



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC CASE NO. 278 OF 2013

GHALIB KARA.....PLAINTIFF

-VERSUS-

ALI ISHARAI HUSAIN JAAFERI & 2 OTHERS.....DEFENDANTS

RULING

1. The 3rd defendant/Applicant has filed a notice of motion dated 30th July 2015 and filed in Court on 31.7.2015. The application is premised under Order 42 rule 6 (1) and (2) of the Rules and Sections 1 A, 1 B and 3 A and the applicant seeks ;
 - 1) Spent
 - 2) Spent
 - 3) Spent
 - 4) **That upon inter parties hearing, the Court be pleased to grant a stay of execution of the ruling delivered on 22.7.2015 pending hearing and determination of an appeal filed in the Court of Appeal.**
 - 5) **Costs of this application be provided for.**
2. The application is supported by the grounds on the face of it and on the affidavit of the Applicant. The Applicant deposes of being aggrieved by the ruling of 22.7.2015 and has since lodged a notice of appeal. The Applicant deposes further that unless stay of execution is granted she will suffer substantial loss as enumerated in paragraph 9 of her affidavit. She deposed that she has made this application timeously and her appeal has high chances of succeeding.
3. The application is opposed by the Plaintiff/Respondent vide his replying affidavit filed in Court on 26th October 2015. In paragraph 7, he denies that the appeal raises any substantial grounds and that if stay is not granted, the appeal will be rendered nugatory. He stated that the applicant can be indemnified if her appeal succeeds. He also denied the jurisdiction of this Court in granting stay as the only avenue applicable is under Rule 5 (2) (b) of the Court of Appeal Rules. He urged the Court to dismiss the application with costs.
4. Parties have filed written submissions which I have read and considered. The guiding principles for granting stay of execution is set under Order 42 rule 6 of the Civil Procedure Rules. One of the principle is that the Application must be made timeously. In this instant, the applicant has met

- the principle as his application was filed within one week of the ruling. The second principle is proof of substantial loss. The Applicant submitted that she is currently in occupation of the suit premises.
5. The Applicant submits that she is the registered owner and will suffer loss as she will be denied the opportunity to enjoy rights conferred upon her by law. She also alleges possible loss in terms of contracts entered into with 3rd parties. She also feared her property (suit premises) being forfeited to the state in the event the Respondent is found guilty of criminal case on trading on wildlife trophies. That this possible forfeiture can be prevented while the Applicant exercises her right to appeal so the appeal is not rendered nugatory.
 6. In support of this, the Applicant cited **Kenya Shell Ltd vs Benjamin Karuga I KAR 100**. The Applicant also submitted she has shown sufficient cause for instance that the Respondent's tenancy had expired on 3.11.2013. Further that the Respondent has not been paying rent or any consideration for being in the premises and the Respondent having been evicted, the Court should avoid creating a contract of tenancy. Lastly she agreed to abide by any security this Court will order her to provide.
 7. The Respondent on his part submits the main dispute is about who is the bona fide owner of the suit property. That the Applicant evicted him in spite of the existence of an injunction and it is him who has always been in occupation and no prejudice will be occasioned to the Applicant if the orders are not granted. He submitted that the Applicant has not shown sufficient cause or satisfied the Court that she will suffer substantial loss. In support of his submissions he cited case laws ;

- **HC Misc Application No 42 of 2011 James Wangalwala & Another vs Agnes Naliaka**

- **HCC No 422 of 2006. Antoine Nchanje vs African Virtual University**

8. The existing orders are currently in favour of the Respondent to enter occupation of the suit premises. In the replying affidavit, he did not explain if he will suffer loss in the event the stay is granted. Neither did he justify this in his submissions. He only stated that the Applicant had not shown sufficient cause or proof of likelihood of substantial loss.
9. The Applicant set out the particulars of substantial loss in paragraph 9 of her affidavit in support of the application. It is not for this Court to determine whether the appeal lodged has great chances of succeeding. All it is to be satisfied with is that there is a notice of appeal filed. In the circumstances of this case, the Court is presented by an explanation on the nature of loss by the Applicant only. The Respondent has not demonstrated that he deposited rent in Court as was directed by the Court.
10. I am satisfied that the Applicant has shown sufficient cause for granting the stay. She has also demonstrated that she is likely to suffer substantial loss. The application was filed timeously. Consequently I do grant the orders of stay on condition that the substantive appeal is filed and served within 60 days. In default, the stay orders shall lapse. Costs of the application is awarded to the Respondent.

Ruling dated and delivered in Mombasa this 10th day of February 2016

A. OMOLLO

JUDGE