



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT

AT ISIOLO

ELC APPEAL NO. 001 OF 2021

GOLICHA ROBA TOTO.....PLAINTIFF

VERSUS

ZEINAB ABDIKADIR.....1ST RESPONDENT

COUNTY GOVERNMENT OF ISIOLO.....2ND RESPONDENT

RULING

1. This application is dated 8/6/2021 and seeks the following orders:

1. **THAT** this application be certified urgent, service in the first instance be dispensed with and interim orders be granted pending service and hearing of the application.
2. **THAT** this Honourable Court be pleased to order stay of execution of the **Judgement delivered on 27th May, 2021 by Honourable Justice Y.M. Angima in the E.L.C Court of Kenya at Meru vide ELC APPEAL CASE NO. 122 of 2019** pending the hearing and determination of this Application.
3. **THAT** this Honourable Court be pleased to order stay of execution of the **Judgement delivered on 27th May, 2021 by Honourable Justice Y.M. Angima in the E.L.C Court of Kenya at Meru vide ELC APPEAL CASE NO. 122 of 2019** pending the hearing and determination of the intended Appeal by the applicant.
4. **THAT** this Honourable court be pleased to grant any other orders and/or relief befitting the circumstances.
5. **THAT** the costs of this Application be provided for.

2. The application is supported by the affidavit of Zeinab Abdikadir, the 1st respondent/applicant sworn on 8/6/2021 and has the following grounds:

- 1) **THAT** a Judgement delivered on 27th, May, 2021 by Honourable Justice Y.M Angima in the E.L.C Court of Kenya at Meru vide E.L.C APPEAL CASE NO. 122 of 2019 was in FAVOR of the Appellant/Respondent.
- 2) **THAT** the Respondent/Applicant being dissatisfied with the said Judgement, intends to file Appeal in court of Appeal at Nyeri against the said whole Judgement and the said Appeal thereof shall raise serious points of law and facts and has overwhelming chances of success.
- 3) **THAT** the applicant (sic) dwelling on the suit plot are in the verge of being demolished or destroyed and thus the urgency of the prayers sought hereof.
- 4) **THAT** there is no stay of execution and should execution proceed before the intended Appeal is heard and determined, the appeal will be rendered nugatory.
- 5) **THAT** should execution proceed as against the Applicant, she will suffer injustice, irreparable loss and damage.
- 6) **THAT** it is not likely that the Appellant/Respondent would be able to reconstitute the Applicant in the event the Appeal succeeds.

7) **THAT** this Application has been brought timeously without unreasonable delay.

3. The application was canvassed by way of Written Submissions.

4. The applicant's submissions are that:

a) The applicant would suffer substantial loss if stay of execution is not granted and this would prejudice the outcome of the appeal in Nyeri Civil Appeal No. E077 of 2021.

b) The application was filed without delay as Judgement was delivered on 27/5/2021 and the appeal was filed on 9/6/2021, exactly 2 weeks after delivery of the judgement.

c) That he deposit of security was not mandatorily required because the applicant was in possession and had made immense developments on the suit property.

d) That costs should follow the event.

5. The submissions of the appellant's respondent are to be the effect:

a) Under Order 42 Rule 6 (2) of the Civil Procedure Rules, in addition to satisfying the need to demonstrate that he would suffer substantial loss, it was mandatory that security must be deposited with court.

b) That the appellant would not suffer substantial loss if stay is not granted as the applicant had forcefully entered the appellant/respondents property and damaged his property.

c) There was undue delay on the part of the applicant in filing this application for order of stay as the Judgement was delivered on 27/5/2021 but the applicant filed the Memorandum of Appeal on 8th November, 2021 six months after delivery of the Judgement.

6. The 2nd respondent's submissions were to the effect:

a) The applicant had not demonstrated that he would suffer substantial loss if stay was granted.

b) The applicant had not furnished any security as required by law.

7. The applicant has submitted that there was no requirement to furnish security as the applicant was in possession and had made immense developments on the property. With due respect I disagree. Order 42 Rule 6 of the Civil Procedure Rules states unequivocally that: No order for stay of execution shall be made under sub-rule (i) unless:

a)

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".

8. The 2nd respondent have argued that the appeal was filed six months after the judgment was delivered. However, they do not dispute the claim by the applicant that he filed a Notice of Appeal exactly 2 weeks after the Judgment was delivered. It is clear that an appeal to the court of appeal rightly becomes an appeal upon filing of a Notice of Appeal. Therefore, I dismiss the 2nd respondent's argument in this respect.

9. As there is already of an appeal, I opine that this is adequate demonstration that the applicant would suffer substantial loss should he succeed in the appeal and the stay prayed for in this application is not granted.

10. Regarding provision of security, Order 42 states that no stay of execution shall be made unless security is furnished. This is a mandatory requirement. But issues should not be obfuscated. The requirement is that security should be furnished before an order of stay of execution is implemented. In my view and in the interest of Justice, this Court can grant an order of stay of execution conditional upon the furnishing of security by the applicant within a stipulated time line.

11. Considering the totality of the circumstances of this application, the following orders are issued:-

a. Conditional stay of execution is granted PROVIDED that the applicant will deposit with court as security the sum of Kshs. 600,000/= within 30 days of the date of the delivery of this ruling, failing which the conditional stay granted herein shall automatically lapse.

b. Costs shall be in the cause.

DELIVERED IN OPEN COURT AT ISIOLO THIS 7TH DAY OF MARCH, 2022 IN THE PRESENCE OF:

COURT ASSISTANCE: BALOZI

MRS OTIENO FOR THE 1ST RESPONDENT

KEN MURIUKI FOR THE 2ND RESPONDENT

NYENYIRE H/B KITHEKA FOR THE APPLICANT

JUSTICE P. M. NJOROGE

JUDGE