



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS ENVIRONMENT AND LAND COURT APPLICATION NUMBER 2 OF 2021**

**MONICA OPETE.....APPELLANT**

**VERSUS**

**MICHAEL OWINO AWINDE.....RESPONDENT**

**RULING**

**Introduction**

1. By a plaint dated 15/02/2021, the respondent filed an amended plaint claiming customary trust over land parcel number NORTH GEM/MALUNGA/219 (**suit property**) against the appellant. The appellant denied the respondent's claim. By its judgement dated 15/04/2021, the court declared that the respondent had proved customary trust over the suit property and ordered a dissolution of the trust and 0.6 hectares of the suit property to be registered in the name of the respondent.
2. Aggrieved and dissatisfied by the judgement of the court, the appellant filed an application for leave to appeal out of time which was allowed by this court. The memorandum of appeal dated 17/8/2021 was deemed as duly filed.
3. The appellant filed the instant motion dated 12/10/2021 seeking stay of execution pending appeal. The motion is the subject of this ruling.

**The applicant's case and submissions**

4. Pursuant to **Sections 1A, 1B, 3, 3A and 80** of the **Civil Procedure Act** and **Order 45 Rules 1, 2, 3** and **Order 51 Rule 1** of the **Civil Procedure Rules**, the appellant filed the motion under a certificate of urgency together with a supporting affidavit. Prayers number 1 and 2 are spent. The substantive prayer pending determination is that of a temporary stay of execution of the judgment of the court in **ELC Number 74A of 2018** pending the intended appeal.
5. The motion is supported on the following grounds; (i) the subdivision of the suit property is imminent, (ii) she had a similar application in the lower court which has since been withdrawn, (iii) If orders sought are not granted, the appeal will be rendered nugatory and, (iv) she will suffer irreparable harm if the stay is not granted.
6. The appellant filed written submissions dated 18/10/2021. She identified one issue for determination; whether the appellant has demonstrated sufficient grounds to warrant stay of execution. She contended that if stay of execution is not granted and the appeal is successful, the land registrar will be compelled to cancel the title and revert the property back to her. She submitted that the motion was filed a few days after judgement was delivered and she had an arguable appeal. She placed reliance on the decisions of **Antoine Ndiye vs African Virtual University (2015) eKLR** and **Butt vs Rent Restriction Tribunal (1979)** among others.

**The respondent's case and submissions**

7. The respondent filed a replying affidavit dated 4/11/2021 in which he contended that; (i) judgement was delivered in the presence of the appellant, however she did not seek stay of execution, (ii) that an appeal had not been lodged and the application for extension of leave to appeal out of time is pending determination, (iii) if the motion is granted, the respondent will be denied fruits of his judgement, and, (iv) there was undue delay in filing the motion.
8. The respondent filed written submissions dated 4/11/2021 in which he submitted that the appellant had not met the criteria for the grant of stay pending appeal. He placed reliance in the authorities of **Republic vs Kenya Anti-Corruption Commission & 2 others (2009) KLR 31** and **RWW vs EKW (2019) eKLR** among others.

**Analysis and determination**

9. This court has had a chance to look at the motion, supporting affidavit, replying affidavit and written submissions and the only issue falling for determination is whether the appellant's motion is merited.

I will proceed to analyze the legal and jurisprudential framework on the issue.

**10. Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules** sets out the principles that guide courts in deciding on whether or not to grant a stay of execution pending appeal. This provision of law sets out three conditions that must be met before the court grants a stay of execution pending appeal which are; (i)The Court is satisfied that substantial loss will be occasioned on the applicant unless stay of execution is ordered,(ii)the application is brought without undue delay and (iii)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. This provision of law has been applied in a line of court decisions including the cases of **Masisi Mwita v Damaris Wanjiku Njeri (2016) eKLR**, **Stephen Wanjohi v Central Glass Industries Ltd, Nairobi HCC No.6726 of 1991** and **Joseph Kakomo Mbenga v Maingi Charles & another [2018] eKLR** and **Joseph Kakomo Mbenga v Maingi Charles & another [2018] eKLR** which quoted the Court of Appeal decision of **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365**.

**11.** The question that then arises is whether the appellant has met the criteria for the grant of stay of execution pending appeal.

**12.** The appellant has contended that she will suffer irreparable loss if the stay is not granted. In setting out such a ground, the appellant is required to demonstrate that the execution will create such a state of affairs that will irreparably interfere with the outcome of the appeal. **In the case of Mukuma V Abuoga (1988) KLR 645** the court in defining substantial loss in an application for stay pending appeal stated thus;

***“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”***

**13.** The appellant has submitted that she holds title to the suit property and if stay is not granted, the respondent may use the suit property to the detriment of the appellant and further, in the event the appeal is successful, the land registrar will undergo the laborious process of reverting the suit property to the appellant. The appellant has not disclosed to this court the status quo of the suit property. It is the considered view of this court that a mere statement that she will suffer irreparable loss or that the respondent will use the suit property to the detriment of the appellant is not sufficient. The appellant is required to go beyond that and particularize the loss and damage that she will suffer in the event the stay of execution is not granted. The motion fails on this 1<sup>st</sup> limb.

**14.** The instant motion was filed six months after the court rendered its judgement. The reason tendered by the appellant for delay is that she had filed an application for stay in the lower court which has since been withdrawn because the magistrate who was handling the application had proceeded on transfer and consequently, she was unable to secure an early hearing date for that application. The appellant is economical on the facts pertaining this particular application. The date of this application, when it was filed, when the directions were made and the date of its withdrawal have not been disclosed to this court. Such disclosure would have assisted the court in deciding whether or not the appellant was keen in seeking a stay of execution immediately the judgement of the court was rendered. What is certain, is that the instant motion was filed 6 months after the court rendered its judgement. This court considers the period of 6 months to be inordinately long. The motion fails on the 2<sup>nd</sup> limb.

**15.** An appellant has to furnish security for the court to determine its sufficiency. This position was upheld in the case of **Equity Bank Ltd – vs- Taiga Adams Company Ltd [2006] eKLR** where the court held thus:

***“of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought ...let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...”*** which principle was also emphasized in ***Carter & Sons Ltd –vs- Deposit Protection Fund Board & 3 Others.***

**16. Order 42 Rule 6 (2) (b) of the Civil Procedure Rules** is couched in mandatory terms and a party who seeks stay of execution pending appeal must furnish security. Such security would be in the form of either a deposit of the title document in court or monetary security. In the instant motion, the appellant has not proffered any security whatsoever for due performance for the court's consideration and in the circumstances, the appellant has failed in the third limb.

**17.** The upshot is that it is my finding that the appellant has not met the criteria for stay of execution pending appeal and consequently, I make the following disposal orders;

**a) The notice of motion dated 12/10/2021 is hereby dismissed**

**b) Costs to the respondent.**

It is so ordered.

**RULING DELIVERED IN OPEN COURT.**

**DATED, SIGNED AND DELIVERED THIS 14TH DAY OF DECEMBER 2021**

**In the Presence of:**

Mr. Owuoro for the appellant

Respondent present in court

Court assistant: Sarah Ooro

**HON. A. Y. KOROSS**

**JUDGE**

**14/12/2021**