



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. 20 OF 2020**

**PHILIP MAKUMI NG'ANG'A.....1<sup>ST</sup> APPELLANT**

**CAROLINE GATHONI MAKIUMI.....2<sup>ND</sup> APPELLANT**

**JOHN NG'ANG'A MAKUMI.....3<sup>RD</sup> APPELLANT**

**JAMES GITHINJI MAKUMI.....4<sup>TH</sup> APPELLANT**

**GOERGE WARUNGE MAKUMI.....5<sup>TH</sup> APPELLANT**

**VERSUS**

**GERALD MUTAI M'ARIMI.....RESPONDENT**

**RULING**

1. The appellant seeks stay of execution pending hearing and determination of this appeal. The application is supported by a sworn affidavit of **Caroline Gathoni Makumi**.
2. The reasons given are that there is an intended eviction, there will be substantial loss if the house is destroyed, the appeal is meritorious, the subject land is the only known homestead.
3. The respondent has opposed through a replying affidavit sworn on 16.3.2020 by Gerald Mutai M'Arimi.
4. Firstly, the respondent states he bought the suit land on 22.11.2012 from the 1<sup>st</sup> appellant who has refused to transfer it to him and, the case has been delayed in the court for over 6 years one way or the other by the applicants; he is entitled to enjoy fruits of his judgment, has suffered a lot and if the orders are granted his suffering shall increase. He urges the court to dismiss the application.
5. **Order 42 rule 6** of the Civil Procedure Rules provides an order for stay shall not be made unless there is proof of substantial loss, there is no unreasonable delay in applying for the stay, and an offer for security for the due performance of the decree is proposed.
6. In *James Wangalwa & Another –vs- Agnes Naliaka Cheseto [2012] eKLR* the court held an execution is a lawful process hence it cannot be said to be a substantial loss. Further the court went on to state, an applicant must show other factors which indicate the execution will create a state of affairs that will irreparably affect or negate the very essential core of the appeal.
7. The essence of stay of execution is aimed at preserving the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal, if successful, is not rendered nugatory. *See RWW –vs- EKW [2019] eKLR*. The court must also balance the interest of the appellant with those of the respondent.
8. In the instant case, the judgment was delivered on 22.1.2020. The appeal was lodged on 20.2.2020 together with this application. It is therefore my finding that the appellant moved the court within reasonable time for stay.
9. Coming to the issue of the nature of the decree issued, the appellant has not attached a copy of the decree or the judgment appealed against. The court is therefore unable to assess the nature of the pleadings, evidence, findings and the conclusion arrived at by the trial court so as to know the background of this appeal.
10. Further the appellant alleges there is an impending eviction and or destruction of his homestead. It is not indicated if the appellant has been served with a notice of eviction.

11. On the issue of substantial loss, the appellant has not demonstrated the loss he is likely to suffer. The respondent has expressly stated the 1<sup>st</sup> appellant took away his money Kshs. 250,000/= with effect 22.11.2012, yet he has declined to refund the same and or transfer the land. Similarly the appellant has made no proposal to deposit the said monies in court as security.

12. In my considered view, the respondent has suffered a lot so far and he is likely to be prejudiced more if the orders of stay are issued.

13. In Charles Wahome Gethi –vs- Angela Wairimu Gethi [2008] eKL, the Court of Appeal held:

***“ ..... It is not enough for the applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The applicant must go further and show the substantial loss that the applicant stands to suffer if the respondent execute the decree in this suit against them.”***

14. In sum, I find the appellant has failed to meet the threshold under **Order 42 rule 6**. The application is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2021**

**In presence of:**

No appearance for parties

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**