



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC APPEAL NO. 23 OF 2021

THOMAS LIMO MUTKAA.....APPELLANT/APPLICANT

VERSUS

ALBINA KAITANY.....RESPONDENT

RULING

1. This is a ruling in respect of a Notice of Motion dated 11th June, 2011 in which the Appellant/Applicant seeks stay of execution pending appeal. The Applicant contends that he is aggrieved by a judgment delivered on 2nd June, 2021 by Hon.Kutwa S.P.M in which he dismissed the Applicant's suit and allowed the Counter-Claim by the Respondent.
2. The Applicant contends that the appeal which he has preferred to this court has high chances of success and that if stay of execution is not granted, his appeal will be rendered nugatory. He further states that he will suffer substantial loss should stay of execution not be granted.
3. The Applicant's application was opposed by the Respondent through a replying affidavit sworn on 28th June 2021. The Respondent contends that the Applicant has not met the threshold for grant of stay of execution pending appeal. The Respondent argues that the Applicant has not demonstrated that he will suffer substantial loss and that in any case, the Applicant's appeal has no chances of success and that the Applicant is only intent in evicting him from the portion of the suit property which he has always occupied.
4. The parties herein were directed to file written submissions in respect of the application. The Applicant filed his submissions on 8th July, 2021. The Respondent did not file any submissions and if any were filed, then they are not in the file.
5. I have considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions by the Applicant. The only issue for determination is whether the Applicant has met the threshold for grant of stay pending appeal.
6. Order 42, Rule 6(2) of the Civil Procedure Rules gives conditions which an Applicant has to meet before stay of execution can be granted. Firstly, an Applicant must bring the application without unreasonable delay. Secondly, the Applicant has to demonstrate that he/she will suffer substantial loss should stay not be granted. Thirdly, there has to be such security given as may ultimately be binding upon the Applicant in the decree.
7. In the instant case, the impugned judgment was delivered on 2nd June, 2021. The present application was filed on 11th June, 2021. I find that in the circumstances, the application was brought within reasonable time. The next question to be answered is whether the Applicant has demonstrated that he will suffer substantial loss should stay not be granted.
8. The applicant's claim was dismissed. The Counter-Claim by the Respondent was allowed. I did not have the benefit of seeing the proceedings from the Lower Court in order to appreciate what the Applicant is apprehensive about. From the supporting affidavit the Applicant states that the trial magistrate directed rectification of the register. If this be the case, then I do not see how this rectification can render the Applicant's appeal nugatory. Demonstration of substantial loss is the cornerstone for grant of stay pending appeal.
9. The Applicant has not demonstrated what substantial loss he will suffer should stay not be granted. If the register is rectified and the Applicant ultimately succeeds in his appeal, the rectification will be reversed. The Applicant has in his submissions alleged that parts of the suit property have been sold to certain individuals who have been named. If this was the case, then this should have been contained in the affidavit and not in submissions which are of no evidential value.
10. Whereas an unsuccessful litigant has a right to prefer an appeal, a successful litigant has a right to enjoy the fruits of his/her judgment. These two competing rights have to be balanced. In the instant case, the Applicant has failed to demonstrate that he will suffer substantial

loss should stay of execution not be granted. This being the case there is no basis upon which this court can grant stay pending appeal. The upshot of this is that the Applicant's application fails. The same is hereby dismissed with costs to the Respondent. The interim orders of stay which were granted on 29th June, 2021 and subsequently extended on 22nd September, 2021 are hereby discharged.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 19TH DAY OF OCTOBER, 2021

E.O. OBAGA

JUDGE

In the virtual presence of;-

Mr.Kipsamo for Appellant

Court Assistant – Mercy

E.O. OBAGA

JUDGE