



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**ELC APPEAL NO. 23 OF 2021**

**(Being an Application for Stay of Execution in an Appeal From The Judgment of**

**Hon Y.i. Khatambi, PM in Nakuru CMCC 1323 of 2015 Cyrus Waweru Kagunyi Vs Mwathi Mwangi)**

**MWANGI MWATHI.....APPELLANT**

**VERSUS**

**CYRUS WAWERU KAGUNYI.....RESPONDENT**

**RULING**

1. The appellant lodged a memorandum of appeal on **4/10/2021** and subsequently brought a notice of motion dated **28/9/2021** within the appeal seeking the following orders:

**1. Spent**

**2. That this honourable court be pleased to stay execution of the entire judgment by Hon Y.I. Khatambi as delivered on the 7<sup>th</sup> September 2021 pending inter partes hearing of this application.**

**3. That this honourable court be pleased to stay execution of the entire judgment by Hon Y.I. Khatambi as delivered on the 7<sup>th</sup> September 2021 pending hearing and determination of the appellant's appeal herein being Nakuru ELC No 23 Of 2021.**

**4. That in the alternative, this court be pleased to issue orders of status quo prior to the judgment date herein as regards the suit parcel herein being Nakuru Municipality Block 29/1476. (the suit land)**

**5. That this honourable court be pleased to make any further orders as it may deem just and reasonable.**

**6. That Costs of this application be provided for.**

2. The application is supported by the sworn affidavit of **Mwathi Mwangi**, the appellant and it is premised on the grounds that: though the trial court below ordered the structures erected on the suit land demolished, he has lodged an appeal against the entire judgment of that court, requested copies of proceedings and judgment, and that he has an arguable appeal which would be rendered nugatory unless the stay orders sought in the instant application are granted. Further, he states, he stands to suffer substantial loss and irreparable damage as it is his matrimonial home that stands to be demolished in the process of execution of that judgment. He states that he is ready to abide by any condition that the court may impose on him, that the application has been brought timeously and that the respondent would not suffer any prejudice perchance the orders of stay sought are granted.

3. The respondent filed grounds of opposition on **29/11/2021** stating that the application is misconceived in law; that the application is incompetent, embarrassing and an abuse of the process of the court and lacking in merit.

4. This court ordered the application to be disposed of by way of written submissions and the parties duly filed their submissions, the appellant on **11/2/2022** and the respondent on **17/2/2022**. I have considered those submissions.

5. The main issue for determination is whether a stay of execution order ought to be granted as prayed, or an order of *status quo* in lieu thereof.

6. Stay of execution proceedings are governed by **Order 42 Rule 6** of the **Civil Procedure Rules**. The conditions for the grant of a stay of execution order are that:

- a. There must be an appeal filed;**
- b. The application must have been brought timeously;**
- c. There is risk of loss substantial loss;**
- d. Such due security as the court orders has been provided.**

7. Citing the case of **Stanley Karanja Wainaina & Another Vs Ridon Anyangu Mutubwa 2016 eKLR** the appellant submitted that all the above conditions have been satisfied in his application. On the other hand, the respondent submits that the decree is for demolition of structures and payment of costs but in the event the court is inclined to grant it the applicant should be compelled to deposit in court at least the sum of **Ksh 300,000/=** as security for the due performance of the decree.

8. Upon a perusal of the motion before court I am persuaded that an appeal is in place. I am also persuaded that the judgment having been delivered on **7/9/2021** the application, brought on **24/11/2021**, was timeously brought. Also the claim that the applicant's matrimonial home is built on the suit land, which is not controverted by the respondent, renders the applicant prone to substantial loss. In addition, the use of and attachment to the matrimonial house may be lost and the inconvenience that may result from any demolition may render the appeal nugatory. I am therefore inclined to grant the application.

9. Consequently, I grant the motion dated **28/9/2021** in terms of **prayer no 3** thereof. The costs of the application shall abide the outcome of the appeal subject to the condition that the appellant shall file and serve his record of appeal in the matter within **60 days** from the date of the order hereof in default of which the orders of stay of execution hereby granted shall stand automatically vacated.

It is so ordered.

**DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 9<sup>TH</sup> DAY OF MARCH, 2022.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**