



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELCA CASE NO. 18 OF 2021

DICKSON MUOKI MUTUKU.....APPELLANT

VERSUS

MRS. FESTUS KAMINZA.....RESPONDENT

RULING

The application is dated 7th April 2021 and is brought under Sections 3A and 95 of the Civil Procedure Act, Cap. 21, Laws of Kenya and Order 42. Rule 6, Order 50. Rule 6. Order 51. Rule 3 of the Civil Procedure Rules, seeking the following orders;

1. That service of this application on the Respondent be dispensed with and this application be heard ex-parte in the first instance;
2. That this application be heard ex-parte in the first instance and as a matter of urgency on the ground inter alia, that execution of the decree passed herein on the 18th of February 2021 against the appellant/applicant is imminent. In the event of the execution of the said decree, the appellant would suffer irremediable loss and damage.
3. That in view of the urgency of this matter, this Honourable Court do grant a stay of execution of this Court's Judgment and/or Decree made on the 18th of February 2021 pending the hearing of this application inter-partes;
4. That this Honourable Court be pleased to grant a stay execution of the Order and/or decision of this Honourable Court made on the 18th of February 2021 until the hearing and final determination of the intended Appeal to this honourable court by the Applicant herein;
5. That this Honourable Court do fix a date for the inter-partes hearing of this application;
6. That the costs of this application be provided for.

It is based on the grounds that the Applicant is dissatisfied with the Judgment and/or decision of this Honourable Court made on 18th February 2021 and has instructed his Advocates to lodge an appeal to this Honourable Court against the said Judgment and/or Decree. That the Appellant/ Applicant has already filed a Memorandum of Appeal. That the appeal by the Appellant/ Applicant is arguable and has high chances of success. That the Applicant is ready willing and able to deposit such sum as this Honourable Court may order to be so deposited in a joint escrow account to the order of both the Applicant's and the Respondent's Advocates. That unless the orders sought herein are granted, the Appellant/ Applicant stands to suffer substantial loss as the said Appeal will be rendered nugatory unless the orders sought are granted.

This court has carefully considered the application dated 7th April 2021 and the submissions herein. The respondent was served but failed to file any documents in response. 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 subordinate court on 18th February 2021 has filed a notice of appeal. 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 applicants have not fulfilled any of the grounds to enable me grant the stay. I find this application has no merit and I dismiss it with no orders as to costs as it was undefended.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 8TH DECEMBER 2021.

N.A. MATHEKA

JUDGE