



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC APPEAL NO. 4 OF 2020.

DHINGRA RAMESH CHANDER T/A

HIMANI TRADERS.....APPELLANT

VERSUS

A.M TAILOR.....DEFENDANT

RULING

INTRODUCTION

1. What is before me is the Appellant's Notice of Motion dated 23.1.2020 brought pursuant to Order 42 Rule 6(1) and (2) of the Civil Procedure Rules and section 3 and 3A of the Civil Procedure Act seeking a stay of execution pending appeal.
2. The application is premised on the grounds set forth in the notice of Motion and the Supporting Affidavit of George Joseph Mogaka Masese Advocate sworn on the 23rd January 2020. In the said affidavit he depones that the Appellant filed suit in the Chief Magistrate's court which was struck out on the grounds that the court did not have jurisdiction. The Appellant then filed an appeal against the said decision. He depones that the appeal has overwhelming chances of success.
3. The application is opposed by the Respondent through her Replying Affidavit sworn on the 2nd day of March 2020 in which she depones that the application and the Memorandum of Appeal filed by the Appellant are devoid of merit. She depones that the Appellant has resorted to delaying tactics rather than approaching the right forum. She depones that the Applicant has not demonstrated that he stands to suffer substantial loss as there has been no attempt to evict him since his suit was struck out and therefore he has no reason to worry.
4. The application was disposed of by way of written submissions and both parties filed their submissions in which they argued their respective positions.

ISSUES FOR DETERMINATION

5. Having considered the Notice of Motion, affidavits and rival submissions, the singular issue for determination is whether a stay of execution should be granted pending appeal.

ANALYSIS AND DETERMINATION

6. Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 provides that an Applicant who is seeking a stay of execution pending appeal must demonstrate the following: -

1. **That Substantial loss may result to the Applicant unless the order was made;**
2. **That the application was made without unreasonable delay; and**
3. **That 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 principles that guide the court in the exercise of its discretion to grant an application for stay pending appeal were enunciated in the case of **Elena D.Korir vs Kenyatta University (2014) eKLR** where Justice Nzioki wa Makau stated as follows;

“the application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & another

vs Thornton & Turpin Ltd where the Court of Appeal (Gicheru JA, Chesoni JA & Cockar Ag JA) held that “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The Applicant must furnish security, the application must be made without unreasonable delay.

In addition, the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo vs Straman EA Ltd[11](2013) as follows:

“In addition the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”.

8. Although one of the grounds on which the Applicant has based his application is that he stands to suffer irreparable loss if a stay of execution is not granted, he has not demonstrated the nature and extent of loss he stands to suffer. The Applicant has also not demonstrated that he is willing to furnish security for costs. It is however not in dispute that the application was made without undue delay as the suit was struck out on 21. 1.2020 and the application was filed on 23.1.2020. I have looked at the Memorandum of Appeal and I am of the view that the appeal is arguable. In the circumstances, if a stay of execution is not granted the appeal shall be rendered nugatory.

9. In the interest of justice, I am inclined to exercise my discretion in favour of the Applicant and grant a stay of execution pending appeal on condition that the Applicant deposits Kshs. 75,000 in court as security for costs within 30 days from the date of this ruling. If the said amount is not paid within the stipulated period, the order of stay shall automatically lapse.

Dated, signed and delivered at Kisii this 15th day of October, 2020.

J.M ONYANGO

JUDGE