



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 17 OF 2017

BERNADETTA SHITUKHU.....PLAINTIFF/RESPONDENT

VERSUS

IGNATIUS KWAMA.....DEFENDANT/APPLICANT

RULING

The application is dated 3rd June 2020 and is brought under Order 51 rule 1, 22 rule 22, 42 rule 6 (1) and (5) of the Civil Procedure Rules 2010 and Section 3 and 3A of the Civil Procedure Act seeking the following orders:-

1. That this application be certified urgent and the same be heard ex-parte in the first instance for reasons of urgency.
2. That this honourable court be pleased to stay execution of the orders granted in its judgment delivered on 19th February, 2020 and decree thereof dated 10th June, 2020 pending the hearing and determination of this application.
3. That this honourable court be pleased to stay execution of the orders granted in its judgment delivered on 19th February, 2020 and decree thereof dated 10th June, 2020 pending the hearing and determination of the appeal.
4. That costs be provided for.

It is supported by the annexed affidavit of Ignatius Kwama and grounds that the respondent is in the process of having the decree of this court executed and also visiting the suit land with persons with an intention of disposing the same by way of sale. That a decision in this matter was made on 19th February, 2020 which decision is promptly being appealed against by the applicant considering the Covid 19 pandemic that halted normal court operations. The appeal being lodged is merited with very high chances of success and if stay is not granted the appeal shall be rendered useless and the applicant shall suffer irreparably and substantially. That the respondent is very much aware of the pendency of the appeal which appeal shall have effect on this matter having been served with a notice of appeal. That there is no inordinate delay in prosecuting the appeal as the applicant have been waiting for proceedings to be typed in order to prepare a record of appeal. That the respondent stands to suffer no prejudice should this application be granted. That in the interest of justice and fair play this honourable court ought to grant this application as prayed.

The plaintiff/respondent opposed the application dated 20th June, 2020 based on the following grounds that the application is incompetent and an abuse of court process for failure to comply with the provisions of order 90 Rule 9 & 10 of the Civil Procedure Rules. The application is premature as no appeal lies as a matter of right from the judgment unless leave to appeal, is granted and in this case none was granted and or sought for as per the provisions of order 43 Rule 1, 2 and 3 of the Civil Procedure Rules. The applicant is guilty of laches, judgment having been delivered on 19th February, 2020, Notice of Appeal filed on 30th June, 2020, 4 months after the stipulated period. The appeal does not operate as a stay hence the orders sought cannot be granted.

This court has carefully considered the application and the submissions herein. 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 appellant needs to satisfy the Court on the following conditions before he 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, the applicant who was dissatisfied with the judgement delivered on 19th February, 2020 and has appealed against the said judgement. That the said appeal has high chances of success. Be that as it may, 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 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.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 28TH SEPTEMBER 2020.

N.A. MATHEKA

JUDGE