



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERGUOYA**

**ELC CASE NO. 66 OF 2017**

**MICHAEL MUNENE KUBURIA.....1<sup>ST</sup> PLAINTIFF**

**JOHN MWAI KITHIGA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**VIRGINIAH MUTHONI GACHUBI.....1<sup>ST</sup> DEFENDANT**

**SOPHIA MUTHONI MIGWI.....2<sup>ND</sup> DEFENDANT**

**RULING**

The application before me is the Notice of Motion dated 16<sup>th</sup> July 2019 brought under **Order 42 Rule 6 Civil Procedure Act**. The Applicant is seeking a stay of the judgment and decree of this Honourable Court issued on 28<sup>th</sup> June 2019 pending the hearing and determination of an intended appeal. The application is premised on ground apparent on the face of the said application and the supporting affidavit of Michael Munene Kuburia sworn the same date. In brief, the applicants contend that they were aggrieved and dissatisfied with the judgment by the Court and have preferred a Notice of Appeal on 9<sup>th</sup> July 2019. The applicants argued that the judgment of the Court ordered *inter alia*, that they both vacate L.R. No. INOI/KIAGA/63 within six (6) months failing which they should be evicted. They further contend that the suit which is the subject of the judgment and decree being appealed against is founded on trust in L.R. No. INOI/KIAGA/63 and that one of the cardinal principle to prove trust is possession which was not established by the respondents and that unless the orders are granted, they would be greatly prejudiced and the appeal would be rendered nugatory. The applicants argued that they solely depend on the suit land for their livelihood and that they have established their matrimonial homes and that should the eviction be carried out, they would suffer substantial loss as they would be rendered destitute. They stated that they are willing to offer such security as the Court may order.

The application is opposed with a replying affidavit sworn by Sophia Muthoni in which she stated that the applicants have only relied on possession as a ground to prove trust while there are other elements and circumstances which establishes the existence of trust. The respondents also argued that the presence of the applicants in the suit land is denial of justice to the rightful beneficiaries of the late Samuel Gachubi Kuburia (deceased) who have been desiring for justice for the last 30 years to at least enjoy their inheritance.

**ANALYSIS AND DECISION**

I have considered the Notice of Motion, the affidavit evidence both in support and in opposition to the application. I have also considered the submissions by the counsels and the applicable law. An application for stay pending Appeal is founded on **Order 42 Rule 6 (2) CPR** which provides as follows:

**‘No order for stay of execution shall be made under Sub-rule (1) unless:**

**a. The Court is certified 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 Court of Appeal gave the guiding principles for stay pending Appeal in the case of **Butt Vs Rent Restriction Tribunal (1982) K.L.R 417** and held thus:

**“1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion**

should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that Appeal Court reverse the Judge’s discretion.

3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The Court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had undoubted right of appeal.

5. The Court in exercising its powers under Order XLI Rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse”.

Again in the case of *James Wangalina & Another Vs Agnes Wathiaka Cheseto (2012) e K.L.R.*, the Court held:

“No doubt in law the fact that the process of execution has been put in motion, or is likely to be in motion by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 CPR. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein Vs Chesoni (2002) 1 K.L.R 867.*

The issue of substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”.

I agree with the decision of the learned Judges save to add that the applicants continued stay in the respondents land after a finding that their stay was unlawful is not a ground for stay pending appeal. The applicants have also stated that unless stay of execution is granted, they would be evicted. There is no execution process that has commenced as at now. The execution was stayed for six (6) months from 28<sup>th</sup> June 2019. The applicants fear in my view is a mere apprehension. In any event, the rights of an applicant exercising his undoubted right of Appeal must be balanced with the right of a successful litigant whose judgment has crystallized.

Weighting the two competing interests, I am not persuaded that the applicants have satisfied this Court that they will suffer substantial loss unless the order of stay is granted. The subject of this appeal is land and the appellant can still resume occupation if the decision of this Court is overturned on appeal. In the upshot, the application dated 16<sup>th</sup> July 2019 lacks merit and the same is hereby dismissed with each party to bear her own costs.

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 14<sup>th</sup> day of February, 2020.**

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**E.C. CHERONO**

**ELC JUDGE, KERUGOYA**

In the presence of:

1. M/S Githaiga holding brief for Mr. Magee for Plaintiffs/Applicants
2. Respondents/Advocate – absent