



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 290 OF 2017**

**BENEDICT NZIOKA ..... PLAINTIFF/APPLICANT**

**VERSUS**

**AGNES WAITA..... DEFENDANT/RESPONDENT**

**RULING**

1. What is before this court for ruling is the Plaintiff's/Applicant's Notice of Motion application expressed to be brought under Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules 2010, Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law for orders;

**i) Spent.**

**ii) Spent.**

**iii) That the honourable court be pleased to stay execution in MAKUENI ELC CASE NO. 290 OF 2017 pending hearing and determination of the intended Appeal against the judgement and subsequent Decree made on 6<sup>th</sup> July, 2020 by the Honourable Justice C. G. Mbogo.**

**iv) That the costs of this application be provided for.**

2. The application is dated 6<sup>th</sup> November, 2020 and was filed in court on 10<sup>th</sup> November, 2020. It is predicated on the grounds inter alia that if stay of execution is not granted, it will render the appeal nugatory and the intended Appellant will suffer grave injustice and irreparable loss, that the intended appellant is willing to abide by any conditions and terms as the court may deem fit to impose.

3. The application is further supported by the affidavit of Benedict Nzioka, the Plaintiff/Applicant herein, wherein he has reiterated the same grounds.

4. The application is opposed by Agnes Waita, the Defendant/Respondent herein, through her replying affidavit sworn at Machakos on the 18<sup>th</sup> January, 2021 and filed in court on 19<sup>th</sup> January, 2021.

5. The Defendant/Respondent has deposed *inter alia* that she is advised by her advocates on record which advise she verily believes that ..... for an order of stay of execution pending to be issued, the conditions set out in order 42 Rule 6 of the Civil Procedure Rules 2010 have to be satisfied and that it is evidence that the Applicant has not satisfied the said conditions and that this court ought to dismiss the instant application.

6. In addition the Defendant/Respondent filed a further affidavit on 9<sup>th</sup> April, 2021 the same having been sworn at Machakos on 29<sup>th</sup> March, 2021. It should be noted that the said further affidavit was only to be filed upon the Plaintiff/Applicant filing a supplementary affidavit. Since the latter did not file any supplementary affidavit, I will expunge the further affidavit filed by the Defendant/Respondent.

7. The application was canvassed by way of written submission.

8. In his submissions, the Plaintiff/Applicant urged the court to preserve the subject matter of appeal filed at the Court of Appeal so as not to render the appeal nugatory. The Plaintiff/Applicant further urged the court to find that the application was filed without untimely delay.

9. On the other hand, the counsel for the Defendant/Respondent framed four (4) issues for determination namely: -

***a) Whether parties are bound by their own pleadings.***

**b) Whether the directions given by court are to be followed to the latter.**

**c) Whether an order for stay of execution can be issued to the very same litigant to whom judgement is in his favour as per pleadings filed in court.**

**d) Whether the Applicant is entitled to an Order for stay of execution yet there is evidence that the judgement and/or decree has been executed in his favour.**

10. In my view the only issue which is relevant under Order 42 Rule 6(2) of the Civil Procedure Rule is whether the applicant is entitled to an order of stay of execution pending appeal.

11. The counsel for the Defendant/Respondent cited Order 46 Rule 6(2) of the Civil Procedure Rules which provides the conditions for the grant of order of stay pending appeal as follows;

**a) Substantial loss may result to him unless the order is made.**

**b) That the application has been made without unreasonable delay.**

**c) The applicant has given security as the court orders for the due performance of such decree as may ultimately be binding on them.**

12. Arising from the above, the counsel submitted that the Applicant has failed to satisfactorily prove that he stands to suffer substantial loss should the court decline to issue an order of stay as well as the conditions precedent for the orders sought.

13. In his supplementary submissions, the Plaintiff/Applicant reiterated his earlier submissions and added that the special circumstances of this case is that the Defendant/Respondent will not be able to return the suit property to the Plaintiff/Applicant in the event that his appeal at the Court of Appeal succeed.

14. Having read the rival submissions, I do note that the requirements for the grant of an order of stay of execution pending appeal under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 must be satisfied before the court can exercise its discretion to grant stay.

15. The court's discretion to grant the orders sought is guided by the Court of Appeal decision in **Butt Rent Restriction Tribunal [1982] KLR 417** where it was held as follows;

***"1. 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.***

***2. 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.***

***3. 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.***

***4. 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.***

***5. 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."***

16. On substantial loss, my finding is that the Plaintiff/Applicant has not demonstrated in clear terms the nature of substantial loss he is likely to suffer should execution of the decree herein proceeds. All what he has done is to merely repeat that he stands to suffer substantial loss without discharging the evidentially burden attached thereto. In the case of **Kenya Shell Ltd -Vs- Kibiru [1986] KLR 416** it was held that:

***"It is usually a good rule to see if order 44 Rule 4 of the Civil Procedure Rules can be substituted. If there is no evidence of substantial loss to the applicant, it would be rare case when the appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented."***

17. I do also note that the Plaintiff/Applicant has alluded to the issue that the Defendant/Respondent is a woman of straw where he has submitted that she might not be able to return the suit property should the appeal succeeds. The Plaintiff/Applicant ought to have substantially given reasons as to why he so thinks that the Defendant/Respondent might not be able to return the property.

18. On the issue of the application having been filed without unreasonable delay, the judgement was delivered on 6<sup>th</sup> July, 2021 while the application was filed on 10<sup>th</sup> November, 2020. That is approximately four (4) months and in my view the delay is unreasonable. The

Plaintiff/Applicant cannot be heard to say that he was waiting for the proceedings herein to be typed so as to enable him file the application. He could have filed the instant application with or without the typed proceedings.

19. The Plaintiff/Applicant has not expressed his willingness to abide by such order for security as this court will order in his application and such, my finding is that the application lacks merits. Same is dismissed with costs to the Defendant/Respondent.

**SIGNED AND DELIVERED AT MAKUENI VIA EMAIL THIS 2ND DAY OF SEPTEMBER, 2021.**

.....

**HON. C. G. MBOGO**

**JUDGE**

**Court assistant: Mr. Kwemboi**