorities and provisions of **Order 42 Rule 6(2)**.

The above provisions of law set out the principles that the court should consider while deciding whether to grant **Stay of Execution Pending Appeal**. These are:-

“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.”

Further, it was stated in in this regard in **Civil Appeal No.107 of 2015, Masisi Mwita V Damaris Wanjiku Njeri (2016) eKLR**, that:-

“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely;- Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.

In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo...Vs...Straman EA Ltd (2013) as follows:-

“In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory.

These twin principles go hand in hand and failure to prove one dislodges the other”

This Court will then proceed to determine whether the Appellant/Applicant herein satisfied the required standard for grant of stay orders pending Appeal

On whether the applicant will suffer substantial loss, It is apparent to this court that as per the photographs produced by the Respondent, the subject parcel of land is bare and undeveloped and therefore the applicant cannot be said to be in occupation of the same. Therefore it is clear to me that there is no danger of imminent substantial loss.

On the issue of security, the applicant has furnished none and claims that the orders in favour of the Respondent are not in quantifiable terms and therefore the same does not suffice. Indeed, it is trite that it is not the duty of the Court to deny a successful litigant the fruits of his/her Judgment.

Consequently and in view of the above it is my finding that the instant application has not met the threshold for grant of the sought orders of stay and therefore the same lacks merit and is dismissed. Costs shall abide the event.

It is so ordered.

READ AND SIGNED IN THE OPEN COURT AT GARISSA THIS 20TH APRIL, 2021.

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HON. E. C. CHERONO

ELC JUDGE

In the presence of:

Ayunda holding brief for Wanyoike for Applicant

Marube – I am for the Respondent

Fardoswa – Court Assistant