



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 54 OF 2010

IN THE MATTER OF THE ESTATE OF KAKUA KIOKO (DECEASED)

KANINI KAKUA.....PETITIONER

AND

JOSEPH NTHENGE KAKUA.....APPLICANT

VERSUS

KENNETH ONSARE MAINA.....RESPONDENT

YES HOUSING CO-OPERATIVE.....INTERESTED PARTY

RULING

1. Before this court is the Respondent's application seeking leave to appeal against this court's ruling delivered on 18th July, 2018 and extension of orders of stay of execution of the said ruling pending the lodging, hearing and determination of his intended appeal. The application is supported by the Respondent's affidavit in which he stated that; he has good and sufficient cause within the meaning of section 7 of the Appellate Jurisdiction Act to be granted leave to appeal and stay of execution in order to preserve the subject property until the intended appeal is heard and determined. That if the orders sought are not granted, the appeal shall be rendered nugatory. He stated that his appeal has high chances of success and that if the application is not allowed, he will suffer irredeemable loss as the Applicant will proceed to execute. It was submitted that the Applicant will not be prejudiced if the orders sought are granted since the Applicant and his family have a whooping 85 acres to themselves while what is in contention is 15 acres. That what is in contention is a parcel of land forming the basis of the appeal. It was submitted that the courts are duty bound to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals once filed on merit. Various authorities were cited by the Respondent thus: **Kenya Shell Ltd v. Kibiru & another [1980] KLR 410**, **Mukuma v. Abuoga [1988] KLR 645**, **Butt v. Rent Restriction Tribunal [1982] KLR Housing finance Company of Kenya v. Sharok Kher Mohamed Ali Hirji & another [2015] eKLR** and **Mbaraki Bulk Terminal Limited v. East African Bulking Services Limited NRB Civil Application No. 4 of 2007 (UR)**.

2. In response thereto, the Applicant filed grounds of opposition as follows; that the application is frivolous, vexatious an abuse of the court process and aimed at wasting valuable judicial time; that the application does not meet the threshold required to grant orders sought; that the ruling of the court delivered on the 18th July, 2018 is very clear and this application is an afterthought meant to scuttle efforts by the applicant to enjoy the fruits of the ruling of the court; that the applicant does not have an arguable appeal with high chances of success hence does not meet the principles required to grant the orders sought; that the applicant has not demonstrated any irreparable loss that he will suffer if the orders sought are not granted; that the applicant has recourse in law as against the alleged seller of the property in question and can pursue the same in a civil claim and not this suit and that the applicant has not provided security to warrant the court to grant the orders sought. It was submitted that the Respondent has failed to satisfy the provisions of order 42 rule 6 particularly that he will suffer loss as alleged. In support of his submissions, the Applicant has cited **Masisi Mwita v. Damaris Wanjiku Njeri [2016] eKLR** where the ruling in **Elena D. Korir v. Kenyatta University [2012] eKLR** was adopted with approval and **Machira T/A Machira & Co. Advocates v. East African Standard [2002] eKLR**.

3. I have given due consideration to the rival depositions and submissions by the parties herein. For an applicant seeking stay of execution to succeed, he/she must satisfy the conditions set out under Order 42 Rule 6 of the Civil Procedure Rules, 2010 thus:-

- i. that the application has been brought timeously;
- ii. that if the stay orders are not granted he will suffer substantial loss; and
- iii. he must give security for costs.

4. It is not in dispute that the application herein has been brought to this court timeously and I shall not delve on that aspect. On the issue of substantial loss, the Respondent was of the view that the appeal shall be rendered nugatory in the event the application is not allowed. The court in **Mukuma v. Abuoga (1988) KLR 645** while dealing with the issue of substantial loss held as follows:

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

5. The substratum of the appeal relates to a parcel of land measuring 15 acres. If the same is not preserved by orders of stay of execution, then the appeal shall be rendered nugatory and a mere academic exercise as submitted by the Respondent. Indeed if the execution proceeds, the subject property would be out of reach of the Respondent by the time the appeal is determined. Hence I find the Respondent has demonstrated that he stands to suffer substantial loss. As regards the aspect of security for costs, the Respondent’s counsel has submitted that this is not a money decree. As such I find the issue of costs can be easily addressed during the determination of the appeal and should therefore abide the said appeal.

6. In the result I find merit in the application dated, 30/7/2018 and same is allowed in the following terms:

(a) The Respondent is granted leave to appeal against the ruling dated 18th July 2018.

(b) An order of stay of execution of the ruling dated 18th July 2018 is granted pending the lodging, hearing and determination of the intended appeal.

(c) The costs hereof shall abide to the appeal.

Dated, Signed and Delivered at Machakos this 18th day of September 2018.

D. K. KEMEI

JUDGE

In the presence of:-

N/A Simba & Simba - for Respondent

Nzioka for Kitonga - for Applicant

Josephine - Court Assistant