



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 49 OF 2016

EVANS ASAVA AMBASA..... PLAINTIFF/RESPONDENT

VERSUS

HAMISI KUTI WASIKE

HADIJA SAGINA WASIKE

JAUSIKU AMISI KUT.....DEFENDANTS/APPLICANTS

RULING

The application is dated 9th December 2019 and is brought under order 42 rule 6 (1), (2) & (4) and order 22 rule 22 of the Civil Procedure Rules and sections 1A & 3A of the Civil Procedure Act seeking the following orders;

(a) There be a stay of execution of the judgment and or decree herein and all consequential orders and proceedings pending the hearing and determination of Kisumu C.A.C.A. No. 263 of 2019.

(b) Costs of this application be provided for.

It is based on the affidavit of Hamisi Kuti Wasike, Hadija Sagina Wasike and Jausiku Amisi Kuti, the defendants/applicants and on the grounds that the defendant/applicants have filed an appeal vide Kisumu C.A.C.A No. 263 of 2019 against the judgment and decree of this honourable court delivered on 24th September, 2019 which appeal is arguable and has overwhelming chances of success. That it is in the interest of justice that execution of the aforesaid judgment be stayed pending the hearing and determination of appeal otherwise the appeal will be rendered nugatory and or a mere academic exercise and the defendants/applicants will suffer irreparable loss, damage and hardship.

The respondent submitted that the defendant/applicant is not entitled to the orders sought in the application. That the defendant/applicant has made the application in bad faith to deny him from enjoying the fruits of his judgment. That the defendant/applicant will not suffer any irreparable damages if the judgment of the court is not stayed since they do not use any portion of the 1.25 acres of land parcel number Butso/so/Shikoti/14610 which is in my absolute possession. That the defendant/applicant can proceed with their appeal and if they succeed he will be ready to comply with any orders which will be granted by the Court of Appeal. That the defendant/applicants have not given any undertaking to deposit security for costs in case the court grants stay of execution as required in law. That the defendant/applicant's appeal has nil chances of success and.

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.”

The grounds herein are that the defendant/applicants have filed an appeal vide Kisumu C.A No. 263 of 2019 against the judgment and decree of this honourable court delivered on 24th September, 2019 and they state that the appeal is arguable and has overwhelming chances of success. This court is not persuaded, that the appeal or intended appeal is arguable, that is to say it is not frivolous. 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.

It is so ordered.

DELIVERED, DATED AND SIGNED THIS 6TH DAY OF MAY 2020.

N.A. MATHEKA

JUDGE