



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELCA NO. 43 OF 2019

NYANJE MDOE

MWANJIRANI MDOE (DURA)

MWANJIRANI MDOE

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NDURYA MDOE.....PLAINTIFFS

-VS-

AWALE TRANSPORTERS LIMITED.....DEFENDANT

RULING

1. The application for consideration is the Notice of Motion dated 12th September, 2019 in which the Appellants/Applicants are seeking orders of stay of execution of the rulings and orders issued by Hon. P. Wambugu, P. M. On 11th September, 2019 in Kwale Magistrate's Court Environment and Land Court Case No.24 of 2018 pending hearing and determination of the appeal herein. The applicants were aggrieved by the said rulings and have lodged an appeal which they aver is arguable and with high chances of success and that unless stay is granted, the appeal will be rendered nugatory.

2. The application is supported by the affidavit and supplementary affidavit of Nyanje Mdoe sworn on 12th September, 2019 and on 24th October, 2019 respectively in which it is deponed that unless the stay is granted, the appeal will be rendered nugatory because the lower court granted eviction and demolition orders from their community home where they have resided since time immemorial thus they will be homeless and destitute. That the trial court granted final orders at an interlocutory stage thus denying the applicants the right of a fair trial guaranteed by Article 25(c) of the constitution. That the ruling and orders of 11th September, 2019 adversely affect a pending suit being Magistrate's Court Case No. 31 of 2019. The applicants aver that no prejudice will be suffered by the respondent if the orders sought are granted.

3. In opposing the application the respondent filed a replying affidavit sworn by Salad Awale Jumale on 23rd September, 2019 in which he deposed that the Respondent is the registered owner of the property known AS KWALE/SOUTH SAMBURU GROUP RANGE/99. That the applicants are squatters and illegal occupants on the suit property. That on 23rd November, 2018 the respondent served upon the applicant an Eviction Notice pursuant to Section 152E of the Land Act demanding that the applicants vacate from the suit property. That on 18th February 2019 the applicants filed an application at Kwale Chief Magistrate's Court seeking suspension of the operation of the aforesaid Eviction Notice. That before the issuance of the said Eviction notice, the respondent had on or about 28th May 2018 instituted a suit and an application in Kwale CMC ELC Case No.24 of 2018 seeking eviction orders, among others against the applicants. That whereas the eviction notice dated 23rd November 2018 is a statutory remedy available to a registered owner of a private land which does not require sanction by the court; the lower court nonetheless confirmed the Eviction Notice and disallowed the application by the applicants challenging the eviction notice. The respondent states that the applicants are not ready to vacate the suit property and have been blackmailing the respondent. That the applicants have filed a new suit to wit Kwale CMCC ELC Suit No. 31 of 2019 against the respondent while the parties already had an existing case No.24 of 2018. That the court cannot stay the execution of the ruling dated 11th September 2019 which was delivered in case No. 24 of 2018 and not Case No. 31 of 2019. That granting the stay orders will deprive the respondent enjoyment of its property.

4. The application was canvassed by way of written submissions which were duly filed by both parties. I have considered the application and the affidavits in support and against as well as the rival submissions. Order 42 Rule 6 sets out conditions that must be met before an order for stay of execution is allowed. It states as follows:

6 (1) 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 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 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.

2 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.

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.

5. The application herein was filed on 12th September 2019. The appeal is against the rulings issued by the subordinate court on 11th September, 2018. I therefore find that the application herein was filed without delay.

6. In the rulings and orders appealed against, the lower court ordered the applicants to vacate the suit property or they be evicted therefrom. The court also ordered the demolition of the applicants' structures. In the case of **Kenya Shell Limited –v- Benjamin Karuga Kigubu & Another (1982-1988) KAR 108** the Court of Appeal stated.

“It is usually a good rule to see if order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be rendered nugatory by some other event. Substantial loss in various forms is the cornerstone for granting stay.”

In the case of **Absalom Dora –v- Turbo Transporters (2013) eKLR** it was stated.

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights the appellant to his appeal which includes the prospect that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. ”

7. The cornerstone of the jurisdiction of the court under Order 42 is that substantial loss would result to the applicant unless a stay of execution is granted. In this particular case, the appeal is against orders of eviction and demolition. No doubt unless stay is allowed the applicants will suffer substantial loss as they will be evicted and their structures demolished. In addition, the appeal herein will be rendered nugatory. This court takes cognizance of the fact that a stay of execution will help preserve the subject matter so that the appeal is not rendered nugatory if it succeeds.

8. Accordingly, the application dated 12th September 2019 is allowed. Costs of the application to abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 27th day of January 2020.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Mwawasa for Appellant

Ms. Abdi for Respondent

Yumna Court Assistant

C.K. YANO

JUDGE