



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 11 OF 2012

PROF. FRANCIS EPHRAIM ONYANGO.....PLAINTIFF

VERSUS

GEORGES AERTSEN.....1ST DEFENDANT

CHRISTINE ANYANGO OKALLO.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

DISTRICT LAND REGISTRAR KISUMU.....4TH DEFENDANT

RULING

The application dated 8/6/2020 is for stay of execution pending appeal. The Judgment was delivered on 26/7/2019. The defendants/applicants claim in the counter claim was dismissed with costs. The applicant filed a notice of appeal. A decree was issued on 24/9/2019. The costs were taxed at Kshs. 221,630. A certificate of costs was issued on 4/3/2020.

Grant of stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules, the relevant part of which states as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 application being made, to consider such application and to make such order thereon as may to it seem just, and 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 such order set aside.

(2) No order for stay of execution shall be made under subrule (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.

(3) ...

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) ...

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

The application for stay of execution can only be issued on grounds of being made without unreasonable delay. This application was made 8 months after the date of decree. I do find this to be unreasonable delay and that there is no explanation. The applicant should also demonstrate that he is likely to suffer substantial loss. In this matter the loss that is likely to be suffered is the taxed amount of the bill of costs that does not translate to substantial loss. The same can be refunded by the respondent if the applicant succeeds in the appeal.

However, this court can also require the applicant to furnish security for the performance of the decree.

In the circumstances of this matter, I do order that there be stay of execution pending appeal on condition that the applicant deposits the decretal amount plus the bill of costs as at now within 30 days from today.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF SEPTEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE