



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 138 OF 2013

ISAAK MUTIMBA MACHIO.....PLAINTIFF/APPLICANT

VERSUS

CORNELIUS WABWIRE ZAKARIA.....DEFENDANT/RESPONDENT

RULING

This application is dated 25th March 2019 and is brought under order 51 rule 1 Order 42 rule 4, 5, 6 of the Civil Procedure Rules and Section 3, 3A, 1A of the Civil Procedure Act seeking the following orders:-

1. That this application be certified as urgent and be heard on priority basis on the first instance.
2. That pending hearing and determination of this application inter parties there be a stay of execution of the judgment of this honourable court against the plaintiff applicant delivered 28th February, 2019 and its subsequent orders.
3. That there be a stay of execution of the judgment of this honourable court delivered on 28th February, 2019 pending hearing and determination of the appeal preferred by the applicant who has lodged a notice of appeal herein.
4. That the costs of this application be provided for.

It is based on the following principal grounds that the applicant was aggrieved by the judgment of the court delivered on 28th February, 2019. That the applicant has a lodge a notice of appeal on 14th March, 2019. That the judgment if executed by the subsequent orders within the 60 days given will prejudice the applicant greatly in terms of eviction and demolition of his homestead as per the judgment delivered. That the applicant has no any other means to get a new home. That the appeal is meritorious with high chances of success. That the respondent will not be prejudiced in any manner, if the orders prayed for are granted. That it will be in the interest of justice for him to be granted the orders.

The respondent submitted that the said application is frivolous, vexatious, lacks merit, an abuse of the due process of the law and ought to be dismissed with costs. That the applicant's application is premature as the court gave the applicant stay of execution of six (6) months. That it is clear that the applicant is out not to obey any orders of the court and is hell bent to denying the respondent from enjoying the fruits of his success. That the applicant herein was granted restraining orders against him in the year 2013 and took possession of the suit land and has been utilizing the same exclusively at his expense.

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, the applicant/defendant was aggrieved by the order/judgment Kakamega Environment & Land Court Cause No. 138 of 2013 delivered on 28th February, 2019. That the defendant/applicant had filed his Notice of appeal pending compiling appeal record. **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.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 3RD JULY 2019.

N.A. MATHEKA

JUDGE