



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO 126 OF 2019**

**JOHN LEMISO OLE LEKAKENY.....PLAINTIFF/RESPONDENT**

**VERSUS**

**DAVID KIPKIRUI KANDIE.....DEFENDANT/APPLICANT**

**RULING**

The application is dated 22<sup>nd</sup> September 2021 and is brought under Section 1A, 1B and 3A of the Civil Procedure Act and Rule 6(1) (6), Order 51 (1) of the Civil Procedure Rules 2010 seeking the following orders;

1. This Application be certified urgent and heard on ex-parte in the first instance.
2. The Honourable court be pleased to grant orders for stay of execution of Decree given in favour of the Plaintiff pursuant to the judgement of Court delivered on 21<sup>st</sup> September 2021 pending the hearing and determination of this application interpartes.
3. The Honourable court be pleased to grant orders for stay of execution of Decree given in favour of the Plaintiff pursuant to the judgement of Court delivered on 21<sup>st</sup> September 2021 pending determination of an Appeal filed by the Defendant/Applicant.
4. The Honourable Court be pleased to issue a prohibitory order directing the Land Registrar Mombasa from effecting any changes in the Register regarding Mombasa Municipality BLOCK XXVI/212 pending determination of an Appeal filed by the applicant.

It is based on the grounds that the Defendant/Applicant is the current registered owner and in possession of the disputed property by virtue of the Decree of this court made on 15<sup>th</sup> February 2019 in ELC No. 22 of 2012 Mombasa. The Plaintiff/Respondent was the vendor for the disputed property while the defendant/applicant was the purchaser. The plaintiff/respondent received the entire purchase price as per sale agreement dated 7<sup>th</sup> January 2010. The judgement of the superior Court delivered on 21<sup>st</sup> September 2021 dismissed the defendant's/applicant's defence and ordered cancellation of the applicant's title in disregard of the sale agreement dated 7<sup>th</sup> January 2010 and proceedings of Court made in ELC No. 22 of 2021 Mombasa. The respondent has now powers to dispose of the disputed property to third parties to the prejudice of the applicant who has filed an Appeal against the said judgement. The Defendant/Applicant has a good appeal which has high chances of success considering the sale agreement dated 7<sup>th</sup> January 2010 and the proceedings of Court made in ELC No. 22 of 2012 Mombasa where the Respondent acknowledged receipt of the purchase price. There is need to preserve the suit property pending determination of the Appeal so that the Appeal is not rendered nugatory hence this Application.

The Respondent submitted that the said Application is incompetent, frivolous, fatally defective, superfluous, lacks merits and is an abuse of the Court process. That the Applicant's intended Appeal is not arguable and does not stand any chance of success based on the analysis of evidence tendered and the well-reasoned judgment of the trial Court herein. That the Applicant's failed to discharge his burden of proof by tendering evidence of payment of Kshs. 10,000,000/= to the Respondent and or failing to call any witness to corroborate his oral evidence/allegations of payment of the entire purchase price to the Respondent in respect of the suit premises. That the Applicant has not annexed a draft memorandum of appeal to enable the Honourable Court evaluate whether the intended Appeal is arguable or stands any chance of success. That the Applicant avers that in blatant breach of the said suit agreement and mutual trust, he paid the Plaintiff a sum of Kshs. 300,000/= but failed, refused and neglected to pay the balance of the purchase price and interest after successful said suit thereof. That the trial Court has duly and judiciously established that it was not true that the Applicant/Defendant had paid the Applicant/Plaintiff the entire purchase price of Kshs. 10,000,000/= as was alleged. The law is clear that a deposit is not recoverable if the entire purchase price is not paid. That the Applicant has not annexed a draft memorandum of appeal to enable the Honourable Court evaluate whether the intended appeal is arguable or stands any chance of success. That the Respondent is entitled to the fruits of this just, fair and judicious judgment hereof. That litigation must come to an end and the Applicant must not be permitted to reopen issues that have been determined by this

Court. Justice must be served to litigants without undue delay. That the application for stay of judgment without a copy of the decree and or a draft memorandum of appeal is superfluous does not lie and is a gross abuse of the court process. That the Applicant will not suffer any prejudice if stay is not granted because the Respondent has peaceful and sole possession of the suit premises. The Applicant does not reside and has not developed the suit premises because he knows that he never paid the purchase price thereof. That this Honourable Court should dismiss the Notice of Motion dated 22<sup>nd</sup> September, 2021 with costs to be assessed by this Honourable Court herein.

This court has carefully considered the application dated 22<sup>nd</sup> September 2021 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 which states 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 court 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. 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 the application dated 22<sup>nd</sup> September 2021 has no merit and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 7<sup>TH</sup> DECEMBER, 2021**

**N.A. MATHEKA**

**JUDGE**