



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCA CASE NO. 22 OF 2019

MARKO ASUTSI LIHANDA

LAWI ASUTSI LIHANDAAPPELLANTS

VERSUS

GEORGE NADIDA OMINGORESPONDENT

RULING

The application is dated 25th September 2019 and is brought under Section 3 & 3A Civil Procedure Act and Order 42 Rule 6 (1) of the Civil Procedure Rules seeking the following orders:-

1. That service of this application may be dispensed with in the 1st instance.
2. That the application may be certified as urgent and heard ex-parte in the 1st instance.
3. That pending the hearing of this application inter-partes, this honourable court be pleased to order stay of execution of judgment/decree in Kakamega Chief Magistrate's Court MCL & E case No. 680 of 2018 (formerly Kakamega High Court Environment & Land Case No. 312 of 2013).
4. That pending the hearing of this application inter-partes, this honourable court be pleased to make a consideration and make an order setting aside the Kakamega Chief Magistrate's Court order in Kakamega Chief Magistrate's court MCL & E case No. 680/2018 dated 17/9/2019 requiring the appellants to deposit Ksh. 500,000/= in court within one month from 17/9/2019 as a condition of staying execution of judgment/decree in Kakamega Chief Magistrate's Court MCL & E No. 680 of 2018 and substitute it with reasonable terms as this honourable court deems fit so as to enable the appellants to exercise their right of appeal to this honourable court.
5. That pending the hearing and finalization of this appeal, this honourable court be pleased to make a consideration and make an order setting aside the Chief Magistrate's Court order in Kakamega Chief Magistrate's court MCL & E case No. 680/2018 (Honourable Malesi SRM) dated 17/9/2019 requiring the appellants to deposit Ksh. 500,000/= in court within one month from 17/9/2019 as a condition of staying execution of judgment/decree in that case before proceeding with this appeal and substitute it with reasonable terms as this honourable court deems fit so as to enable the appellants to exercise their right of appeal to this honourable court.
6. That pending the hearing and final determination of this appeal, this honourable court be pleased to order stay of execution of judgment/decree in Kakamega Chief Magistrate's Court MCL & E No. 680 of 2018 (formerly Kakamega High Court Environment & Land Case No. 312 of 2015)
7. That costs of this application be provided for.

It is based on the affidavit of Lawi Asutsi Lihanda and the following grounds that his appeal against judgment in respect of Kakamega Chief Magistrate's Court MCL & E Case No. 680 of 2018 (formerly Kakamega High Court Environment and Land Case No. 312 of 2018) delivered on 2/7/2019 by Hon. Malesi (SRM) is yet to be admitted, heard and finalized. That soon after the delivery of the judgment by the Kakamega Chief Magistrate's Court MCL & E No. 680 of 2018 (Hon. Malesi SRM), the appellants felt aggrieved and filed this appeal to this honourable court. That soon after filing this appeal, the appellants filed their application dated 18/7/2019 in the lower court seeking stay of execution of its judgment pending the hearing and final determination of this appeal which application was heard and ruling delivered on 17/9/2019 ordering the appellants to deposit Ksh. 500,000/= in court from that date as a condition of stay. That the appellants felt aggrieved by the lower court to deposit Ksh. 500,000/= in court within one month from 17/9/2019 as a condition of stay as the same is too high for them to meet. That substantial loss may result to the appellants as they may end up losing their land unless the orders sought herein are granted. That the application has been made without unreasonable delay. That the appeal has high chances of success. That the appeal will be

rendered nugatory should execution take place. That the appellants are ready and willing to give reasonable security as may be ordered by this honourable court for due performance of such decree or order as may ultimately be binding on them. That in the interest of justice, the application be allowed.

The respondent submitted that, the application is scandalous, frivolous and vexatious, a waste of precious judicial time and resources and that of the respondent. That the applicant indeed sought for stay of execution pending hearing of the appeal herein at lower court. That in his application dated 18/7/2019, seeking for stay of execution pending hearing of the appeal, the applicant stated that he is willing and ready to offer security as may be ordered by the court for due performance of such order. That the court in observing the principles of granting an order for stay of execution pending appeal ordered, as per the request of the appellant that he deposits Ksh. 500,000/= as security being a pre-condition for stay of execution. That the applicant's sudden change of tact and now alleging to be a man of straw cannot stand.

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, they filed their application dated 18/7/2019 in the lower court seeking stay of execution of its judgment pending the hearing and final determination of this appeal which application was heard and ruling delivered on 17/9/2019 ordering the appellants to deposit Ksh. 500,000/= in court from that date as a condition of stay. That the appellants felt aggrieved by the lower court to deposit Ksh. 500,000/= in court within one month from 17/9/2019 as a condition of stay as the same is too high for them to meet as they are both men of straw. That substantial loss may result to the appellants as they may end up losing their land unless the orders sought herein are granted. I find that the amount to be deposited as a condition for the grant of stay is not unreasonable. 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