



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 73 OF 2014**

**LYNSTONE SACHIEL AMBUNDO.....PLAINTIFF/RESPONDENT**

**VERSUS**

**HARRISON OMMUMIA SHIUNDU**

**JACKTONE MALIKA LAWI..... DEFENDANTSAPPLICANTS**

**RULING**

This application is dated 27<sup>th</sup> March 2019 and is brought under sections 1, 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act, orders 51 rules 1, 4, 6, 10 (1), (2) and 42 (4) of the Civil Procedure Rules and Article 159 (2) (d) of the Constitution of Kenya seeking the following orders;

1. That this application be certified urgent and the same be heard on priority basis.
2. That the honourable court do issue an order of stay of proceeding over this matter pending the hearing and determination of the defendants/applicants appeal at the Court of Appeal in Kisumu.
3. That costs of this application be in the cause.

It is based on the annexed affidavit of Harrison Mumia Shiundu, the grounds that, there existed a suit at the ELC Court in Kakamega designated as KAKAMEGA HCC ELC NO. 52 OF 2014 between the parties herein and over the same parcel of land as in this case and particularly LR NO. KISA/MUNDEKU/633 which matter was dismissed on the 25/9/2018. That upon such dismissal the defendants/applicants herein having been dissatisfied with the decision in KAKAMEGA HCC ELC NO. 52 OF 2014 preferred an appeal the Court of Appeal by filing of a notice of appeal dated 28/9/2018 and signed by the Deputy Registrar on the 23/10/2018. That this matter is co-related with Kakamega HCC ELC NO. 52 OF 2014 as the issues in dispute are the same. That should this matter proceed to hearing the defendants/applicants would suffer prejudice and their appeal would be rendered nugatory and a mere academic exercise should the same succeed. That the suit parcel herein constitutes the defendants/applicants homes and is their only place of abode and that of their families whereof they have lived peacefully since 1975. That it is in the interest of justice that this application be heard on merit and on priority basis.

The plaintiff/respondent opposed the defendants/applicants application dated 24<sup>th</sup> of April, 2019 on the following grounds that, the application is frivolous and devoid of any merit. The application is vexatious and waste of the courts precious time. The application is made of wrong principles of law. The application lacks merit and ought to be dismissed with costs.

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 applicant submitted that, there existed a suit at the ELC Court in Kakamega designated as KAKAMEGA HCC ELC NO. 52 OF 2014 between the parties herein and over the same parcel of land as in this case and particularly LR NO. KISA/MUNDEKU/633 which matter was dismissed on the 25/9/2018. Annexed is a copy of originating summons and submissions by the defendants/applicants herein who were plaintiffs in the said suit together with a copy of the judgment marked HMS 1 (a) and (c). That upon such dismissal and having been dissatisfied with the judgment in Kakamega HCC ELC NO. 52 OF 2014 they preferred an appeal at the Court of Appeal by filing of a notice of appeal dated 28/9/2018 and signed by the Deputy Registrar on the 23/10/2018, which notice of appeal was duly served upon counsel for the plaintiff/respondent. That this matter is co-related with KAKAMEGA HCC ELC NO. 52 OF 2014 as the issues in dispute are the same. That should this matter proceed to hearing they would suffer prejudice and their appeal would be rendered nugatory and a mere academic exercise should the same succeed. The intended appeal relates to a different suit altogether and not this one. I find this application frivolous and a waste of the courts time. There is no way the principals of granting a stay as mentioned above can be established as this application seeks to stay a different suit. I find this application lacks merit and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 3<sup>RD</sup> JULY 2019.**

**N.A. MATHEKA**

**JUDGE**