



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO 185 OF 2012**

**RAMADHAN MASHUA MAVUMBA.....PLAINTIFF/APPLICANT**

**VERSUS**

**GEORGE KAMAU.....DEFENDANT/RESPONDENT**

**RULING**

The application is dated 16<sup>th</sup> June 2021 and is brought under Order 42 Rules 6 and Order 22 Rules 22 of the Civil Procedure Rules and Section 1A and 3A of the Civil Procedure Act seeking the following orders;

1. THAT this application be certified as urgent and service of the same be dispensed with in the first instance.
2. THAT this Honourable Court be pleased to issue a temporary order of stay of execution herein pending the hearing of this Application interpartes.
3. THAT this Honourable Court be pleased to issue an order of stay of execution herein pending the hearing and final determination of the Appeal in the Court of Appeal.
4. THAT the costs of this Application be provided for

It is based on the grounds that the Plaintiff's suit was dismissed with costs and judgment was entered for the Defendant as per his Counter Claim. That the Plaintiff /Applicant has preferred an Appeal in the Court of Appeal against the said judgment and has even filed the Notice of Appeal. That the Plaintiff / Applicant has prepared a Memorandum of Appeal, however, he is still waiting for the typed and certified proceedings to enable him file the Appeal. That the Plaintiff/Applicant intended Appeal in the Court of Appeal raises arguable grounds and has overwhelming chances of success. That the Defendant/ Respondent may proceed to execute the decree any time after the grace period of 14 days is over thereby rendering the intended Appeal nugatory. That the Defendant / Respondent will not suffer any prejudice if the orders sought herein are issued as he will have time to defend the Appeal in the Court of Appeal.

The respondent submitted that the instant suit was heard and judgment delivered by the court on 2<sup>nd</sup> June, 2021, where the Honourable Court in its judgment dismissed the plaintiff's suit against the defendant with costs to the Defendant. That upon delivery of the said judgment, the Plaintiff prayed for thirty days stay of execution which the Court granted. That the Plaintiff/Applicant, with intention of delay payment proceeded to file a notice of Motion Application dated 16<sup>th</sup> June, 2021 seeking orders to stay the execution pending hearing and determination of their Appeal. That the defendant is the owner of the suit property and the Plaintiff has been trespassing on the plaintiff's property for 9 years thereby prejudicing his rights. That from the pleadings and the draft Memorandum of Appeal dated on 30<sup>th</sup> June, 2021 the Plaintiff is not disputing that the defendant is the owner of the suit property and that he has been occupying the suit property in total flagrant of his rights. That the Applicant has not demonstrated any sufficient grounds to warrant a stay of execution of the judgment of 2<sup>nd</sup> June, 2021 and decree thereof. The Applicant has not placed any material and information that should lead the court to conclude surely he stood a risk of suffering any loss that cannot be compensated after the appeal has been heard and determined. That also in this application he has not demonstrated how and of what value he will be prejudiced once he vacates the suit property considering that matter has been in court for close to eight(8) years when he has been sitting on the Defendant's suit property. A stay of execution against the Defendant has been in place since the year 2013. That the Applicant's application and memorandum of appeal lacks merit and should be dismissed as they raise no triable issues to warrant consideration from this Honourable Court and the same should be dismissed with costs. That the court has unlimited discretion to make orders as it deems fit, but the Applicant has utterly failed to demonstrate being deserving of the court's exercise of discretion in its favour, and they urge the court to decline to do so. That the Applicant has utterly failed to issue any undertaking on costs or comply with any conditions that may be set out by the court. That should the Honourable Court allow the application by the applicant, they urge the court orders the plaintiff/Applicant to furnish the security of equal value to the suit property in court.

This court has carefully considered the application and the submissions herein. The principles for granting stay of execution are provided for

under Order 42 rule 6 (1) of the Civil Procedure Rules as follows:

*“No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”*

Order 42, rule 6 states:

*“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.”*

The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and
3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

The principles governing the exercise of the court’s jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of *Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR)*, thus:

*“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-*

1. *That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,*
2. *That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”*

The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in *Chris Munga N. Bichange Vs Richard Nyagaka Tongi & 2 Others eKLR* where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus:-

*“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”*

In the case of *Mohamed Salim T/A Choice Butchery Vs Nasserpuria Memon Jamat (2013) eKLR*, the court stated that:-

*“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right .....*”

We are further guided by this court’s decision in *Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997*, at Page 4 as follows:

*“ . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”*

From the grounds, in the application the applicant being aggrieved with the judgment delivered by this court on 23<sup>rd</sup> June, 2020 have filed a notice of appeal. That the appeal, if successful will be rendered nugatory and substantial loss will be suffered if the stay of execution pending appeal is not granted. Be that as it may, this court is not persuaded, that the appeal or intended appeal is arguable, that is to say it is not

frivolous. Secondly, I am not persuaded that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the applicant has not fulfilled any of the grounds to enable me grant the stay. I find this application has no merit and I dismiss it with costs.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 9<sup>TH</sup> NOVEMBER 2021.**

**N.A. MATHEKA**

**JUDGE**