



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCC NO. 511 OF 2014

GRACE ANDESO INDECHE.....PLAINTIFF

VERSUS

WYCLIFFE INDEKWA OMUYONGA.....1ST DEFENDANT

JOSHUA NJEKA MBAYI.....2ND DEFENDANT

RULING

1. By Notice of Motion dated 5th October 2021, the defendants seek the following orders:

a. [Spent]

b. [Spent]

c. THAT the Honourable Court be pleased to order for a stay of execution of the orders issued in the suit herein pending the hearing and determination of the Defendant's/Applicant's intended appeal to the court of appeal.

d. THAT costs of this application be provided for.

2. The application is supported by an affidavit sworn by the first defendant. He deposed that being dissatisfied with the judgment delivered herein on 30th April 2020, he duly filed a notice of appeal and that the plaintiff has extracted a decree which he may execute any time. That the plaintiff has started threatening him that she will evict him from his portion of the suit property. He added that his appeal has high chances of success and that he will suffer irreparable loss if stay of execution is not granted because the respondent will displace him and his family from the suit property.

3. The plaintiff opposed the application through a replying affidavit in which she deposed that she has already conducted execution as per decree issued on 7th October, 2020 and that as it stands now, land parcel no. Kisa/Mushiangubu/1453 has been subdivided in to two parcels known as Kisa/Mushiangubu/1885 and Kisa/Mushiangubu/1886 which have been registered in her name and that of her son Nelson Omwanda respectively. She further deposed that the applicants filed the notice of appeal way back over a year ago on 7th May, 2021 and that the applicants have not filed a record of appeal at the Court of Appeal thus making them guilty of laches. She further deposed that it's been more than a year since the decree was issued which amounts to inordinate delay.

4. Parties were ordered to canvass the application through written submissions. The respondent did not file any submissions.

5. The applicants submitted that they have satisfied the conditions under **Order 42** of the **Civil Procedure Rules** and that they will be evicted from their portion of the suit land and the same transferred to third parties unless stayed is granted. They urged the court to grant the orders sought.

6. I have considered the application, the affidavits and the submissions. This court's jurisdiction to grant stay of execution pending appeal is guided by **Order 42 rule 6 (1) and (2)** of the **Civil Procedure Rules, 2010** which provides as follows:

6.(1) No appeal or 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 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 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.

7. The purpose of stay pending appeal is to preserve the substratum of the case especially in land matters where the character of the suit property may be changed while the appeal is pending. The applicants must demonstrate that substantial loss will result to them if stay is not granted and that the application has been made without unreasonable delay. The applicants are further required to give such security as the court may order for the due performance of the decree. See **Kenya Power & Lighting Co. Ltd v Kigaita Ngare Unduthu & 36 others [2020] eKLR** and **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**.

8. Whether or not to grant the remedy of stay of execution pending appeal is a matter of judicial discretion. Such discretion must be exercised judiciously while bearing in mind the need to balance between the two competing interests of a party who has a judgment in his favour and another who is desirous of exercising his right of appeal. The on the party seeking stay to prove that he has met the threshold set in **Order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010**.

9. Judgment in this matter was delivered on 30th April 2020 while the present application was filed on 5th October 2021, over one and a half years after delivery of judgment. No valid explanation has been offered for the delay which I find to be unreasonable delay.

10. In the course of the delay in bringing the application, the respondent moved to have land parcel no. Kisa/Mushiangubu/1453 subdivided in to two parcels known as Kisa/Mushiangubu/1885 and Kisa/Mushiangubu/1886 which have been registered in her name and that of her son, a fact which has not been controverted by the applicants. In those circumstances, the applicants are attempting to shut the stable door after the horse has bolted and I am not persuaded that they will suffer any substantial loss if stay is not granted.

11. An applicant seeking stay pending appeal is also required to provide security for the due performance of such decree or order as may ultimately be binding on him. The applicants have not offered any security.

12. In view of the foregoing discourse, I do not find merit in Notice of Motion dated 5th October 2021. I dismiss the application with no order as to costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 8TH DAY OF MARCH, 2022

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the plaintiff

No appearance for the defendants

Court Assistant: E. Juma