



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. 34 OF 2019**

**SAMWEL GISIORA OGOTI.....APPELLANT /APPLICANT**

**VERSUS**

**SEVENTH DAY ADVENTIST CHURCH (E.A) LTD.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY REGISTRAR NYAMIRA.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY LAND**

**ADJUDICATION OFFICER.....3<sup>RD</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. What is before me is the Appellant's Notice of Motion dated 15<sup>th</sup> January 2020 seeking a stay of execution of the orders of the Keroka PM's court issued on 11<sup>th</sup> December 2019 in Keroka PMELC Case no. 26 of 2018. In the said judgment, the court declared that the 1<sup>st</sup> defendant was the registered proprietor of Land Parcel Number Gesima Settlement Scheme /482 and ordered the Appellant to vacate the said parcel of land.
2. The application is based on the grounds stated on the face of the Notice of Motion and the Applicant's supporting affidavit sworn on the 15<sup>th</sup> January 2020. The Applicant depones that he has filed an appeal against the decision of the lower court. He has annexed a copy of the Memorandum of Appeal to his affidavit. He further depones that soon after delivery of judgment he applied for an interim stay of execution which was granted pending the filing of a formal application. He then filed an application for stay in the lower court but and the court declined to grant him an ex-parte order of stay pending the hearing of the application inter partes. The Applicant is apprehensive that if a stay is not granted, he shall be evicted from a portion of the suit property and the appeal shall be rendered nugatory. He depones that he has a large family which depends on his Land Parcel Number. Gesima Settlement Scheme/299 and if he is evicted therefrom, it will result in untold suffering for him and his family.
3. The application is opposed by the 1<sup>st</sup> Defendant/Respondent through the Grounds of Opposition dated 20<sup>th</sup> January 2010 and the affidavit of Duke Moseki Sibwoga sworn on the 20<sup>th</sup> January 2020. In essence the 1<sup>st</sup> Respondent contends that Kekinga SDA church has been in possession of a portion of Land Parcel Number Gesima Settlement scheme/482 which is registered in the name of the 1<sup>st</sup> Respondent and the Appellant had merely fenced it with view to propagating his claim over the same. The 1<sup>st</sup> Respondent contends that the Appellant has not met the conditions for stay of execution pending Appeal as he has failed to demonstrate that he will suffer substantial loss if the orders for stay are not granted and he has not provided any security for costs.
4. In his oral submissions Counsel for the Applicant relied on the supporting affidavit. He emphasized the fact that if the order for stay is not granted, the Applicant would be denied the use of a portion of land he has occupied for the last 50 years. He submitted that the appeal has high chances of success and that the Applicant was willing to abide by any conditions the court may impose.
5. In his response counsel for the Respondent submitted that the Applicant did not deserve the orders sought as he had not met the conditions in Order 42 Rule 6 of the Civil Procedure Rules. He submitted that granting the stay would prevent the Respondent from enjoying the fruits of his judgment. He argued that even though the court had discretion to grant an order for stay, such discretion should not be exercised where the Respondent is likely to suffer hardship.
6. The principles that guide the court in the exercise of its discretion to grant an application for stay pending appeal were enunciated in the case of **Elena D.Korir vs Kenyatta University (2014) eKLR** where Justice Nzioki wa Makau stated as follows;

*“the application must meet a criteria set out in precedents and the criteria is best captured in the case of **Halal & another vs Thornton & Turpin Ltd** where the Court of Appeal (Gicheru JA, Chesoni JA & Cockar Ag JA) held that “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay.”*

7. In addition, the Applicant must demonstrate that the intended appeal will be rendered nugatory if a stay is not granted as was held in **Hassan Guyo Wakalo vs Straman EA Ltd[11](2013)** where the Court stated that:

*“In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”.*

8. In **Absalom Dova v Tarbo Transporters (2013) eKLR** the court held that

*“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 the case deserved. This is in recognition of the fact 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”*

9. Before applying the above-mentioned principles to the instant suit I must address my mind to the fact that at the time of writing this ruling the Applicant has a similar application pending in the lower court which was filed before this application. The Applicant must therefore choose which application to pursue as this application is sub-judice and pursuing both applications concurrently amounts to an abuse of the process of the court. For that reason, the court shall stay this application pending the hearing and determination of the application in the lower court.

Dated signed and delivered at Kisii this 28<sup>th</sup> day of February 2020

**J. M ONYANGO**

**JUDGE**