



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 164 OF 2009

RAHANS INVESTMENTS LIMITED.....PLAINTIFF/RESPONDENT

-VS-

AMARANTH ENTERPRISED LIMITED.....DEFENDANT/APPLICANT

AND

KENYA NATIONAL CHAMBER OF COMMERCE.....THIRD PARTY

RULING

The application is dated 11th September 2020 and is brought under Sections 1A, IB, 65 and 95 Civil Procedure Act Order 42 Rule 6 (1) and (2) Order 50 and Order 51 Civil Procedure Rules seeking the following orders;

1. That there be a temporary stay of execution pending hearing and determination of this application.
2. That there be a stay of execution pending the hearing and determination of the Applicants Appeal at the Court of Appeal.

It is based on the grounds that judgement has already been entered against the applicant. That the Respondent has embarked on the process of execution and may execute the decree herein at any time. That the Applicant has filed Notice of Appeal herein and is in the process of filing the Memorandum of Appeal. That it is therefore necessary to preserve the status quo pending the hearing and determination of the Applicant's said Appeal before the Court of Appeal so that the said Applicant's Appeal is not rendered otiose redundant and nugatory. That the orders sought herein are necessary for the ends of justice to be met. That in the interests of justice the orders sought herein ought to be granted.

The respondent submits that vide its judgment dated 15th July 2020, the court issued a permanent prohibitory injunction restraining the Defendant from interfering with the Plaintiff's occupation of Mombasa/Block XXIII/185. The court also issued a permanent mandatory injunction compelling the Defendant to remove all materials that it deposited on the suit property. That in the judgment, the 1st Defendant's witness is recorded confirming that the Plaintiff has been in occupation of the suit property since January 2016. The Plaintiff's occupation was obtained long after Azangalala J. (as he then was), granted an interlocutory mandatory injunction on 27th August 2009. That since the Plaintiff has admittedly been in possession since 2016, there is nothing capable of being executed as far as Order (a) & (b) of the judgment are concerned. That as for Order (c) & (d) being Kshs. 1,219,551.18 as general damages and Kshs. 1,500,000.00 as aggravated damages for trespass, they constitute monetary awards and will not in any way affect the Defendant's right of appeal. That the Plaintiff is running a car dealership on the suit property. Additionally, the Plaintiff is the registered owner of the very valuable suit property. That the Plaintiff is capable of refunding to the Defendant the decretal sum that it will pay, should the intended appeal succeed.

This court has carefully considered the application and the submissions herein. 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 applicants being aggrieved with the judgment delivered by the court on 15th July 2021 have 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. It has come out in submissions that part of the judgement has already been executed and it is only the monetary part left. 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 applicant has not fulfilled any of the grounds to enable me grant the stay. I find this application dated 11th September 2021 has no merit and I dismiss it with costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE