



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT MOMBASA**

**ELC NO 282 OF 2008 (O.S)**

**KHAIRRUNISSA HUSSEIN HAJI LADHA**

**SHEHNAZ HUSSEIN HAJI LADHA.....PLAINTIFFS/RESPONDENTS**

**- VERSUS -**

**1. SULEIMAN ABDULREHMAN**

**2. NIZAR ALI MOHAMMED (as administrator of the Estate of Ayshabhai Alimohamed Haji)**

**3. MOHAMEND KHALID ISMAIL (as administrator of the Estate of Esmail Haji Suleiman Haji Ladha)**

**4. SALIM HAJI ESSAK**

**5. BILQIS SALIM SULEIMAN.....DEFENDANTS/APPLICANTS**

**RULING**

1. What is before this Honorable Court is the Notice of Motion application dated 5<sup>th</sup> July 2021 by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants/Applicants. Being aggrieved by the Judgement of this court delivered on 3<sup>rd</sup> June, 2020, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants/Applicants herein applied to institute an appeal at the Court of Appeal against the said decision. In the meantime, pending the hearing of the said appeal they brought this application under the provisions of Order 42 Rule 6,(1), (2) and (6) Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act. The application seeks for the following orders:

***a) Spent***

***b) Spent***

***c) Spent***

***d) That this honorable Court be pleased to order a stay of a Execution of the Judgement delivered by Honorable Justice C. Yano on the 3<sup>rd</sup> June 2021, pending the hearing and determination of this intended appeal.***

***e) That the costs of this application abide the outcome of the intended appeal.***

2. The application is premised on the grounds and the 14 Paragraphed Supported Affidavit of SALIM HAJI ESSAK, the 5<sup>th</sup> Defendant/Applicant herein He deposed that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants/Applicants herein intend to prefer an appeal against the Judgement of Justice C. Yano, delivered on 3<sup>rd</sup> June, 2021. To demonstrate their intention, the deponent annexed a Notice of Appeal dated 17 June 2021 and filed on 18 June 2021 (marked as "SHE – 1") and a letter to the Deputy Registrar dated 18 June 2021 (marked as "SHE - 2") requesting for the certified copies of proceedings and judgement. Upon their application they were granted 30 days stay of execution of the aforesaid Judgement pending the hearing and determination of the application and which were about to lapse.

3. They averred that the intended appeal raised serious issues of law and fact to be ventilated in the Appeal especially on whether the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Respondents indeed acquired valid prescriptive rights over the all that parcel of land known as Plot No. MSA/BLOCK/XII/155 (Hereinafter referred to as "The Suit land") through land adverse possession. They were concerned that immediately the stay orders lapsed the Plaintiffs/Respondents would execute the decree from the Judgement. The Defendants/Applicants averred that should the

Plaintiffs/Respondents cause the execution they would be subjected to undue hardships and thereby suffer irreparable damage in that:-

- a) The 4<sup>th</sup> and 5<sup>th</sup> Defendants were still the registered owners to the suit property and held the title deed;
- b) The Judgement was to the effect that the title deed registered to and held by the two of them was null and void and the same to be surrendered for cancellation by the Land Registrar, Mombasa.
- c) The Land Registrar was also ordered to register the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Respondents as the true owners of the suit land and issue them with a title deed in their favour, to the exclusion all of the Defendants/Applicants

For these reasons, they were concerned that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs / Respondents would execute the decree from the Judgement immediately the stay orders lapsed.

4. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants/Applicants claimed that the intended appeal had high chances of success and the execution of the decree would render the appeal nugatory and an exercise in futility if it was successful. The Defendants/ Applicants argued that the Plaintiffs/Respondents were their relatives and were fully aware that they would continue to occupy a flat on the first floor forming part of the house erected on the suit property as the Defendants/Applicants had no intention of interfering with that occupation during the pendency of the matter and the intended appeal. They held that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Respondents would not suffer any prejudice if the application was allowed since they were in actual occupation of part of the suit property. If anything, it was the 4<sup>th</sup> and the 5<sup>th</sup> Defendant/Applicants to suffer great prejudice if the application was not allowed as the title deed was registered in their names. The Defendants/Applicants urged Court to grant the said orders as the application had been brought in good faith and without undue nor unreasonable delay.

#### **The Plaintiffs/Respondent's case**

5. On 28 July 2021, the 2<sup>nd</sup> Plaintiffs/Respondents filed a 10 Paragraphed Replying Affidavit dated the same date in response to the application. She deposed that the existence of an appeal alone ought not be a ground for stay of execution as ideally the Applicant ought to prove the grounds established in Order 42 Rule 6 of the Civil Procedure Rules. She averred that she had no intention of selling the house, therefore the Applicants would not suffer any prejudice nor irreparable harm if the application was declined.

She confirmed that the Defendants/Applicants were her relatives and indeed they were in occupation of part of the suit property. She argued that the only fear the Defendants/Applicants had was if the suit property was registered in her name, if their appeal succeeded. She held that Court ought to order the title to be cancelled and registered in their names. The deponent urged Court to dismiss the application as the Defendants/Applicants had not proved the grounds required for a grant of stay of execution.

#### **The Submissions**

6. On 30<sup>th</sup> September, 2021 when all the parties were present in court, directions were taken to the effect that they dispose off the said Notice of Motion application dated 5<sup>th</sup> July, 2021 by way of written submission. Pursuant to this, all the parties complied with the said directions accordingly.

#### **The Submission by the Defendants/Applicants**

7. On 6<sup>th</sup> October 2021, the Learned Counsel to the Defendants/Applicants, the law firm of Messrs. Muthee Kihiko Soni & Associates LLP filed their written submissions in support of the application. The Learned Counsel submitted that the grant of stay of execution pending appeal was discretionary dependent on the circumstances of each case. Learned Counsel argued that the application had been brought without undue delay, having been filed on 6<sup>th</sup> July 2021, on the day the stay of execution was meant to lapse.

8. They were apprehensive that their intended appeal, which they claimed raised arguable issues and stood a fair chance of succeeding, would be rendered nugatory if the stay was not granted. The Learned Counsel submitted that the intended appeal sought to question how the Court arrived at granting the Respondents/Applicants title to the suit property despite the 4<sup>th</sup> and 5<sup>th</sup> Respondents/Applicants having acquired good title from their previous owners. The Learned Counsel urged Court to find that the issues raised in the intended appeal were bonafide, arguable and not frivolous.

9. The Learned Counsel submitted that should the judgement be executed, the Applicants' title to the suit property would be cancelled, before they are accorded the chance to ventilate the issues on appeal. They relied on the case of **James Wangalwa & another – Vs - Agnes Naliaka Cheseto (2012)eKLR, where substantial loss was discussed ‘...the applicant must establish other factors which show that execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as a successful part in the appeal... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.’**

10. The Learned Counsel further submitted that the Defendants/Applicants had offered sufficient and reasonable security for the performance of the resultant decree, by reassuring the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendant/Respondents who were their relatives, that they would not be evicted from the first floor of the suit property where they currently reside in. The Defendants/Applicants undertook not to interfere with the occupation and use of the suit property and prayed Court to also stop the Respondents from dealing with the title in any way. The Learned Counsel invited Court to consider granting them status quo and strike a balance between their rights to appeal and those of the Respondents of enjoying the fruits of their judgement. Counsel relied on the case of **Victory Construction Versus BM (2019)eKLR.**

In conclusion, the Learned Counsel urged Court to order each party to bear their own costs because the parties herein were family members. Essentially, the Learned Counsel urged Court to allow the application with no order as to costs.

### **The Submission by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants/ Applicants**

11. On 18<sup>th</sup> October 2021, the Advocates for the Plaintiffs/Respondents, the law firm of Messrs. Khatib & Company Advocates filed their submissions in opposition of the application. The Learned Counsel's main argument was that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants/Applicants had not established, the requirements stipulated on provision under Order 42 Rule 6 of the Civil Procedure Rules for granting of the orders sought.

12. Therefore, they urged Court to dismiss the application with costs. The Learned Counsel argued that the only term of execution of the decree was the registration of the suit property in the name of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Respondents, which in any case could be cancelled if the appeal was to be successful. The Learned Counsel contended that the registration is reversible hence possessed no prejudice or danger to the appellant thus the Defendants/Applicants had not established any substantial loss to be suffered if the application was to be declined. Counsel invited this Court to find that the application was not merited and dismiss it with costs.

### **ANALYSIS AND DETERMINATION.**

13. I have carefully read and put into account all the filed pleadings, the written submissions by both Advocates for the Plaintiffs and Defendants, authorities relied on and the relevant provisions of the appropriate and enabling laws with regard to the application dated 5<sup>th</sup> July, 2021 by the Defendants/Applicants. In order to arrive at an informed decision, I have framed the following salient issues for consideration. These are:-

***a) Whether the Defendants/Applicants have fulfilled the fundamental requirements of being granted stay of execution of the Judgement of this Court made on the 3<sup>rd</sup> June, 2021 as set out under Order 42 rule 6 (1) & (6) of the Civil Procedure Rules.***

***b) Who will bear the costs of the said Notice of Motion application.***

***c) Issue No. a). Whether the Defendants/Applicants have fulfilled the fundamental requirements of being granted stay of execution of the Judgement of this Court made on the 3<sup>rd</sup> June, 2021 as set out under Order 42 rule 6 (1) & (6) of the Civil Procedure Rules.***

14. Before proceeding further, it is imperative that I spell out the facts of this case briefly. From the pleadings, I have noted that the matter involves family members. The main bone of contention is on the ownership of the suit property. The title deed was registered in the names of the 4<sup>th</sup> and 5<sup>th</sup> Defendants/Applicants.

The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Respondents are and have been in actual occupation of a flat on the first floor of the suit property. In the course of time, a dispute over ownership of the suit property arose between them and the Defendants. As result, the Plaintiffs/Respondents instituted the suit claiming legal ownership of the suit property by way of land adverse possession. The matter was heard and determined Judgment in their favour. The court declared that the Plaintiffs/Respondents were the legal owners to the suit property by way of land adverse possession. It ordered that the title deed be issued in their names by totally excluding all the other Defendants.

Further, the Court ordered that the title deed which by then as was in the names of the 4<sup>th</sup> and 5<sup>th</sup> Defendants as indicated above be surrendered to the Land Registrar, Mombasa for cancellation and issuance of a new one in the names of the Plaintiffs/Respondents.

The Defendants/Applicants were aggrieved by the court's decision and have filed a notice of appeal and this application.

Ideally, the purpose of an application for stay of execution by any applicant is with an aim to preserve the subject matter in dispute so that the right of the Applicant is safeguarded. See the case of *Consolidated Marine – Versus - Namprijad & Ano. Civil Appeal No. 93 of 1989* Nairobi where court held that:-

***“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.***

In saying so, it is imperative to critically assess the legal spectrum of this aspect. The legal substratum for granting stay of execution is anchored in these provisions of law. These are:-

Order 42 Rule (6) (1) of the Civil Procedure Rules entitled ***“Stay in Case of Appeal”*** hold inter alia:

***“No appeal or 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 application being made to consider such an application and to make such order thereon as may to it seem just and 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 such order set aside”.***

While the provisions of Order 42 rule (6)(6) of the CPR which provides:-

**“Notwithstanding anything contained in Sub-rule (1) of the rule the High Court shall have power in exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from the sub-ordinate Court or tribunal has been complied with.**

15. Regarding the granting of stay of execution pending appeal, there are plethora of decided cases and hence a well set out principles based on precedents. For instance, below are the leading ones. In the Civil Appeal *No. 107 of 2015 – Masisi Mwita –VS\_ Damaris Wanjiku Njeri [2016] eKLR* where the court held that:-

**“The application must meet a criteria set out in precedents and the criteria is best captured in the case of “Halal & Another –VS- Thornton & Turpin Ltd. where the Court of Appeal Gicheru J.A., Chesoni & Coker AG 1A) held that: “The High Courts discretion to order stay of execution of its order or Decree is fettered by three (3) conditions namely:- Sufficient Cause, substantial loss would ensue from a refusal to grant stay the Applicant must furnish security, the application may be made without unreasonable delay. In addition the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakolo –VS- Straman E.A. Ltd.[2013]* as follows:-**

**“In addition the Appellant must prove that if the orders sought are not granted and his Appeal eventually succeeded them the same shall have been rendered nugatory”. These twin principles go hand in hand and failure to prove one dislodges the other. The court notes with great humility the Plaintiff/Applicant agrees with it by citing the case of *Vishram Rouji Halal –VS- Thrornton & Turpour Civil Appeal No. 15 of [1990] KLR 365,***

And in the *Canvass manufacturers Ltd. –VS- Stephen Reuben Korunditu Civil application No. 158 of 1994 [1994] LLR 4853* – where the court held that:-

**“Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised”** Further in the case of *“Stephen Wanjiku –VS- Central Glass Industries Ltd. Nbi) HCC No. 6726 of 1991* the court held that:-

**For the court to order a stay of execution there MUST be:-**

- i. Sufficient cause;**
- ii. Substantial loss**
- iii. No unreasonable delay.**
- iv. Security and the grant of stay is discretionary.**

16. It is evident from the above provisions of law that the court has discretion to issue an order of stay of execution. However, the said discretion must be exercised judicially and not capriciously. In exercising its discretion, court should therefore always opt for the lower rather than the highest risk of injustice. The court is to weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that the successful party is not impeded from enjoying the fruits of judgement. Always, there is need for equal level footing or playing ground.

17. Despite of these principles, courts have also argued that the four (4) principles above are not binding on this court in view of the overriding principles (or what has been termed as the Oxygen rule) being the courts inherent powers as founded under the provisions of Sections 1, 1A, 3, 3A of the CPA and Section 3 of the Environment and Land Court Act No. 19 of 2012. These inherent powers emphasise on having land dispute being justly, expeditiously, proportionately and assessible determination of dispute without impending on to undue technicalities. While considering whether to grant the orders for stay court has to weigh all these considerations without taking the risk of leading to undesirable or absurd outcome.

18. Furthermore, based on the above clear four (4) principles, this court will then proceed to determine whether the Applicant herein has satisfied the required standard for granting of stay orders pending appeal as follows:-

Firstly, the Applicant must show that they will suffer substantial loss. Apparently, this seem to be the main issue out of the four set out principles. There must be empirical or documentary evidence of the substantial loss to support the contention and not just in face value.

**In the case of *Victory Constructions – Vs - BM (a minor suing through next friend one PMM) (2019)eKLR, Odunga J* discussed what Court ought to consider when faced by an application for stay pending appeal, he stated that: ‘It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principle of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that is the business of the Court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice, the Court in exercising its discretion, should therefore always apt for the lower rather than the higher risk of injustice.’**

19. The Defendants/Applicants argue that the effect of the judgment would be the cancellation of the 4<sup>th</sup> and 5<sup>th</sup> Defendants/Applicants' title to the suit property, and registration of the Respondents as the owners of the suit property. The Plaintiffs/Respondents on the other hand, have claimed that the Defendants/Applicants will not suffer substantial loss since the process of registering them as the owners can be reversed if the Applicants are successful in their appeal. In my view, the Applicants have not established that they stand to suffer substantial loss if the application is not allowed. It is not sufficient to merely state that the cancellation of a title will amount to substantial loss, what sort of loss would this be and how will it be experienced by the Defendants/Applicants. **In Samvir Trustee Limited V Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997, Warsame J (as he then was), expressed himself as follows: 'for the applicant to obtain a stay of execution, it must satisfy the Court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the Court will not consider assertions of substantial loss on the face value but the Court in exercising its discretion would be guided by adequate and proper evidence of substantial loss.'**

20. The Defendants/Applicants have deponed in their supporting affidavit that the Respondents occupy the first floor of the house on the suit property, and gave an assurance that they have no intention of interfering with the occupation until the intended appeal is heard and determined. The Plaintiffs/Respondents on the other hand, deposes that the Defendants/Applicants will suffer no prejudice as she doesn't intend to sell or interfere with the suit property whatsoever. Although, the Court is the one that orders what security the Defendants/Applicants ought to furnish under Order 42 Rule 6 (2) of the Civil Procedure Rules, it would have been a good gesture and a sign of good faith if the Defendants/Applicants would have offered security for costs that would reflect their readiness and commitment to offer security. But that never happened. I am not persuaded that a mere statement not to evict the Plaintiffs/Respondents from their current residence is a tangible security proposition from the Defendants/Applicants.

21. On the third issue, I do agree that this application was brought without undue delay as it was filed on 6<sup>th</sup> July 2021, within the 30 days stay of execution that was granted by Court on 3<sup>rd</sup> June 2021.

In the instant application, I am not persuaded that the Defendants/Applicants have satisfied the conditioned melted out by Order 42 Rule 6. I associated myself with the findings of *Macharia T/A Macharia & Co Advocates – Vs - East African Standard (No. 2) (2002) KLR 63, it was held:-*

***“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to the principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled.’***

22. The Learned Counsel for the Defendants/Applicants submitted that Court ought to maintain the status quo pending the hearing and determination of the intended appeal, which he maintained has a likelihood of success. In my view, this Court is only called to apply the overriding objective of ensuring that the execution of one's party's right does not defeat or derogate the right of the other. In carrying out a balance exercise to ensure justice and fairness thrives, I am inclined to take the necessary steps in order to maintain the status quo. In order to preserve the suit property, it is imperative that an inhibition to be registered by the Land Registrar, Mombasa against all the suit property.

23. ***Who will bear the costs of the said Notice of Motion application.***

The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. In this case, as Court finds that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants/Applicants have failed to fulfill the conditions set out under Order 42 Rule 6 (2) and (6) of the Procedure, this application shall be deemed to have been dismissed with costs awarded to the Plaintiffs/Respondents.

#### **Determination**

From the foregoing, therefore, and for avoidance of any doubts, I order:-

- 1. THAT the notice of motion application dated 5<sup>th</sup> July, 2021 by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants/Applicants is bereft of any merit and the same is and hereby dismissed.**
- 2. THAT it is directed that the Land Registrar, Mombasa to register an inhibition onto all that property known as Land Reference Numbers Plot No. Mombasa/Block XXII/155 by invoking the provision of Section 68 (1) and (2) of the Land Registration Act No. 3 of 2012 and Rule 79 of the Land Registration (General) Regulations, 2017 within the next 30 days from the date of this ruling at the costs of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants/Applicants.**
- 3. THAT the costs of the application to be borne by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants/Applicants.**

**IT IS SO ORDERED.**

**RULING IS DATED, SIGNED AND DELIVERED AT MOMBASA VIRTUALLY THIS 18<sup>TH</sup> DAY OF NOVEMBER 2021.**

**JUSTICE L.L NAIKUNI**

**JUDGE**

**ENVIRONMENT AND LAND COURT, MOMBASA**

**In the presence of:-**

*M/s. Yumna – the Court Assistant*

*Mr. Khatib Advocates for the Plaintiffs/Respondents;*

*Mr. Mutugi Advocate for the Defendants/Applicants*