



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 551 OF 2008

CHARLES ZABLON MWANIKI.....PLAINTIFF/RESPONDENT

- VERSUS -

JACOB NEYOLE.....1ST DEFENDANT/APPLICANT

PHOEBE KARANI.....1ST DEFENDANT/APPLICANT

GLADYS KAMASA.....1ST DEFENDANT/APPLICANT

PASTOR DAVIS KIFUNDE.....1ST DEFENDANT/APPLICANT

DR. PEREZ OLINDO1ST DEFENDANT/APPLICANT

(ALL SUED AS OFFICIALS OF FRIENDS CHURCH OF KENYA (QUAKERS))

RULING

1. This is the Notice of Motion dated 21st January 2021 brought under order 42 rule 6 of the Civil Procedure Rules, 2010 and all other enabling provisions of law.

2. It seeks orders:-

1. Spent.

2. Spent.

3. That pending hearing and determination of the appeal, there be a stay of execution of the judgment of Honourable L. Komingoi J delivered on 10th December 2020.

4. That costs of this application be provided for.

3. The grounds are on the face of the application and are set out in paragraphs 1 to 7.

4. The application is supported by the affidavit sworn by Gladys Kamsa, the 3rd defendant/applicant sworn on the 21st January 2021.

5. The application is opposed. There are grounds of opposition dated 10th February 2021 filed by the plaintiff/respondent.

6. The application was canvassed by oral submissions on 8th March 2021.

7. I have considered the notice of motion and the affidavit in support. I have also considered the grounds of opposition and the oral submissions. The issues for determination are:-

i. Whether the defendants'/applicants' application meets the threshold for grant of orders of stay of execution pending

appeal.

ii. Who should bear costs?

8. The principles guiding the grant of orders of stay of execution pending appeal are well settled. **Order 42 rule 6(2)** of the Civil Procedure Rules, 2010, provides that:-

“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.”

It is clear from the above provisions that for an order of stay of execution pending appeal to be granted, specific conditions must be met by the applicant.

9. I have considered the notice of motion herein and I find that it has been brought without undue delay.

10. It is the defendants'/applicants' contention that the appeal has high chances of success. That it risks being evicted from the suit property hence it will suffer substantial loss. It has put forward the cases of **Reg Noil Kenya Limited vs Winfred Njeri Karanja [2019] eKLR; Paul Kamura Kirunge vs John Peter Nganga [2019] eKLR.**

11. The plaintiff/respondent on the other hand contends that this application is an abuse of the court process. That this court having rendered a final decision the defendants/applicants ought to have moved the Court of Appeal for this order. He prays that the application be dismissed with costs.

12. I have considered the oral submissions. I find that the defendants/applicants has made out a good case for grant of the orders sought. In the case of **Samvir Trustee Ltd vs Guardian Bank [2007] eKLR**, the court held thus:-

“It is my humble view that for the applicant to obtain a stay of execution it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention.....”

I am satisfied that the defendants/applicants have demonstrated that they will suffer substantial loss if these orders are not granted.

13. Also in the case of **Musisi Mwita vs Damaris Wanjiku Njeri [2016] eKLR** the court held that:

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another vs Thornton & Turpin Ltd where the Court of Appeal (Gacheru JA, Chesoni and Cockar Ag JA) held that:-

“The High Court’s discretion to order stay of execution of its order or decree is unfettered 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 Wakolo vs Stratmen EA Ltd [2013] eKLR 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”.

14. I have considered the circumstances of this case. I find that the defendants'/applicants' application meets the requirements as set out under order 42 rule 6 of the Civil Procedure Rules.

15. In conclusion, I find merit in this application and I grant the orders sought namely:-

a. That an order for stay of execution of the decree emanating from the judgment delivered on 10th December 2020 is hereby granted pending the hearing and determination of the intended appeal on condition that the defendants/applicants do deposit a sum of Kshs.500,000 being security for costs within thirty (30) days from the date of this ruling. In default the orders of stay shall lapse.

b. That costs of this application be borne by the defendants/applicants.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 15TH DAY OF APRIL 2021

.....

L. KOMINGOI

JUDGE

In the presence of:-

Ms Mumbi for Mr. Maina for the Plaintiff

Ms Nekesa for the Defendants

Phylis -Court Assistant