



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. 22 OF 2019**

**FORMERLY MC ELC NO. 76 OF 2018**

**MARK ADEMBA OKUMU.....APPELLANT**

**-VERSUS-**

**DANIEL OJIJI ODHIAMBO.....RESPONDENT**

**RULING**

By a Notice of Motion dated 5<sup>th</sup> September, 2019 and brought under section 1A,1B,3A of the Civil Procedure Act, order 42 Rule 6 (2) and 51 Rule 1 the applicant sought for orders: -

1. Spent
2. A stay of execution of the impugned decree dated 16<sup>th</sup> May, 2019 and all decisions, actions and steps taken consequent thereto pending the hearing and the final determination of this application be issued.
3. A stay of execution of the decree dated 16<sup>th</sup> May, 2019 and all decisions, actions and steps taken consequent thereto pending the hearing and the final determination of the applicant's appeal be issued
4. The court be pleased to issue such other orders and directions as befit the circumstances.
5. The respondent be condemned to pay the costs of this application.

The Application was based on the grounds that on the 29<sup>th</sup> Day of November, 2019 judgement was entered against the respondents and the application herein counterclaim of 600,000 was allowed together with costs and interests therein and a further declaration that the defendant was entitled to a refund of a purchase price less 10% being default penalty and the applicant had challenged the court order resulting in an appeal and the instant application in which the applicant is dissatisfied with the ruling delivered on 3/9/2019 in which an impugned decree was validated and thus the applicant risks civil jail on a notice to show cause was issued and consequently loss and damage.

The application was further based on the grounds that he will suffer substantial loss in the effect that execution is commenced.

The Application was opposed by the respondent by way of a replying affidavit in which he contends that pursuant to a judgement of lower court he was entitled to a refund of the purchase price less 10% of default penalty where he had paid the sum of kshs. 6 million as the initial purchase price and he thus contends that the application herein is only meant to delay the refund as ordered by court.

I have read the application before me and the rival submissions filed by the parties and at this stage without going to the actual merits of the appeal what is for the court to determine is if the applicant has met the conditions for stay of execution pending the hearing of his appeal.

The grounds upon which a stay of execution is granted is now well settled as to whether the applicant will suffer substantial loss and if the application was brought without undue delay.

In the case of **BASHIR GODANA -VERSUS- FATUMA GODANA TUPI(2018)EKLR** the court while dealing with a stay of execution held that..

**“the court balances two parallel positions first, that of a litigant, if successful should not be deprived of the fruits of a judgement in his favour without a just cause and the second factor is that if the execution of the decree will render the proposes appeal nugatory.**

In the instant application the decree that the applicant ought to stay its execution is for a liquidated sum of money and I find that if the same is not stayed then the applicant is likely to suffer irreparable loss. Since the instant application was filed on 5/9/19 I find that there was no inordinate delay in filing the same.

The upshot of my above finding is that the Notice of Motion dated 5/9/19 is merited and I will thus allow it in the following terms: -

1. That there be stay of execution of the decree dated 16/5/19 and all decisions, actions emanating therefrom pending the hearing and determination of the applicant's appeal.
2. The costs of the application to the applicant.

**DATED, SIGNED and DELIVERED in open court at NAROK on this 6<sup>TH</sup> day of MAY, 2020**

**Mohammed Kullow**

**Judge**

In the presence of: -

CA:Chuma

Mr. Tanyasis holding brief for Amolo for the appellant/applicant

N/A for the respondent

**Mohammed Kullow**

**Judge**

**6/5/2020**