



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. 19 OF 2020**

**KINGORI KIMBU & 2 OTHERS.....APPELLANTS**

**VERSUS**

**LEONARD KAMENCHU & ANOTHER.....RESPONDENTS**

**RULING**

1. The appellants filed application dated 19<sup>th</sup> May 2020 seeking a stay of execution of the judgement delivered in **TIGANIA PM ELC No. 193 of 2014**, and the proceedings thereof pending the hearing and determination of this appeal. The application was supported by the sworn affidavit of **Kingori Mumbui** (the 3<sup>rd</sup> Appellant herein) who averred that they are aggrieved by the decision and judgement of the trial court and they have since filed an appeal herewith raising arguable grounds with high chances of success. That the respondents are in the process of executing the judgement of the trial court and they have in such effort applied for orders of security for eviction of the appellants. That if the execution is complete the appellants will suffer substantial loss considering that they have been living on the aforesaid suit premises from 1967 to date. That the appeal herein shall also be rendered nugatory if the orders sought are not granted.

2. The respondent has opposed the application through his replying affidavit dated 18<sup>th</sup> June 2020, where he avers that the application has been made belatedly. That the appellants are buying time to unlawfully benefit from the suit premises which they have been benefiting from all these years. That they have suffered irreparably and that the appellants have not demonstrated that they are ready and willing to abide by the conditions set by the court. The respondent states that the applicants should be condemned to pay security for costs of Kshs. 2,000,000/= in view of the fact that they are frivolous appellants and will not be able to pay for the costs.

3. On 23/6/2020 this court directed the parties to canvass the application through written submissions. Both parties have since filed their submissions. The appellants submitted that the application has been made timely and reiterated that they shall suffer substantial loss. It was their submission that the circumstances of the case do not require the provisions for security. They relied on the cases of **Sarah N. Sakwa versus Elizabeth Wamwayi T/A Namukhosi Ltd & Anor. Mombasa HCA No. 3 of 2017**, **Mukuna vs Abuoga (1988) eKLR**, and **Embu ELC No. 50 of 2017 Christopher Njeru vs Eugenio Njagi M'Muchege**.

4. The Respondent submitted that the application has been made belatedly, that the appellants have not proved substantial loss and/or security for costs. That in any case the appellants should be condemned to pay Kshs 500,000/= as security for costs. The respondent relied on the case of **David Ogega Ngangi & another v Alfred Matoya Chweya [2020] eKLR**.

**Analysis and Determination**

5. The relief of stay of execution pending Appeal is governed by **Order 42 Rule 6 of the Civil Procedure Rules** which provides as follows:

*“6(1) No Appeal or 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 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 appealed 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 undue 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.”*

6. In Loice Khachendi Onyango v Alex Inyangu & another [2017] eKLR the court held as follows;

*“The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. In determining whether sufficient cause has been shown, the Court should be guided by the three pre-requisites provided under Order 42 Rule 6 of the Civil Procedure Rules. Firstly, the Application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicants unless stay of execution is granted; and thirdly 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. On whether the application herein was made timeously, the trial courts judgement was made on 16/1/2020 and the appellants filed their appeal on 18/2/2020. The respondents filed the application for security during the eviction process on 27/1/2020. The appellants filed this application on 19/05/2020. This was four months after the delivery of the judgement. The appellants have not explained the delay in filing the application. Given the circumstances of this case, and the fact that the appeal herein was made timeously I shall give the appellants the benefit of doubts.

8. On whether the applicants shall suffer substantial loss, I have read the trial court’s judgement and the appeal raised by the appellant. I have also considered the averments made by the appellants that they shall suffer substantial loss if their semi-permanent structures were to be destroyed by the respondent. The case in the trial court spawns from a double allotment issued to the appellant and the respondent. The trial court held in favour of the appellant. It is however not lost to this court that the appellant has been in occupation of the suit premises for a rather lengthy period. The appellants do raise triable issues in this appeal. The appellants have therefore proved substantial loss.

9. On the issue of security, it is one of the key elements a court is bound to consider for the due performance of the decree; see **Francis Njoroge vs. Stephen Maina Kamore (2018)eKLR**.

10. I also find fortress in the provisions of **Section 63 (e) of the Civil Procedure Act** which provides that;

*“...in order to prevent the ends of justice from being defeated, the court may if it so prescribed..... make such other interlocutory orders as may appear to the court to be just and convenient”.*

11. Balancing the interest of both parties to this case I hereby grant a conditional stay in the following terms;

- 1) I hereby grant a stay of execution of the decree and judgment in TIGANIA PM ELC No. 193 of 2014 for a period of ONE YEAR.
- 2) The applicants shall deposit a sum of Ksh 450 000 in court within a period of 30 days from the date of delivery of this ruling failure to which the order of stay of execution shall lapse.
- 3) The costs of this application shall abide those in the appeal.
- 4) Appellant to move speedily to ensure that the Record of Appeal is filed.
- 5) By virtue of the above stay, there shall be a stay of the proceeding in TIGANIA PM ELC No. 193 of 2014, for a period of ONE YEAR.

DATED, SIGNED AND DELIVERED AT MERU THIS 16<sup>TH</sup> DAY OF SEPTEMBER, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 23.6.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to 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.

HON. LUCY N. MBUGUA

ELC JUDGE