



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KITUI

ELC APPEAL NO. 32 OF 2021

(FORMERLY ELC CIVIL APPEAL NO. 5 OF 2021 AT MACHAKOS)

MUTETHYA ALI.....APPELLANT

VERSUS

GREGORY MATHEW KYALO.....RESPONDENT

RULING

1. The application before the court is dated 20th April 2021. The same is brought under Order 42 Rule 6 and Order 51 of the Civil Procedure Rules. Prayer 1 and 2 of the application are spent and only prayer 3 of the application remain for determination and the same seeks the following order;

“THAT the Honorable Court be pleased to issue an order of stay of execution of the judgement and ruling delivered in the CM’s ELC Case Number E003 of 2021 by the Honorable M Kasera, SPM on 25.3.2021 pending hearing and determination of the appeal”

2. The Applicant states that judgement was entered in the trial court on 25.3.2021 and being dissatisfied by the said judgement she preferred the instant appeal. The Applicant claims that the Respondent had issued verbal threats the he would demolish the Appellants buildings by 25.4.2021 and that unless an order of stay of execution is granted the appeal will be rendered nugatory.

3. The Applicant states that on receiving the trial court judgement the Respondent immediately proceeded to partially demolish her house regardless of there being an order of stay of execution for 30 days issued by the subordinate court. The Applicant further claims that the Respondent scared away her tenants and threatens to demolish the rest of the buildings.

4. The Applicant further states that she is ready and willing to abide by any conditions that will be imposed by the Court. She further states that the respondent will suffer no prejudice if the application is allowed.

5. The Respondent filed a replying affidavit and submissions where he reiterated the facts that led to judgement being entered in his favour by the trial court. He has further stated that he is in the process of constructing a Petrol Station on his parcel of land but the Appellant is determined to ensure that he does succeed and that was the reason she refused to accept the report of the Surveyor/Registrar.

6. That the acts of the Applicant have caused and continue to cause untold financial losses as he has had to stop the construction and yet he has running contracts and financial obligations.

7. Stay of execution pending appeal is provided for under Order 42, rule 6 of the Civil Procedure Rules. Rule 6 (2) provides no order for stay of execution shall be made under sub rule (1) unless the court is satisfied that;

i) substantial loss may result to the applicant unless,

ii) the order is made and that the application has been made without unreasonable delay;

iii) and 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. In the case of **Kenya Shell v Kibiru and Another (1986) KLR 410, Platt Ag. JA** (as he then was) emphasized the fact that the applicant must prove that he stands to suffer substantial loss and if that is proved such loss must be prevented. The Court stated that:

“It is usually a good rule to see if Order XLI Rule 4 of the civil Procedure Rules can be substantiated. If there is no evidence of

substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”

9. Has the Applicant shown that he stands to suffer substantial loss? The Applicant states that the Respondent has already demolished part of her houses. The Respondent further threatened her tenants that he would demolish the rest of the buildings forcing them to vacate.

10. Further, In the famous decision on this aspect cited to this court by the Respondents, namely **Butt v Rent Restriction Tribunal (1979) e KLR, Madan JA** stated that:

“The litigants and their professional advisors are the best judges of their affairs. If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

*It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:**

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

11. In the case of **Kenya Shell v Kibiru and Another (Supra) Platt Ag. JA** (as he then was) observed that: -

“It is usually a good rule to see if Order XLI Rule 4 of the civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”

Earlier on, **Hancox JA** in his ruling observed that:

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would... render the appeal nugatory.....

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

12. I have considered the provisions of Order 42 Rule 6 of the Civil Procedure Rules and the above cited authorities on the conditions to be met by an applicant for grant of orders of stay of execution pending appeal. The Respondent has stated that it was his intention to build a petrol station on his land and I believe on the portion of land that is the subject of the dispute herein. I find that such construction on the disputed portion of the land would change the nature of the land in dispute to the detriment of the Appellant in case she is successful in the appeal.

13. I am of the view that it is in the interests of justice that the property subject matter of the appeal be preserved pending hearing and final determination of the appeal herein. I further reiterate **that it is equally important that a successful litigant should not be deprived of the fruits of a judgment in his favour without just cause and find that it is necessary that stay of execution be granted on condition.**

14. The Court thus makes an order that the application dated 20th April 2021 be and is hereby allowed in the following terms;

1) That an order of stay of further execution of the judgement and ruling delivered in the CM’s ELC Case Number E003 of 2021 by the Honorable M Kasera, SPM on 25.3.2021 be and is hereby granted pending hearing and determination of the appeal herein.

2) That the stay of execution order is granted on condition that the Applicant deposits the sum of Kshs 200,000/- in court within 60 days from the date hereof failure to which the stay order will automatically lapse.

3) Costs of the Application shall be in the cause.

DELIVERED, DATED AND SIGNED AT KITUI THIS 9TH DAY OF MARCH, 2022

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Ruling read in open court and online in the presence of-

C. Nzioka.....Court Assistant

Kariuki Advocatefor the Appellant/Applicant

Musyoki Advocate.....for the Respondent

The Appellant/Applicant Mutethya Ali present