



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO.474 OF 2017**

**SAMUEL NJEHIA GITAU.....PLAINTIFF/ RESPONDENT**

**VERSUS**

**JOYCE WANJIKU.....DEFENDANT/ APPLICANT**

**RULING**

The matter for determination is the **Notice of Motion Application** dated **9<sup>th</sup> November 2020**, bought under Sections **3, 3A, 63(e)** of the **Civil Procedure Act, Order 42 Rule 6, Order 22 Rule 22(1)** and **Order 51 Rule 1 of the Civil Procedure Rules**, by the Defendant/Applicant, who has sought for the following orders;

- 1. That there be a stay of Execution, pending the hearing and determination of the Appeal.***
- 2. Costs be in the cause.***

The Application is supported by the grounds on the face of the Application and on the affidavit of **Edwin Simiyu Wabuge**, who averred that on **6<sup>th</sup> December 2019**, this Court delivered a Judgement, dismissing the Defendant/Applicant's counterclaim against the Plaintiff/Respondent and ordered that the Plaintiff's costs be paid by the Defendant/Applicant. He further averred that the Defendant/Applicant's Advocates have filed and lodged a **Notice of Appeal**, in this Court and has also requested for certified proceedings and Judgement.

He contended that the Defendant/Applicant has prepared and is about to file a **Memorandum of Appeal**, which is arguable and has very high chances of success. That the Defendant/Applicant is apprehensive that should the orders in this Application herewith not be issued, she stands to suffer substantial loss and that her Appeal may be rendered nugatory.

The Application is opposed vide Grounds of Opposition dated **8<sup>th</sup> December 2020**, on the following grounds;

- 1. The Applicant does not meet the threshold set in law for the prayers sought.***
- 2. The Application lacks merit.***
- 3. The nature of the Judgement and Order is not capable of being stayed.***

Parties were directed to file written submissions to canvass the instant Application and the Defendant/Applicant filed her written submissions dated **11<sup>th</sup> February 2021**, through the **Law Firm of Lubulellah & Associates Advocates**, and submitted that the Defendant/Applicant has fully satisfied all conditions precedent for granting of an order for **Stay of Execution pending Appeal**, while the Plaintiff/Respondent relied on the Grounds of Opposition filed through the Law Firm of **Wachira Ndung'u & Co. Advocates**.

The Court has carefully considered the instant Application, the pleadings in general and the rival written submissions and finds that issues for determination is;

***1. Whether the Defendant/Applicant has achieved the threshold for grant of leave to file an Appeal out of time.***

This Court has Jurisdiction to allow an Applicant to file an Appeal out of time, but in doing so, the Court is to use its discretion and be satisfied that the Applicant has given sufficient reasons to warrant the grant of the said Leave.

Further, the guiding principles for **Stay of Execution Pending Appeal** is guided by **Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, 2010** which provides as follows:

*6.(1) No appeal or 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 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 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.*

In other words, an Applicant seeking stay of execution pending hearing and determination of an Appeal, must demonstrate that substantial loss will result to it if **Stay is not granted**, and that the application has been made without unreasonable delay. As **Platt Ag JA** (as he then was) stated in **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**, “that substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal”.

On substantial loss, the Defendant/Applicant contends that she is faced with imminent danger of Execution. However, the Defendant/Applicant has not tabled any evidence of an imminent danger. Imminent danger may include; **eviction notice, proclamation notice** or any **notice** stating that the Judgement upon which it is appealed against is being executed, and is likely to occasion loss to the Defendant/Applicant.

Secondly, another question that must be answered is whether the Defendant/Applicant has explained the reasons for the delay to the satisfaction of this Court. The Court notes that the Judgement herein was delivered on **6<sup>th</sup> December 2019**, and a Notice of Appeal was filed on **16<sup>th</sup> December 2019**. The instant Application is dated **9<sup>th</sup> November 2020**. It is this Court’s considered view that the instant application is brought **past I year**, since the impugned Judgement was delivered and thus there is unreasonable delay that is evidently occasioned.

Further, the Defendant/Applicant contends that the Appeal has overwhelming chances of succeeding. However, this Court cannot determine if the Appeal has high chances of success as a draft Memorandum of Appeal has not been attached to welcome the audience of this Court.

It is virtually impossible for such an Application to succeed if the Defendant/Applicant fails to demonstrate that she will suffer substantial loss if stay is not granted.

Be that as it may, the necessary conditions for Stay of Execution pending Appeal, **have not** been satisfied by the Defendant/Applicant and this Court will have no business to entertain such an Application.

The Court having found that the Defendant/Applicant has not met the threshold for grant of stay pending Appeal, further finds that the Defendant/Applicant is not entitled to the orders sought.

The Upshot of the foregoing is that the **Notice of Motion Application** dated **9<sup>th</sup> November 2020**, is **not merited** and the same is **dismissed** entirely with costs to the Plaintiff/ Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT THIKA THIS 30TH DAY OF SEPTEMBER, 2021.**

**L. GACHERU**

**JUDGE**

**Court Assistant – Kuyiki**