



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO 48 OF 2012(O.S)

SUNDIATA NATHAN MUTENDE.....PLAINTIFF/RESPONDENT

VERSUS

WILLY MWOLOLO MUINDI.....DEFENDANT/APPLICANT

RULING

1. In the Notice of motion dated 18th February, 2019, the Applicant is seeking for the stay of execution of the Judgment of the court made on 7th December, 2018 pending hearing and determination of the Appeal.
2. The Application is supported by the Affidavit of Willy Mwololo Muindi where he depones that he had filed a Notice of Appeal; that the Appeal has good chances of success; that the Application has been filed without undue delay and that should execution proceed, then he stands to suffer because the land that is the subject matter of the suit is bound to be registered in the name of the Respondent. The deponent indicated his willingness to abide by the conditions of the court pertaining to security for the due performance of the Decree.
3. The Application was opposed. In his Replying Affidavit, the Plaintiff deponed that the court having confirmed that he had already obtained ownership of the suit property, it only affirmed the position that is existing on the ground. The Plaintiff deponed that if the court allows the Application, then the Applicant should be directed to deposit the Title Deed in court and security for costs for the Appeal.
4. The Application was canvassed by way of written submissions. Learned counsel for the Applicant filed submissions on 1st August, 2019 whereas the Respondent's submissions were filed on 5th May, 2020. Learned counsel for the Applicant submitted that this court has jurisdiction to entertain the application and placed reliance on the provisions of Order 42 Rule 6 of the Civil Procedure Rules. Counsel, while placing reliance on the case of *Selestica Limited vs. Gold Rock Development (2015) eKLR*, submitted that the Applicant had satisfied all the conditions precedent for the grant of the order sought.
5. According to the Respondent's counsel, there are conditions for grant of stay of execution that should be met by the Applicant. In that regard, counsel cited the provisions of Order 42 Rule 6 of the Civil Procedure Rules and submitted that the Applicant has not satisfied the grounds for grant of stay of the Judgment of this court.
6. It was submitted that the Application was filed after unreasonable delay and that the same is an afterthought. Reliance was placed on the case of *Superior Homes (Kenya) Limited vs. Musango Kithome (2018) eKLR*.
7. This Application was brought under Order 42 Rule 6, Order 22 Rule 22 and Order 51 Rule 1 and 3 of the Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act. Order 22 Rule 22 is of no value to the instant Application. Section 3A preserves the Applicants' right to approach this court to realize their cherished right of Appeal and Order 42 Rule 6 provides for stay of execution pending Appeal. The conditions to be met by an Applicant in order to be entitled to an order for stay are laid out in that Rule in the following terms:

***“6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 application being made, to consider such application and to make such order thereon as may to it seem just, and 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 such order set aside.*”**

(2) No order for stay of execution shall be made under sub-rule (1) unless-

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

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.”

8. As was held in the case of *Selestica*