



REPUBLIC OF KENYA.

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 536 OF 2014

CHARLES AURA RATIALA.....PLAINTIFF/RESPONDENT

VERSUS

JONATHAN MACHEMBE OMUNE....DEFENDANT/APPLICANT

RULING

The application is dated 5th November 2019 and is brought under section 3A, Civil Procedure Act and order 22, rule 22, Civil Procedure Rules seeking the following orders;

1. That there be a stay of the execution of the court's decree dated the 28th day of June, 2018 and;
2. That the court's ex parte order dated 18th day of September, 2019 and issued on the 1st day of October, 2019 be set aside, pending hearing and final determination of the appeal (Kisumu Court of Appeal – appeal No. 233 of 2019 – Jonathan Machelombe Omune vs. Charles aura Ratila lodged by Jonathan Machelombe Omune against the judgment and decree of this court aforementioned.

It is based on the grounds that it is ineet and fair and just. The plaintiff/respondent does not suffer any material or detriment if this application is allowed

The respondent submitted that the applicant has been evicted and therefore there is nothing to stay as the judgment herein has been enforced. Annexed is a copy of letter by Jakacha Auctioneers marked as "CARI". That in any event this court is now functus officio. That the applicant has not provided any security for costs. That the applicant's application is misplaced and cannot be granted by this court in view that he has filed an appeal in Court of Appeal. That the application therefore should be dismissed with costs.

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 who was dissatisfied with the judgement of this court of 28th June 2018 and order issued on the 1st October 2019. 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 19TH FEBRUARY 2020.

N.A. MATHEKA

JUDGE