



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ELC CASE NO. 250 OF 2016

DARIYA SHINYANZWA

JANE AGISTA LUSIMBA..... PLAINTIFFS

VERSUS

JOSEPHAT LISIOLO LISHENGA

MAURICE MITEKHO LISHENGA

JACKSON KHAYUMBI INZIANI t/a

J.I. KHAYUMBI & CO. ADVOCATES

THE LAND REGISTRAR, KAKAMEGA

THE HON. ATTORNEY GENERAL.....DEFENDANTS

RULING

The first application is dated 30th April 2020 and is brought under Sections 1A, 1B & 3A of the Civil Procedure Act and Order 42 Rule 6 (1) of the Civil Procedure Rules 2010 seeking the following orders:-

1. That this honourable court be pleased to certify the application herein as extremely urgent and be heard ex parte in the first instance on priority basis, and subsequently service of all court documents be effected electronically either by e-mail or “whatsapp”.
2. That this honourable court be pleased to issue an order of status quo in respect of suit land known as Isukha/Shirere/1183 pending inter partes of the application herein.
3. That this honourable court be pleased to stay execution of the orders, decree and or judgment delivered on 5th November, 2019 herein pending inter partes hearing of the application herein.
4. That this honourable court be pleased to stay execution of the orders, decree and or judgment delivered on 5th November, 2019 herein pending hearing and final determination of the intended appeal.
5. That costs of this application be provided for.

It is based on the affidavit of the 1st defendant/applicant Josephat Lisiolo Lishenga and the grounds that

being dissatisfied with the orders, decree and or judgment made on 5th November, 2019 the 1st defendant/applicant filed a Notice of Appeal dated 5th November, 2019 intending to appeal to the Court of Appeal against the whole of the said decision and or judgment. That indeed the 1st defendant/applicant through his lawyers on record applied and paid for certified copies of the proceedings and judgment on the same day 5th November, 2019 following by reminder of letters dated 10th December, 2019 and 10th February, 2020 respectively. That the plaintiff's/respondents lawyers on record were notified vide letter dated 10th December, 2019 regarding filing of the Notice of Appeal. That the 1st defendant/applicant is eager, keen and interested to lodge an intended appeal in the Court of Appeal immediately the said certified copies of the proceedings and judgment are supplied. That the delay of lodging the intended appeal has not been deliberate but occasioned due to the delay in obtaining copies of the said certified proceedings and judgment. That the 1st defendant/applicant seeks orders to stay execution of the said orders, decree and or judgment made on 5th November, 2019 or in the alternative issuance of orders of status quo be maintained in respect of the suit land known as Isukha/Shirere/1183 pending hearing and determination of the instant application on merit. That the 1st defendant/applicant herein is in actual occupation and utilization of the suit land known as Isukha/Shirere/1183 in total exclusion of the plaintiffs/respondents herein who have never stepped onto the said suit land as clearly ruled by this honourable court pursuant in its ruling made on 25th July, 2017. That the plaintiff/respondent shall not suffer any loss and or damage because they have never been in actual possession, occupation and or utilization of the suit land. That the appeal has an overwhelming chances of success. That unless the application herein is heard on priority basis the intended appeal shall be rendered nugatory. That the 1st defendant/applicant shall suffer immense and irreparable loss and damages unless the instant application is heard and determined on priority basis. That it is in the interest of justice that the prayers sought be granted.

The second application is dated 18th May 2020 and is brought under Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, and order 51 rule 1 of the Civil Procedure Rules, 2010 seeking the following orders:-

1. That this application be certified as urgent and be heard ex-parte.
2. That the honourable court be pleased discharge and or vacate the maintenance of status quo orders issued on 5th May, 2020 and thereafter to breath life into it's judgment delivered on 5th November, 2019 and the subsequent decree emanating therefrom by issuing an explicit order of eviction against the 1st and 2nd respondents together with their respective servants, agents and relatives from the plaintiff's/applicants land parcel title No. Isukha/Shirere/1183.
3. That this honourable court be pleased to direct the Officer Commanding Kakamega Police Station to ensure peaceful implementation of order 2 above upon its issuance.
4. That the costs of this application be provided for.

It is based on the supporting affidavit of Jane Agista Lusimba, and grounds that the plaintiffs/applicants instituted the suit herein which was heard and judgment delivered on merit in their favour on 5th November, 2019 by the learned Justice N.A. Matheka in the following terms. That the 1st and 2nd defendants their servants, agents and relatives are to vacate the suit land parcel number Isukha/Shirere/1183 within the next 6 months from the date of this judgment and in default eviction order to issue. The cautions and restrictions placed on the suit land parcel number within the next 6 months from the date of this judgment and each party to bear its own costs. That although the aforesaid judgment was delivered in an open court, six months down the line, the 1st and 2nd respondents are in contempt and blatant disobedience of the judgment and the decree emanating therefrom refused, failed and or otherwise neglected to honour the judgment and move away and or vacate from the suit property, and they have instead commenced illegal constructions on the said parcel of land. That the defendants have proceeded and obtained orders for maintenance of status quo through misrepresentation and concealment of material facts and the said orders ought to be set aside In the circumstances, this is a proper application for the

court to proceed and vacate the orders of maintenance of status quo as they were obtained through misrepresentation. That the continued contemptuous occupation of the suit property by the 1st and 2nd respondents is causing the plaintiffs substantial loss and irreparable harm as the 1st plaintiff cannot fulfill her obligations of handing vacant possession of the suit property that she sold to the 2nd plaintiff who cannot use her land parcel in total contravention of article 40 of the Constitution of Kenya. That it is in the interest of justice that the court proceeds and issues the orders sought and to deny the 1st and 2nd respondents audience in this application as it is now trite law that a party who disobeys a court order/decreed ought not to be given audience unless and until he purges the contempt by obeying the said order and or decree. It is in the interest of orderly administration of justice and fairness that the orders sought herein be granted and the grant of the said orders will not prejudice the respondents or make them suffer any hardship but instead will bring litigation to an end and ease the anxiety on all the parties to the suit.

This court has carefully considered both the applications and the submissions herein. On the first application dated 30th April 2020 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 therein, the applicant/^{1st} defendant was dissatisfied with the judgment of this court of 5th November, 2019. 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 in the application dated 30th April 2020 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. On the second application dated 18th May 2020 the applicant/plaintiff seeks eviction orders and assistance by the police to execute the orders. Orders for eviction had already been issued in the judgment dated 5th November 2019. Be that as it may and since the stay was not granted as per the application dated 30th April 2020 I find this application has merit and I grant the application dated 18th May 2020 as prayed. However, due to the coronavirus pandemic the orders will be stayed for the next 90 (ninety) days.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 24TH DAY OF JUNE 2020.

N.A. MATHEKA

JUDGE