



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 11 OF 2018**

**AGGREY MUSUMBA AMALANDA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**ELKANA BUYENGO ARONA.....DEFENDANT/APPLICANT**

**RULING**

This application is dated 18<sup>th</sup> September 2019 and is brought under order 42 rule (1) of the Civil Procedure Rules, Section 1A and B, 3A of the Civil Procedure Act and Article 15a (2) (b) of the Constitution of Kenya 2010 seeking the following orders;

1. That the application be certified as urgent and be heard on priority basis.
2. That pending the interparties hearing of the application, a temporary order of stay do issue staying further proceedings in this case except for the instant application and a further order of execution of the decree of this court arising from the judgment delivered on the 7<sup>th</sup> day of May, 2019.
3. That the orders of stay of proceedings and stay of execution of the decree prayed for in 2 above do remain in force after the interparties hearing until the final determination of the appeal filed at the Court of Appeal in Kisumu vide appeal case No. 206 of 2019.
4. That costs of this application be provided for.

It is predicated on the grounds that the applicant being dissatisfied with the decision of this court has preferred an appeal against the said decision in the Court of Appeal at Kisumu vide appeal No. 206 of 2019. The applicant is exercising his constitutional right of appeal as provided for in the law. The applicant's appeal raises substantial issues of law and shall be rendered nugatory unless the orders being sought are granted. The applicant has been and is still in physical occupation of the suit property and substantial loss may result if execution of the decree issued herein is effected unless the orders being sought are granted. The appeal has been preferred timeously and that the instant application has also been bought without undue delay. The applicant is ready and willing to abide by any other reasonable conditions as may be imposed for the due performance of the decree.

The respondent relied on the grounds of opposition and submitted that the applicant has not demonstrated that he will suffer substantial loss if stay is not granted.

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, the applicant submitted that, the applicant’s appeal raises substantial issues of law and shall be rendered nugatory unless the orders being sought are granted. The applicant has been and is still in physical occupation of the suit property and substantial loss may result if execution of the decree issued herein is effected unless the orders being sought are granted. 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 has no merit and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20<sup>TH</sup> FEBRUARY 2020.**

**N.A. MATHEKA**

**JUDGE**