



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 118 OF 2015

REUBEN KOTWA MEDA ALAIS.....PLAINTIFF/RESPONDENT

VERSUS

NORA KOLEB

HENRY ANGATIA KOLE.....DEFENDANTS/APPLICANTS

RULING

The application is dated 6th May 2021 and is brought under order 45 rule 6 and order 22 rule 22 of the Civil Procedure Rules seeking the following orders:-

1. That service of this application be dispensed with, the same be certified urgent and be heard ex parte in the 1st instance.
2. That pending the hearing of this application inter parties, there be stay of execution of the judgment delivered on 21st April, 2021.
3. That there be a stay of proceedings and execution of the judgment delivered on 21st April, 2021 pending the hearing and determination of the intended appeal.
4. That costs of this application be provided for.

It is grounded on the annexed affidavit of Norah Kole, the 1st defendant/applicant herein and the following grounds that the applicants were aggrieved and dissatisfied with the judgment of this honourable court delivered on the 21st April, 2021 and intend to file an appeal which has high chances of success. That the applicants stand to suffer substantial loss unless the orders sought are granted since the registration of Kole Inzianaji as the sole proprietor of Land Parcel No. Kakamega/Bushu/489, subject matter herein, is at risk of being cancelled and registered in the name of the respondent any time from now. That this application has been made without unreasonable delay. That the applicant is willing to comply with such conditions the court shall impose as it thinks fit. That it will be in the interest of justice if this application is allowed.

The respondent submitted that he is aware that this court delivered its judgment herein on 21st April, 2021. That the notice of appeal was filed and served out of time. That that the said notice is materially defective. That the notice was filed and served out of time without leave to extend time being granted. That the application has been filed by an advocate who is no properly on record as no leave or consent has been served on them. That the applicants do not have a meritorious appeal as they have not stated so and/or annexed draft memorandum of appeal. That in any event, the applicants intended appeal lacks merit due to the fact that the applicants in their various pleadings and testimony admitted that he is using part of the said land. That there should be no stay of execution as the portion of land comprised in title No. Kakamega/Bushu/489, measuring 11.79 acres, the applicants have never used it at all, hence the intended appeal is frivolous.

This court has carefully considered the application and the submissions herein. The principles for granting stay of execution or proceedings 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.”

From the grounds of the application and the annexed affidavit of Norah Kole, the 1st defendant/applicant herein the applicants were aggrieved and dissatisfied with the judgment of this honourable court delivered on the 21st April, 2021 and intend to file an appeal which has high chances of success. That the applicants stand to suffer substantial loss unless the orders sought are granted since the registration of Kole Inzianiaji as the sole proprietor of Land Parcel No. Kakamega/Bushu/489, subject matter herein, is at risk of being cancelled and registered in the name of the respondent any time from now. That this application has been made without unreasonable delay. That the applicant is willing to comply with such conditions the court shall impose as it thinks fit. 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 orders. I find this application has no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 21ST JULY 2021.

N.A. MATHEKA

JUDGE