



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT KERUGOYA**

**MISC. CIVIL APPEAL NO. 7 OF 2019**

JAMES MAINA GACHIE.....1<sup>ST</sup> PLAINTIFF

CECILY MUTHONI MATHATHI.....2<sup>ND</sup> PLAINTIFF

VERSUS

**THE SEVENTH DAY ADVENTIST CHURCH (E.A)**

**THE CENTRAL KENYA CONFERENCE OF**

**SEVENTH DAY ADVENTIST CHURCH.....DEFENDANTS**

**RULING**

The Applicants have moved this Court vide a Notice of Motion dated 22<sup>nd</sup> May 2019 seeking the following orders:

***(1) Spent.***

***(2) That there be a temporary stay of execution of this Honourable Court's orders issued on the 22<sup>nd</sup> January 2019.***

***(3) This Honourable Court be pleased to grant stay of execution pending the hearing and determination of this application.***

***(4) That this Honourable Court be pleased to grant stay of execution pending the hearing and determination of the intended Appeal.***

***(5) That this Honourable Court be pleased to grant the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants leave to appeal against the judgment on 24<sup>th</sup> December 2018 out of time.***

***(6) The costs of this application be provided for.***

The application is supported by the affidavit of James Maina Gachie sworn the same date. According to the applicant, the judgment was entered in this suit on 24<sup>th</sup> December 2018 in the absence of either the parties including their advocate. The applicants further contend that they were not satisfied with the said judgment and that they intend to appeal. He stated that this application has been brought without inordinate delay and that should the application not be allowed, the intended appeal will be rendered nugatory as they have nowhere else to go. The application is opposed with a replying affidavit sworn by George Morara Gori who stated that the impugned judgment was indeed delivered on 24<sup>th</sup> December 2018 in the absence of both parties. However, the respondent subsequently extracted a decree dated 22<sup>nd</sup> January 2019 and served upon the applicants. The respondent further stated that this application was filed on 22<sup>nd</sup> May 2019, four (4) months after service of the decree upon them which period is inordinate and prejudicial to the defendant and no plausible explanation has been given. He stated that the applicants have not demonstrated the substantial loss they would suffer if the orders are not granted. He contends that this application is a ploy to frustrate the respondent from enjoying the fruits of its judgment. He stated that the applicants appeal ought to be balanced with the right of the decree holder to enjoy the fruits of its judgment.

**ANALYSIS AND DECISION**

I have considered the affidavit evidence and the submissions by the counsels. The applicants have stated that the judgment was entered in their absence and that of their advocate. If indeed the applicants were absent and their advocate was also absent, they should have

made/sought to know what transpired of their case soon thereafter. They waited for five months until 22<sup>nd</sup> May 2019 when they filed the instant application. The second ground for the grant of stay pending appeal is that an applicant must show that she will suffer substantial loss. Substantial loss is a matter of evidence. The applicants have stated that they have been on the subject matter ever since and they have nowhere else to go and that the intended appeal if successful will be rendered nugatory as they will have been evicted.

The third and final ground for the grant of stay pending Appeal is that an application for stay must be brought timeously and without unreasonable delay. The applicants have stated that they were not served with a notice of delivery of judgment. They also stated that their counsel on record was not also served with a notice of judgment. They stated that they were only served with the decree as part of execution process. The applicants have also stated that they are currently in occupation of the suit property and that they have nowhere else to go. The respondents admitted that they were served with the decree on 22<sup>nd</sup> January 2019 and filed this application on 22<sup>nd</sup> May 2019. That is a period of almost four (4) months. I also consider that the applicants are currently in possession of the suit property and any execution may render the intended Appeal nugatory.

I am therefore satisfied that the Notice of Motion dated 22<sup>nd</sup> May 2019 is merited and the same is allowed on the following terms:

***(1) A stay of execution be and is hereby issued for a period of six (6) months from the date hereof failure which this order shall be vacated.***

***(2) The 1<sup>st</sup> and 2<sup>nd</sup> applicants are hereby granted leave to Appeal against the judgment delivered on 24<sup>th</sup> December 2018 within 30 days from today.***

***(3)The applicants to pay the costs of this application assessed at Ksh. 5,000/= within 14 days from today.***

***READ, DELIVERED and SIGNED in open Court at Kerugoya this 8<sup>th</sup> Day of May, 2020.***

.....

**E.C. CHERONO**

**ELC JUDGE**

**In the presence of:**

***1.Ms Wangechi Munene holding brief for Mr. Munene Muriuki for Plaintiff/Applicant.***