



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. 136 OF 2014**

**MALICK UPANDE.....APPELLANT/APPLICANT**

**VERSUS**

**NICKSON SEMBE BARASA.....RESPONDENT**

**RULING**

1. By the application dated 18th of November 2014 the applicant seeks for stay of execution pending the hearing and determination of the appeal herein. The application is brought pursuant to **Order 42 Rule 6 (1) and (2)** of the Civil Procedure Rules and it is premised on the grounds that judgment was delivered on the 05/11/2014 and the appellant was ordered to be evicted and may be evicted from the suit property any time. Further that the appellant has a good appeal with high chances of success and the same may be rendered nugatory if the orders sought are not granted.
2. The applicant in support of the application has sworn an affidavit dated 18th November 2014 to which he has annexed a copy of pleadings and judgment of the lower court "MU1-4". Briefly he states that he does not stay on the suit land but has grown sugar cane thereon which he claims the Respondent is targeting. He explains that he entered the suit land through an agreement with one of the beneficiaries of the estate and he believes that the Respondent cannot have a good title as there is a succession cause No.473 of 2007 which is still pending confirmation by the court. He claims to have a good appeal with high chances of success. He maintains further that the bone of contention herein is sugarcane which he has planted on part of the suit land and if harvested by the Respondent the appeal will be rendered nugatory.
3. The Respondent filed a Replying Affidavit dated 26th November 2014 opposing the application. In it he states that the appeal is a mere tactic of delay by the appellant to deny the Respondent the fruits of his judgment. He claims that the appellant failed to enjoin the person who leased him the land as a party in the suit at the lower court and he as a Defendant in the lower court-house could not successfully challenge the Respondents Title even if he claims that the title was subject of succession. He claims to have grown the cane after he obtained an order of injunction on 1st August 2013 as shown in the annexure "NSB1". He contends that an appeal does not operate as a stay and that the appellant ought to offer security for costs in any event.
4. When this matter came up for hearing on the 19/11/2014 the same was certified urgent and a temporary stay granted to the Applicant for seven (7) days. Consequently on the 26/11/2014 the said orders were extended as parties agreed to canvass the application by way of written submissions which they filed and exchanged.
5. This Court has considered the application and the response thereto together with the submissions by both parties including the authorities the parties have cited.
6. The instant application is based on Order 42 Rule 6 (1) and (2). That Rule

Provides:-

“6.(1) No appeal or second appeal shall operate as a stay of 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 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—

(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.”

7. The issue for determination by this court is whether the applicant has met all the 3 conditions above stated to warrant the granting the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him. The applicant must satisfy all and not just one or two of the conditions.
8. I am satisfied that the Appellant’s application for stay of execution was filed without unreasonable delay as required under Order 42 Rule 6(2) and in any case the Respondent did not allege any such delay.
9. Appellant has stated that he will abide with any order on security the Court may make. Such undertaking is in compliance with provisions of Order 42 Rule 6(2).
10. The appellant claims that he will suffer substantial loss unless the orders sought are granted. He claims that at the time the decree complained of was made he was in occupation of a portion of the suit land and if the decree is executed he will be forced out. He also maintains that the dispute arose from the sugar cane growing on the portion in issue whose proceeds he may lose unless the judgment is stayed. I find that this may occasion the applicant substantial loss though the appellant has not quantified the amount of loss he will suffer.
11. After carefully considering the grounds of appeal and the affidavit evidence, I am satisfied that the appellant’s appeal has high chances of success. Further, considering the totality of the parties’ arguments vis-à-vis the law, I am satisfied that the application has merit. Accordingly, the Notice of Motion dated 18/11/2014 is allowed in terms of prayer (2) thereof on condition that the applicant deposits into court a sum of KShs.200,000/= (Kenya Shillings Two Hundred Thousand only) being security of costs. The deposit shall be made within ten (10) days from today failing which the application for stay shall stand dismissed with costs to the Respondent.
12. The costs of the application shall abide the outcome of the appeal.
13. It is so ordered.

***Ruling delivered, dated and signed in open court at Kakamega this 4<sup>th</sup> day of February 2015***

**RUTH N. SITATI**

**JUDGE**

In the presence of

Mr. Anziya (present) .For Appellant/Applicant

M/S P. Muleshe (absent).For Respondent

F. Juma.Court Assistant