



**REPUBLIC OF KENYA**

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

**CASE NO. 124 OF 2017 (O.S)**

**JANE ELIZABETH BARASA.....APPLICANT**

**= VERSUS =**

**GEORGE WESONGA OJWANG'.....1<sup>ST</sup> RESPONDENT**

**CHARLES NYANGULE NAMAI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1) The Applicant seeks stay of execution pending appeal vide her application dated 23<sup>rd</sup> June, 2021 brought under sections 1A, 3A and 65 of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules and rules 1 (3) and 47 of the Court of Appeal Rules, 2010. The Applicant seeks the following ORDERS:

**a) Spent;**

**b) That pending hearing and determination of this application inter partes this Honourable Court be pleased to issue injunction orders restraining the Respondents, their servants, agents, workers from interfering with peaceful occupation of suit property by the Applicant;**

**c) That the execution of judgement be stayed pending hearing and determination of intended appeal by the Applicant;**

2) The application was supported by the Applicant's supporting affidavit dated 24<sup>th</sup> May, 2021 and on the following grounds:

*a) The Applicant being dissatisfied with the judgement delivered on 28<sup>th</sup> April, 2021 by Hon. Lady Justice A. Omollo at the Environment and Land Court at Busia intends to lodge an appeal at the Court of Appeal;*

*b) The Applicant has an arguable appeal with good prospects of success;*

*c) The appeal may be rendered nugatory if stay of judgement is not granted;*

*d) The Applicant has raised fundamental issues of both law and facts which relate to the finding of the trial court;*

*e) The Respondents shall suffer no prejudice if stay of judgement is granted. To the contrary, the Appellant/Applicant shall greatly suffer if execution is carried out based on the judgement that is likely to dispossess the applicant of her home;*

*f) The Applicant is willing and ready to comply with whatever conditions this Honourable Court shall give for stay of the impugned execution pursuant to the orders issued in the judgement;*

*g) The application has been made within reasonable time in the circumstances and in very good faith; and*

*h) It is in the interest of justice that there be a stay pending the hearing and determination of this application and the Applicant's appeal.*

3) The Respondents opposed the application on the 9<sup>th</sup> of July, 2021 on the following grounds:

*a) That the Application is improper before the Court as it offends the mandatory provisions of Order 9 Rule 9 of the Civil Procedure Act;*

b) *That the instant application is not merited as no security for the appeal has been provided;*

c) *That the application before this Court should be dismissed for the abuse of Court.*

4) The Applicant filed a further supporting affidavit on the 22<sup>nd</sup> of July, 2021 attaching to it an amended Memorandum of Appeal, Grounds of Appeal and receipts for the payment of court fees at the Court of Appeal.

5) During the hearing of the application on the 13<sup>th</sup> of July, 2021, the parties agreed to canvass the hearing by filing written submissions. The Applicant filed her submissions on the 22<sup>nd</sup> July, 2021. She submitted through her advocate that she has demonstrated that her application merits grant of stay of execution. The Applicant submitted that the application was brought without unreasonable delay, the appeal has a high chance of success and substantial loss is bound to occur if the stay is not granted.

6) The Applicant sought to rely on the findings of the following cases: **Gichuhi Macharia & another vs. Kiai Mbaki & 2 Others (2016) eKLR, Rhoda Mukuma vs. John Abuoga (1988) eKLR, Francis Macharia Nzeki vs. Republic (2021) eKLR, Godfrey Wainaina Kinyanjui & another vs. Joseph Mwikya Musaa (2020) eKLR and HGE vs SM (2020) eKLR.**

7) The Respondents filed their submissions on the 26<sup>th</sup> of July, 2021. They submitted that the Applicant's current advocate was not properly on record as Order 9 Rule 9 barred him from representing the Applicant hence the application should be dismissed. The Respondents sought to rely on the following cases: **Lalji Bhimji Shangani Builders and Contractors vs. City Council of Nairobi (2012) eKLR, Monica Moraa vs. Kenindia Assurance Co. Ltd (2010) eKLR and James Ndonyu vs. Muriuki Macharia (2020) eKLR.**

8) The Respondent raised in their grounds of opposition and their submissions the fact that the Applicant's current advocate Felix Otieno Oketch & Co Advocates is improperly on record. Order 9 Rule 9 of the Civil Procedure Rules provides that a change of advocates after judgement shall not be effected without a court order or a consent filed between the outgoing advocate and the proposed incoming advocates. The firm of Wanyama & Co. Advocates on record for the Applicant recorded a consent with Felix Otieno Oketch & Co. Advocates on the 24<sup>th</sup> of May, 2021 for the latter to take over the Applicant's case while the firm of Calistus & Co. Advocates recorded a consent with the firm of B.M Ouma & Co. Advocates on the 13<sup>th</sup> of July, 2021 for the latter to come on record for the Defendants/Respondents. It is therefore my opinion that both current advocates are properly on record.

9) The main purpose of this application is seeking for an order for stay of execution. It is settled law under order 42 of the Civil Procedure Rules that a stay of execution cannot be granted unless an applicant has proved the following:

a) *That substantial loss may result unless the order is made;*

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

c) *He is willing to provide such security as the court may order for the due performance of such decree.*

10) In her effort to demonstrate that she is entitled to be granted the orders of stay, the Applicant in her supporting affidavits deposed that she has an arguable appeal with good prospects of success. She swears further that she will suffer substantial loss if the orders issued by this Court are executed after the lapse of the ninety (90) days. The orders were for vacant possession of suit land Bukhayo/Mundika/2216 within ninety (90) days in default of which, the Applicant was to be evicted from the suit land.

11) In the case of James **Kamau & 42 others vs. Leonid Limited (2021) eKLR** the Court stated that:

***“It is incumbent upon an applicant to demonstrate, within the application for stay pending appeal, that he stands to suffer substantial loss if stay is not granted. In other words, the applicant needs to inform the court exactly what loss he stands to suffer if stay is not granted so that the court may assess whether this loss meets the standard of substantial loss. Thus, evidence of such loss must be provided by the applicant, ordinarily within the affidavit in support of the application, and it is not for the respondent, or the court, to speculate on the loss the applicant stands to suffer if stay is not granted. I have described what is deposed in the supporting affidavit and I am afraid that nothing in that affidavit provides any evidence, of any loss, that may be occasioned to the applicants if stay is not granted, and I cannot speculate on the loss that they may suffer...”***

12) The Applicant has submitted that she had built a semi-permanent house on the suit land and six rental houses that generate K.Shs. 21,000/- per month where the Applicant and several tenants live, and eviction will render her and the tenants homeless. She stated further that she has developed the land through cultivation and execution during the harvesting period she will incur substantial loss which loss she is afraid the Respondents might not be able to compensate her.

13) The eviction of the Applicant if it is not stayed is likely to cause her substantial loss. Besides raising the objection on the competence of the application, the Respondents said nothing in regard to the merits of the application is so far of the prayer for stay of execution. Consequently, I hold that the application for stay has merit.

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

**a) Stay of execution pending hearing and determination of the appeal before the Court of Appeal is hereby granted; and**

**b) The costs of this application to abide with the winner in the appeal.**

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 28<sup>TH</sup> DAY OF OCTOBER, 2021.**

**A. OMOLLO**

**JUDGE**