



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAKAMEGA
ELC CASE NO. 209 OF 2017

PRISCILLA MUHONJAPLAINTIFF

VERSUS

HESBON JAHONJA.....DEFENDANT

RULING

The first application is dated 17th December, 2019 and is brought under order 42 rules 6 (1), (2) (A) (B) (3) (4) (5) and (6) of the Civil Procedure Rules seeking the following orders;

1. That the honourable court be pleased to order for a stay of execution in the case herein pending the hearing and determination of the defendant/applicant's intended appeal to the Court of Appeal at Kisumu.
2. That the status quo on land parcel number Kakamega/Mudete/198 be maintained pending the hearing and determination of the defendant/applicant's intended appeal to the Court of appeal at Kisumu.
3. That the costs of this application be provided for.

It is based on the annexed affidavit of Hesbon Wrace Ongadi and the grounds that the defendant/applicant was sued in the suit herein. That judgment was given against the defendant/applicant. That the defendant/applicant was dissatisfied with the judgment and he intends to prefer an appeal to the Court of Appeal at Kisumu. That the defendant/applicant has filed a notice of appeal and applied for proceedings to enable him file appeal at the Court of Appeal at Kisumu. That the defendant/applicant will suffer irreparable loss unless stay is granted since he has done substantial development on the suit land. That the plaintiff/respondent will not suffer any loss if stay is granted. That it is in the interest of justice and public tranquility that the orders be granted.

The plaintiff/respondent submitted that, the application is misconceived and has not been brought timeously. That the allegations made in the supporting affidavit of Hesbon Wrace Ongadi are mere allegations and are not supported by any cogent evidence. That the defendant's application herein is an afterthought meant to defeat the ends of justice. That the application is a delay of the court process and hence justice. That the application is not supported by any evidence to warrant the orders prayed for. That the application does not meet the requirements upon which it is alleged to be brought. That this application being contrary to the intents of the maxims of equity and justice be dismissed with costs to the respondent.

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 herein, the applicant submitted that, the defendant/applicant has filed a notice of appeal and applied for proceedings to enable him file appeal at the Court of Appeal at Kisumu. That the defendant/applicant will suffer irreparable loss unless stay is granted since he has done substantial development on the suit land. 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 no orders as to costs.

The second application is dated 12th December 2020 and is brought under Order 51 of the Civil Procedure Rules seeking the following orders:-

1. That this application be certified urgent and be heard ex-parte on priority basis.
2. That the decree issued herein on the 31st January, 2020 be and is hereby executed.
3. That auctioneers be and are by ordered to conduct the eviction of the defendant/respondent, his agents, personal representatives and or assigns from that parcel of land known as Kakamega/Mudete/198.
4. That the Officer Commanding Station (OCS) Mudete Police Station and the Area Chief, North Maragoli location to ensure that the process of eviction of the defendant/respondent, his agents, personal representatives and or assigns from that parcel of land known as Kakamega/Mudete/198 is carried out smoothly and efficiently.
5. That costs of this application be provided for.

It is founded upon the affidavit of the applicant herein, Priscilla Muhonja, and on the grounds that this suit was determined by way of a judgment on 2nd July, 2019 by this honourable court. That the decree was extracted and issued on 31st January, 2020. That the said suit was then concluded when the judge found that the plaintiff had established her case on a balance of probabilities. That there is no order stopping the plaintiff/applicant from executing the eviction process. That the plaintiff/applicant has a pressing need to develop the property known as Kakamega/Mudete/198 hence she is required to be in full use and occupation of the property known as Kakamega/Mudete/198 to enable her accomplish the same. That the defendant has refused to vacate the property known as Kakamega/Mudete/198 despite there being a judgment and a decree ordering them to vacate.

The defendant submitted that, the plaintiff/applicant is not entitled to the orders sought in the application because he has preferred an appeal to the Court of Appeal against the judgment of the court. (Annexed is the memorandum of appeal marked HJ1). That the plaintiff/applicant should be patient until his appeal is heard and determined by the Court of Appeal. That he has a constitutional right of appeal against the judgment of the High Court. That if the plaintiff/applicant's application is allowed his appeal will be rendered nugatory since he will be evicted from the suit land before the conclusion of his appeal. That he has done substantive development on the suit land since he bought the land from the plaintiff/applicant's sister. (Annexed is a picture marked HJ2). That the plaintiff/applicant has never interfered with his use of the land since he bought the same from her elder sister.

This court has considered the application and submissions therein. It is based on the grounds that this suit was determined by way of a judgment on 2nd July, 2019 by this honourable court. That the decree was extracted and issued on 31st January, 2020. That the said suit was then concluded when the judge found that the plaintiff had established her case on a balance of probabilities. The court having dismissed the application dated 17th December 2019 there is no order stopping the plaintiff/applicant from executing the eviction process. I find this application has merit and I grant the same with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED THIS 30TH DAY OF APRIL 2020.

N.A. MATHEKA

JUDGE