



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC NO. 5 OF 2015

(Formerly High Court Civil Case No. 51 of 2010)

SIMON EROT AJEKO.....1ST PLAINTIFF/APPLICANT

IBRAHIM ETYANG AJEKO.....2ND DEFENDANT/APPLICANT

VERSUS

LYDIA AMOIT OTIGIL.....DEFENDANT/RESPONDENT

R U L I N G

1. The Plaintiffs filed an Application under certificate on the 11th of August, 2020 for orders THAT:
 - a) **The application herein be certified urgent and heard exparte in the first in the first instance;**
 - b) **Spent;**
 - c) **There be an interim stay of execution of the decree pending the hearing and determination of this application;**
 - d) **There be a stay of execution of decree herein pending the hearing and determination of the appeal filed by the applicants against the entire judgement and Decree herein; and**
 - e) **The costs of this application be in the cause.**
2. The Application was supported by the affidavit of SIMON EROT AJEKO dated and on the following grounds;
 - a) *THAT, the Applicant's former counsel is deceased;*
 - b) *THAT, the Applicant's being dissatisfied with the whole judgement have instituted an appeal against the said judgement;*
 - c) *THAT, the appeal shall be rendered nugatory if the orders sought herein are not granted;*
 - d) *THAT, the applicants shall suffer irreparable loss and damage if the application is not allowed;*
 - e) *THAT, the Respondent has initiated execution proceedings against the Applicants;*
 - f) *THAT, the Applicants' appeal has high chances of success.*
3. The Defendant/Respondent did not file a response to the Application.
4. Parties agreed to canvass the Application by way of written submissions with the Plaintiffs filing their submissions on the 17th of March, 2021 and the Defendant on the 16th of March, 2021.
5. The Plaintiffs submitted that despite being served the Respondent did not file a reply to the application and the application is therefore

unopposed and as such the Applicants' averments are not rebutted, denied or controverted and that this Court should grant the orders sought. The Applicants also submitted that the issues for determination were: **whether the applicants will suffer substantial loss if stay is not granted and whether the Applicants have or are willing to furnish security as the court may order for the due performance of the decree.**

6. The Defendant on the other hand submitted that the Applicants have not provided any proof to demonstrate that the appeal shall rendered nugatory if the orders sought are not granted. The submitted further that it is doubtful that the Applicants have any appeal pending and if there was any then it is a victim of laches and has been overtaken by events since more than two years had lapsed since the notice of appeal was lodged at the Court of Appeal. She stated that should this Court be inclined to grant the application and stay of execution, it will only be just to do so on condition that the Applicant's deposit the decretal sum in Court or in an interest earning account in the joint names of the counsels of the parties.

7. Courts are obligated to issue orders for stay pending appeal but under the conditions cited under Order 46 Rule 6 (2) of the Civil Procedure Rules, 2010. **Order 42 Rule 6 (2) of the Civil Procedure Rules** provides that 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;*

b) *Such security as the court orders for the due performance of such decree or order as may be ultimately binding on him has been given by the Applicant.*

8. The Plaintiffs seek to stay an execution for the costs awarded by this Court to the Defendant on the 14th of August 2019 before the Deputy Registrar. The Plaintiffs neither filed a reply nor submissions to the Bill of Cost before the Deputy Registrar. It is also noteworthy that the Defendant brought this Application two years after delivery of the judgement on the 25th day of September, 2018 and one year after the ruling for costs on the 14th day of August, 2019. The Applicants' delay in filing the present application has not been explained to this Court.

9. This Court is called upon to determine whether or not the Applicants have met any criteria for granting an order for stay. The Applicants have pleaded and submitted that their appeal will be rendered nugatory if the orders of stay are not granted.

10. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion when granting stay of execution and held that:

a) **The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal;**

b) **The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion;**

c) **A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings;**

d) **The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal; and**

e) **The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.**

11. The Applicants have submitted that in the event their appeal succeeds, the Defendant would not be able to refund the decretal sum of KShs.154,889.60 to them. The judgement delivered on the 25th of September, 2018 entitled the Defendant to either keep the suit land or have the Plaintiffs' refund KShs.75,000/= together with the interest on the amount at the rate of 12% per annum which interest is to run from the time the money was paid to the time when the refund was to be made.

12. The Applicants have submitted that they are willing to submit at least half of the decretal sum in a joint interest earning account in the names of the parties' counsels as security. The Respondent on the hand urged this Court to only grant the stay on the condition that the Applicants deposit the entire decretal sum in court or in a joint interest earning account. The issue of security was discussed in the case of **Victory Construction vs. BM (minor suing through next friend one PMM) 2019 eKLR** where Odunga J. quoted the decision of the Court of Appeal in the case of **Machira T/A Machira & Co. Advocates vs East African Standard [2002] KLR 63** where the Court of Appeal held that **"to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put in effect by the way we handle applications for stay of further proceedings or execution, pending appeal."**

13. In light of the foregoing and taking the interests of both parties in the present case, I make an order that the Applicants shall have the taxed costs of K.Shs. 154,889.60 deposited in an escrow account in the joint names of the advocates on record within 60 days of this ruling to

protect the interests of the Defendant/Respondent.

14. In conclusion, the application is allowed on terms stated herein that:

- 1) Stay of execution of the decree pending appeal is granted;**
- 2) The Plaintiffs/Applicants shall deposit the amount of taxed costs of Kshs.154,889.60 in a joint escrow account in the names of the advocates for the parties on record to be held pending hearing and determination of the said appeal;**
- 3) In default of (b) above, the execution shall proceed and amounts realized deposited on the escrow account; and**
- 4) The costs of this application to abide the winner in the appeal.**

Dated, signed & delivered at BUSIA this 14th day of July, 2021.

A. OMOLLO

JUDGE