



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 24 OF 2012**

**MURTAHAR AHMED DAHMAN**

**ALI-AMIN AHMED DAHMAN** (Suing as Administrator of the

Estate of **MARIAM BINTI SAID**.....**PLAINTIFF**

**VERSUS**

**ATHUMAN SUDI**.....**RESPONDENT**

**RULING**

1. I have before me for determination a Notice of Motion application dated 24<sup>th</sup> October 2019. By the said Motion, Athman Sudi (the Defendant) prays for an order of stay of execution of the Judgment and Decree of this Court dated 8<sup>th</sup> October 2019 pending the hearing and determination of the Intended Appeal.

2. The application which is supported by an affidavit sworn by the Defendant is premised on the grounds: -

**i. That Judgment was delivered herein on 8<sup>th</sup> October 2019 allowing the Plaintiffs suit as prayed;**

**ii. That the Defendant is dissatisfied with the decision and intends to appeal;**

**iii. That unless the stay is granted, the object of this application and the intended appeal shall be rendered nugatory since the Plaintiff may proceed to evict the Defendant from the suit property;**

**iv. That the Applicant is still in occupation and possession of the suit property and risks being rendered homeless; and**

**v. That the Defendant is ready and willing to furnish such reasonable security as this Court may deem fit to order and is ready to abide by any conditions and terms as to security as the Court may deem fit to impose.**

3. The application is opposed. By Grounds of Opposition dated 2<sup>nd</sup> November 2019 as filed herein on 4<sup>th</sup> November 2019, Mtwahar Ahmed Dahman and Al Amin Ahmed Dahmar (the Plaintiffs) oppose the application on the grounds: -

**1. That neither the costs have been taxed nor decree settled to make this matter ripe for execution.**

**2. There is no competent Notice of Appeal issued and served, seeing that the exhibited notice was lodged on 23.10.2019 in contravention of the Court of Appeal Rules.**

**3. Without a competent Notice of Appeal, the proposed appellant has not properly invoked the jurisdiction of Court.**

4. In further response to the application and by a Replying Affidavit sworn by the 1<sup>st</sup> Plaintiff, they aver that the application by the Defendant is not made with promptitude and that the Defendant has not offered any security for the due performance of the decree. The Plaintiffs further urge the Court that should it be inclined to grant a stay of execution, then the Defendant should be made to deposit a sum of Kshs 2.5 Million as security.

5. I have perused and considered the Defendants' application as well as the response thereto by the Plaintiffs. I have also considered the oral

submissions as canvassed before me by the Learned Advocates for the parties-Mr. Mbura for the Defendant/Applicant and Ms Waithera for the Plaintiffs/Respondents.

6. The principles guiding the grant of a stay of execution pending appeal are well-settled. These principles are provided under Order 42 Rule 6(2) of the Civil Procedure Rules as follows: -

**“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. In *Vishram Ravji Halai –vs- Thornton & Turpin Civil Application No. Nai.15 of 1990 (1990) KLR 365*, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, this Court’s jurisdiction to do so under the then Order 41 Rule 6 of the Civil Procedure Rules is fettered by three conditions, namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further, the application must be made without undue delay.

8. As was stated by Warsame, J. (as he then was) in *Samvir Trustee Ltd –vs- Guardian Bank Ltd, Nairobi (Milimani) HCCC 795 of 1997: -*

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment or exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary power of the Court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the Court in a particular manner. But the yardstick is for the Court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his Judgment. It is a fundamental factor to bear in mind that, a successful party is **prima facie** entitled to the fruits of his Judgment; hence the consequence of a Judgment is that it has defined the rights of a party with definitive conclusion. The Respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the Court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contentions.”

9. In the matter before me, there is no doubt that the application for stay was filed by the Defendant without undue delay. The application was filed within two weeks of the Judgment delivered herein on 8<sup>th</sup> October 2019. It was not contested that the Defendant has built a house on the suit property and that there is a risk of his being evicted therefrom with his family and being rendered destitute in the absence of a stay order being granted herein.

10. On the material placed before me, I am persuaded that the Defendant stands to suffer substantial loss. It was the Plaintiff’s prayer that in the event this Court considers it necessary to grant a stay, the Defendant should be required to deposit security of not less than Kshs 2.5 Million in Court. No basis was however provided for the said figure.

11. Having considered the instant application, it is my view that this is a case wherein a stay ought to be granted but on condition as the Plaintiff was claiming unpaid rent and mesne profits from the Defendant.

12. Accordingly, the order which commends itself to me and which I hereby grant is that there will be a stay of execution pending the hearing of the Appeal on condition that the Defendant deposits a sum of Kshs 100,000/- in Court within 30 days from the date of this Ruling. In default, this application shall be deemed to have been dismissed with costs to the Respondents.

13. Otherwise, the costs of this application shall be in the Appeal.

**Dated, signed and delivered at Malindi this 2<sup>nd</sup> day of October, 2020.**

**J.O. OLOLA**

**JUDGE**