



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 15 OF 2013**

**SABENZIA ACHITSA AMUTI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**KAITANO ASHIONO EMBALI LUKUTSA...DEFENDANT/APPLICANT**

**RULING**

The application is dated 1<sup>st</sup> April 2019 and is brought under section 3 & 3A of Civil Procedure Act and Order 22 Rules 22 (1) of the Civil Procedure Rules seeking the following orders;

1. That there be stay of execution of the judgment of the honourable court pending determination of the Appeal No. 43 of 2019 at the Court of appeal at Kisumu filed by the applicant herein.
2. That costs of this application be provided for.

It is grounded on the annexed affidavit of Kaitano Ashiono Imbali Lukutsa and the grounds that, the applicant has preferred an appeal against the decision and or judgment of this honourable court to the Court of appeal at Kisumu. That the said appeal is No. 43 of 2019. That the appeal has overwhelming chances of success. That it is necessary that there be stay of execution of judgment of this honourable pending determination of the appeal. That unless the orders and or prayers herein the appeal shall be rendered nugatory. That it is in the interest of justice that the application herein be allowed.

The respondent submitted that the application is mischievous, unmerited, oppressive, vexatious, in bad faith and a deliberate attempt by the applicant to arm twist the respondent in order to gain undue advantage. That the supporting affidavit contains falsehood and or half truth and the same is full of mischief and is aimed at misleading this honourable court and or perverting the course of justice. That it is not true that evidence was illegally and an procedurally introduced in court at submission stage. To the contrary she tendered evidence during the hearing of this suit and together with her witnesses did confirm that the applicant herein obtained land from her deceased father by way of fraudulent means. That the applicant herein sought time to avail witnesses such as police officers to adduce the evidence of fraud but failed to do so. That her father the deceased registered owner of suit land was very sick and being the person who used to take care of him to the extend to cleaning and bathing him he never attended any Land Control Board, never participated in the process of subdivision and did not appear before the firm of DSG Mango & Co. Advocates for attestation of transfer document, the applicant through his advocate on record did not challenge these evidence at all and neither did he tender any evidence to the contrary. That this applicant is improperly before this honourable court for offending order 9 (9) of the Civil Procedure Rules the application having been represented by an advocate until at the time judgment was delivered. That the application does not conform to the requirements of order 42 Rule 6 of the Civil Procedure Rules. That the application is meant to deny her the fruits of her successful litigation and the judgment of the court. That the applicant's action as demonstrated during the hearing of this case and by alleging that he has been developing the suit parcel of land during the pendency of this case herein are devoid of condour and he has come to court with soiled hands, which hands should not be allowed to torch the pure fountain of justice. That the orders being sought by the applicant are unnecessary pre-emptive, uncalled for, punitive and will and continue to cause her and her family unnecessary hardship and inconvenience yet this is a court of justice and not one of injustice.

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 he has preferred an appeal against the decision and or judgment of this honourable court to the Court of appeal at Kisumu. That the said appeal is No. 43 of 2019. That the appeal has overwhelming chances of success. That it is necessary that there be stay of execution of judgment of this honourable pending determination of the appeal. That unless the orders and or prayers herein the appeal shall be rendered nugatory. The applicant submitted that the respondent’s evidence was illegally and un procedurally introduced in court at submission stage. I find that the respondent tendered evidence during the hearing of this suit together with her witnesses. I find that the principals of granting a stay as mentioned above have not been established. 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 4<sup>TH</sup> JULY 2019.**

**N.A. MATHEKA**

**JUDGE**