REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 233 OF 2009

JANENDRA RAICHAND SHAH.............................PLAINTIFF

VERSUS

NASSOR MOHAMMED NAHDY.........................DEFENDANT

AND

NASSOR MOHAMMED NAHDY......................PLAINTIFF

VERSUS

JANENDRA RAICHARND SHAH

NASSOR MOHAMMED NAHDY

KAVJI RAMJI MANJI

THE REGISTRAR OF TITLES

THE ATTORNEY GENERAL...........................DEFENDANTS

RULING

The application is dated 1st April 2021 and is brought under Section 1A, 1B and 3A of the Civil Procedure Act; under Order 42 Rule 6 (1) and Order 45 Rule 1(a) and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders;

1. That this matter be certified as urgent and service be dispensed of in the first instance.

2. That a temporary stay of execution be granted ex parte in respect of the judgment and decree of Honourable Justice C K. Yano given at Mombasa on the 9th March 2021 in Mombasa ELC No. 233 of 2009 Nassor Mohammed Nahdy vs Jenandrah Raichand Shah and 3 Others pending hearing and determination of this application.

3. That directions be given for service of this notice of motion application and to fix a date for the interpartes hearing thereof.

4. That before the said interpartes hearing of this application this court be pleased to extend the ex-parte period of stay given on oral application on 9th March 2021 for 14 days to await formal application to stay which we hereby make.

The grounds of the application are that there was an oral application for stay made at the time of delivery of the judgment and a stay of 14 days was granted. That it has been impossible to make the application within that time given in finalizing the decree and immediately accessing the court file to get a certified copy of the judgment in time. That the matter of the orders is very final and compelling and there would be a need to apply for stay. That the stay if awarded will not cause any substantive loss to the decree holder because there is an order of injunction forbidding any alienation by anyone and there is no envisaged loss to the land owner. That the Honourable Court do direct when the interpartes hearing of this application will be heard. That this Honourable court do grant any further orders as it deems necessary in the circumstances. That an appropriate order be made for costs of the case.

The respondent submitted that the application herein is fatally defective, ill-conceived, lacks merit, and should therefore be struck out in *limine* with costs to the plaintiff. That on 9th March 2021 judgment was entered in his favour and against the applicant for inter alia, a mandatory injunction directing the defendants to pull down all structures from and to issue vacant possession of all that property known as subdivision Number 890 (Origin. No. 284/99 Section III Mainland North under Certificate Number 39028). That the above judgment affirmed his proprietary rights over the property, which was the subject matter of the suit herein. That in order for the court to grant an order of stay of execution, the applicant must satisfy the court that he stands to suffer substantial loss and that adequate security has been deposited in court as set out under Order 42 Rule 9 (2) (b) of the Civil Procedure Rules 2010. That the applicant must produce empirical evidence to prove that he stands to suffer substantial loss/irreparable harm should the orders of stay not be granted. That in this case, the applicant has merely stated that he has structure and buildings constructed on the suit property. This is not sufficient to trump over his indefeasible proprietary rights on the suit property. Additionally, the applicant does not reside on the suit property hence the applicant is not at risk of suffering irreparable harm. That this Honourable Court delivered its judgment on 9th March 2021, which is over two months ago. Since then the applicant has been seeking extension of interim orders for stay without taking any substantive steps to pursue his appeal. Under paragraph 4 of the supporting affidavit sworn by Munir Mohamed Sketty, the applicant is seeking an extension of the interim orders to at least three months is not founded on any provisions of the law.

This court has carefully considered the application and the submissions herein. I have perused the court file and find that on the 14th June 2021 the court ordered that the applicant files his supplementary affidavit within 21 days if need be but the same was filed on the 6th October 2021. The respondent urged the court to expunge the same as it was filed out of time without leave of the court. In *Raila Odinga vs I.E.B.C & Others (2013) eKLR,* this Court observed that:

> "Article 159(2) (d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court."

Be that as it may, the essence of Article 159(2) (d) is that a Court should not allow the prescriptions of procedure and form to overshadow the primary object of dispensing substantive justice to the parties as is the case here and I hence admit the said affidavit.

The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the Civil Procedure Rules as follows:

> "No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside."

Order 42, rule 6 states:

> "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."

The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.

2. The application has been made without unreasonable delay, and

3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

The principles governing the exercise of the court's jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR), thus:

> "Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-
>
> 1. That the appeal or intended appeal is an arguable *one, that is, that it is not a frivolous appeal,*
>
> 2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction."

The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in Chris Munga N. Bichange Vs Richard Nyagaka Tongi & 2 Others eKLR where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus:-

> "……………. The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated………"

In the case of Mohamed Salim T/A Choice Butchery Vs Nasserpuria Memon Jamat (2013) eKLR, the court stated that:-

> "That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right ……………"

We are further guided by this court's decision in Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997, at Page 4 as follows:

> " . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay."

From the grounds in the application the applicant being aggrieved with the judgment delivered by the court on 9th March 2021 and intends to appeal basically on a matter of evidence. That the appeal, if successful will be rendered nugatory and substantial loss will be suffered if the stay of execution pending appeal is not granted. Be that as it may, this court is not persuaded, that the appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, I am not persuaded that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the applicant has not fulfilled any of the grounds to enable me grant the stay. I find this application has no merit and I dismiss it with costs.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH OCTOBER, 2021

N.A. MATHEKA

JUDGE