



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL NO.19 OF 2019

MAGDALENE WANJIKU NDUNG'U.....APPELLANT/ APPLICANT

VERSUS

JANE NJOKI NJUGUNA.....RESPONDENT

RULING

The matter for determination is the **Notice of Motion** Application dated **2nd October 2019**, by the Appellant/ Applicant seeking for orders that;

1. This Honourable Court be pleased to stay execution of the Judgement dated and delivered on 8th February 2019, by the Learned Magistrate (M.W Wanjala, SRM) pending the hearing and determination of this Appeal.

2. THAT the Plaintiff be ordered to pay costs of this Application.

The Application is premised on the grounds that Judgment was delivered on **8th February 2019**, in favour of the Respondent herein. That the Appellant/Applicant was aggrieved by the outcome of the Judgment and has already preferred an appeal against the said Judgment. That the Appellant's/Applicant's application for stay of execution in the lower Court was declined and the Court indicated that there was no imminent danger of execution, but that if the same arose, an Application for stay of Execution could be filed before this Honourable Court. That the Appeal has high chances of success and in the event the appeal is successful, it shall be rendered nugatory if the orders sought herein are not granted.

In her supporting Affidavit sworn on **2nd October 2019**, **Magdalene Wanjiku Ndungu**, the Appellant/ Applicant herein reiterated the contents on the grounds on the face of the Application and averred that she has been living and cultivating in the suit property since the year **2000** when she purchased it. It was her contention that she is in imminent danger of being evicted from **L.R Gatuanyanga/Ngoliba/ Block 1/162**. She further averred that she has a good appeal with high chances of success having bought the suit property from one **Gladys Woki Ndungu**, and having taken possession of all documents obtained from **Nyakinyua Company Limited** including a clearance certificate which showed the root of her title. That she has been served with a decree pursuant to the Judgment, a clear indication that there is a threat and/ or danger of execution. Further that it is in the interest of Justice that the Application be allowed because failure to do so, the appeal would be rendered nugatory.

The Application is opposed and the Respondent filed Grounds of opposition and averred that the Appeal has no chances of success as apart from the title deed, the Applicant did not have any other documents to prove her case. Further that the Applicant made a similar Application in Court, which was rejected because it had no basis and therefore the instant Application is a repeat of the same Application. It was contended that it is clear from the evidence adduced in Court, that the Applicant never occupied the suit land as she had been evicted by a **Court Order in Civil Suit No. 286 of 2006**, and also the Application by the Applicant are made to stay execution so that the Respondent does not enjoy the fruits of her judgment.

The Application was canvassed by way of written submissions, to which the Court has now carefully read together with the cited authorities and provisions of law. The court too has considered the whole proceedings and the said Judgment issued by the Subordinate Court.

Order 42 Rule 6(2). Of the Civil Procedure rules set out the principles that the court should consider while deciding whether to grant **Stay of Execution Pending Appeal**. These are:-

“No order for stay of execution shall be made under subrule (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.”

There are plethora of decided cases on the issue of grant of Stay of Execution pending Appeal. See Civil Appeal No.107 of 2015, Masisi Mwita..Vs...Damaris Wanjiku Njeri (2016) eKLR, where the Court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another..Vs... Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-

“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely;- Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.

In addition, the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo...Vs...Straman EA Ltd (2013) as follows:-

“In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory.”

These twin principles go hand in hand and failure to prove one dislodges the other”

This Court will then proceed to determine whether the Appellant/Applicant herein has satisfied the required standard for grant of stay orders pending Appeal.

It is evident from the above provisions of law that the Court has discretion to issue an Order of stay of execution. However, the said discretion must be exercised judicially. See the case of Canvass Manufacturers Ltd...Vs...Stephen Reuben Karunditu, Civil Application No.158 of 1994, (1994) LLR 4853, where the Court held that:-

“Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised”.

Further in the case of Stephen Wanjohi...Vs...Central Glass Industries Ltd, Nairobi HCC No.6726 of 1991, the Court held that:-

“For the court to order a stay of execution there must be:-

- i. Sufficient cause*
- ii. Substantial loss*
- iii. No unreasonable delay*
- iv. Security and the grant of stay is discretionary.”*

As the Court also embarks in determination of this application, it will take into account that it is not the practice of the Courts to deprive a successful litigant of the fruits of his/her litigation. Further the Court will take into account that the purpose of stay of execution pending Appeal is to preserve the subject matter. See the case of Consolidated Marine...Vs...Nampijja & Another, Civil App.No.93 of 1989 (Nairobi), where the Court held that:-

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.

The conditions that the Applicant herein should satisfy is as stated in **Order 42 Rule 6(2)** of the **Civil Procedure Rules**. The Court will now consider each of the condition and juxtapose them with the available evidence herein to determine whether the Applicant is deserving of the orders sought.

Firstly, the Applicant must satisfy that she will **suffer substantial loss**, unless the orders sought are issued. From the Judgment of the subordinate Court, it is clear that the Respondent had sought for the cancellation of the Appellant/ Applicant’s title and the Court had allowed her prayers.

Though the Respondent has alleged that the Applicant would not suffer loss as the Court has already found in her favour and further that the Appellant/ Applicant was never in possession as she had already been evicted, the Appellant/ Applicant insists that she has been in possession of the suit land. From the proceedings and the grounds of opposition, the Respondent has acknowledged that there was an eviction so the appellant/ Applicant must have been in possession. Further the effect of the decree is that the Appellant’s/ Applicant’s ownership over the suit property would be cancelled and the same would be registered in the name of the Respondent.

The fact that the orders that have been granted will serve the purpose of evicting the appellant from the suit property and further cancellation of her title, then this Court finds that the Appellant/Applicant will suffer loss and her Appeal might be rendered nugatory in the event that the Appeal is successful. This is so because the Appellant/Applicant is fighting not to be evicted and if she is to lose possession of the suit land at this stage, it would probably mean that she has already been evicted and the Appeal would serve no purpose. Further if her title is to be cancelled, it would also mean that that the appeal will be rendered nugatory.

The Court makes this finding taking into account that it is not the duty of the Court to deny a successful litigant the fruits of his/her Judgment. Further, the Appellant should also have an assurance that her Appeal will not be rendered nugatory. However, taking into account that the Appellant's title is set to be cancelled, then she has satisfied this Court that she will suffer substantial loss if the orders sought are not granted.

The Applicant must satisfy the Court that the application was made without **unreasonable delay**. The Court noted that the **Memorandum of Appeal** was filed on **22nd February 2019**, and an application for stay was filed on **2nd October 2019**. *This Court also notes that there is an Application of stay that was filed in the lower Court and was determined on the 6th June 2019, where the Court held that there was no imminent danger. However there is a decree that was issued on 8th August 2019, which the Appellant/ Applicant avers that indicated then that there was imminent danger of execution hence the need to file the instant Application*. Therefore the Court finds that that there was no inordinate delay in filing this Application.

On the issue of security of costs, the Court finds that as the same is discretionary and being that no specific sum has been brought forth. At this juncture the same is not merited. The Court herein finds that the **Order** sought of stay of execution would protect and preserve the suit property.

Having now carefully considered the instant application, the written submissions, the cited authorities and the relevant provisions of law, the Court finds that the said application is merited and it is allowed entirely.

Further, the Court directs the parties do prepare the Appeal for hearing expeditiously.

It is so ordered.

Dated, signed and Delivered at Thika this 15th day of June 2020

L. GACHERU

JUDGE

15/6/2020

Court Assistant - Jackline

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By Consent of:

No consent for the Appellant/Applicant

No consent for the Respondent

L. GACHERU

JUDGE

15/6/2020