



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 424 OF 1996

1. SAIFUDEEN ABDULLA BHAI

2. HUSSEIN ABDULLA BHAI.....PLAINTIFFS

VERSUS

ZAINAB MWINYIDEFENDANT

RULING

1. For determination is the Notice of Motion dated 6th June 2019 by the defendant/applicant seeking an order of stay of execution of the judgment delivered herein on 17th January 2019 and all consequential orders pending the hearing and determination of the intended appeal. The application is brought under Section 1A, 3 and 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules and is based on the grounds that the defendants are aggrieved by the judgment and decree of this court and has lodged an appeal by filing a notice of appeal. That the intended appeal has high chances of success and that no prejudice will be occasioned to the plaintiff if the orders sought herein are granted. The defendant states that she is ready and willing to abide by any conditions that may be set in allowing the application and that unless the orders of stay are granted, the defendant is likely to suffer substantial loss and the appeal may be rendered nugatory.

2. The application is supported by the affidavit of the defendant sworn on 6th June 2019 in which the applicant has reiterated the above grounds and has annexed a copy of a Notice of Appeal dated 18th January 2019. The defendant avers that the plaintiff has no means of repaying her damages and states that the delay in filing this application is as a result of the follow up with the registry in procuring the necessary documents such as typed proceedings for filing the appeal.

3. In opposing the application, the plaintiffs filed a replying affidavit sworn by Saifudeen Abdulla Bhai, the 1st plaintiff on 16th July 2019 in which it is deponed that stay by consent was entered on 17th January 2019 and which was to last until 19th February, 2019. That the defendant is in defiance of the said court order which was to take place 18/2/2019 and is therefore in contempt of court. The plaintiff states that the defendant has filed the present application under certificate of urgency only after the plaintiffs moved the court on its application dated 20th February 2019 seeking for the defendant's eviction. It is the plaintiff's contention that the defendant has not demonstrated that her intended appeal has any chance of success and urged the court to dismiss the application.

4. The application was canvassed by way of written submission. The defendant filed her submissions on 20th August 2019 in which it was submitted that the application has been filed without unreasonable delay, and that delay if any, was occasioned by the delay in procuring the proceedings from the registry. It was further submitted that the defendant is the one in possession of the house on the suit property and her eviction and demolition of the house would result in substantial loss and psychological torture and trauma. Further, that unless stay is granted, the appeal would be rendered nugatory as the subject matter would cease to exist. Counsel for the defendant relied on the case of **Sele Stica Limited –v-Gold Rock Development Limited (2015)eKLR** and submitted that it is not contested that the land still belongs to the plaintiffs' and the outcome of the case will not affect that. Counsel further submitted that no prejudice will be occasioned to the plaintiffs if the orders of stay are granted as they can be compensated by way of costs. Further, that the plaintiffs if they proceed with execution have not shown means of repaying the defendant damages. The defendant submitted that she is willing and ready to abide by any reasonable conditions that may attach to the orders of stay if granted.

5. The plaintiffs filed their submissions on 20th August 2019 and submitted that the defendant has not demonstrated that she deserves the equitable orders for stay for the reason that the application has been brought belatedly and with no logical explanation for such delay. The plaintiffs further submitted that the appeal has no chances of success and that it is only intended to delay the plaintiffs from enjoying the fruits of their judgment.

6. I have considered the application and the submissions made. The only issue for determination is whether the applicant herein should be granted stay of execution of the judgment of the court delivered on 17th January 2019 and all consequential orders pending the hearing and

determination of the intended appeal. Order 42 Rule 6 of the Civil Procedure Rules sets out the conditions that must be met before an order for stay of execution is allowed. It states as follows:

6. (1) No appeal or 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 application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court appealed from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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 undue 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.

3)

4)

5)

6)

7. The application herein was filed on 12th June 2019 and the judgment appealed against was delivered on 17th January 2019. This is a period of about five (5) months. On whether or not the application was brought without undue delay, I am not satisfied that the same was made timeously. The applicant has stated that the delay was occasioned by the follow up with the registry in procuring the necessary documents when filing an appeal such as typed proceedings. However, no evidence to support such assertion has been exhibited by the applicant. I do not think that it was necessary to obtain typed proceedings before one can file an application for stay of execution. I also note that the applicant lodged the notice of appeal on 21st January 2019, which is a period of only about 4 days after the delivery of judgment. It was incumbent upon the applicant to explain to the court the reason for the delay in filing the application. In my view, no good explanation has been given by the applicant. The explanation given is not believable and cannot be true. I therefore find that there was delay on the part of the applicant in bringing this application.

8. The other issue to consider is whether the applicant will suffer substantial loss if the stay is not granted. The applicant admits that the suit land belongs to the Respondents and submitted that the outcome of this case will not affect that position as it is not contested. However, the applicant has submitted that if the respondents proceed with execution, they have no known means of repaying the applicant damages. I find this submission contradictory. The subject matter of this suit are structures standing on the respondents land. It is admitted that the respondents own the land. I am therefore not convinced that if execution proceeds, the respondents have no means of repaying damages. In my view, they have the means that includes the land. This court takes cognizance of the fact that a stay of execution helps preserve the subject matter of the appeal so that it is not rendered nugatory if the appeal succeeds. In this case, I am not convinced that the intended appeal will be rendered nugatory if the stay herein is not granted.

9. With regard to the issue of security, the applicant submitted that she is willing to abide by any reasonable conditions that may attach to the orders of stay if granted. However, I do not find it necessary to order for any security from the applicant as the stay has been refused.

10. For the foregoing reasons, I find the application dated 6th June, 2019 as lacking in merit and hereby dismiss it with costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 4th day of February, 2020.

C. YANO

JUDGE

IN THE PRESENCE OF:

Nyabuti holding brief for Mr. Anyanzwa for plaintiff

Ms. Naliaka holding brief for Khatib for defendant

Yumna Court Assistant

C.K. YANO

JUDGE