



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 300 OF 2015

DAVID A. ANEKEYA.....PLAINTIFF/RESPONDENT

VERSUS

DANIEL ANEKEYA.....1STDEFENDANT/APPLICANT

HUMPHREY NJIRANI MUKABI.....2ND DEFENDANT

RULING

The application is dated 24th July 2020 and is brought under Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010, Section 3A & 3 of the Civil Procedure Act, Article 159 of the Constitution of Kenya, 2010 seeking the following orders:-

1. That this application be certified as urgent and be dispensed with in the first instance.
2. That the honourable court be pleased to stay execution of the judgment/decree delivered on 24th June, 2020 pending the hearing of this application inter parties.
3. That the honourable court be pleased to stay execution of the decree pending hearing and determination of the appeal.
4. That the costs of this application be provided for in the cause.

It is based on the following main grounds that the applicant being aggrieved with the judgment delivered by the trial court on 25th February, 2020 intends to file an appeal without inordinate or unreasonable delay. That as a consequence of the appeal, cancellation of title will lead to removal or destruction of all developments on land parcel No. Butso/Ingotse/1869 causing substantial loss and hence the need for stay. That the appeal, if successful will be rendered nugatory and substantial loss will be suffered if the stay of execution pending appeal is not granted. That the applicant is willing and able to abide by any set conditions as prerequisites for granting of the orders for stay pending appeal. That the respondent will not be prejudiced in anyway if the orders for stay pending appeal are granted that cannot be remedied by costs. That it is only in the interest of justice that the orders being sought herein are granted.

The respondent submitted that the application is incompetent, frivolous and vexatious. That the application has been filed after undue delay. That the 1st defendant/applicant has not filed any appeal capable of being heard. That the applicant is therefore approaching the court with dirty hands and thus does not deserve the equitable remedies he is seeking from this court. That there is no substantial loss that the applicant will suffer since he has been residing and using the portion that the court confirmed is family land. That the defendant/applicant has not given any undertaking capable of enforcement in his application papers filed herein. That he has partly executed the judgment herein given that he has already registered the order leading to cancellation of the suit property.

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 appellants need to satisfy the Court on the following conditions before they 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 of this application the applicant being aggrieved with the judgment delivered by the trial court on 25th February, 2020 intends to file an appeal without inordinate or unreasonable delay. That as a consequence of the appeal, cancellation of title will lead to removal or destruction of all developments on land parcel No. Butso/Ingotse/1869 causing substantial loss and hence the need for stay. That the appeal, if successful will be rendered nugatory and substantial loss will be suffered if the stay of execution pending appeal is not granted. 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 OCTOBER 2020.

N.A. MATHEKA

JUDGE