



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 21 OF 2017

ESTHER NELIMA MANYASIPLAINTIFF

VERSUS

SIMEA JAMIN ALFRED

ANUNDA DAVID

ALEMBE KHATERE

JAMES WAFULA

ANTHONY MANASSEH

ALFRED WAFULA MUSOMBI

PETER BARAZA

MARY OREDI.....DEFENDANTS

RULING

The first application is dated 4th October 2020 and is brought under Order 42 Rule 6 (1), (2) and (4) and Order 51 of the Civil Procedure Rules, Articles 48 and 159 of the Constitution and Sections 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act seeking the following orders:-

1. That this application be certified as urgent and be dispensed with on priority basis.
2. That this honourable court is pleased to stay execution of judgment and decree of this court pending the hearing and determination of applicants' intended appeal to the Court of Appeal.
3. That the costs of this application abide by the outcome of the intended appeal.

It is premised upon the grounds that the applicants being aggrieved by the judgment read on 23rd June, 2020 have preferred an appeal by filing a notice of appeal. The execution of the decree is imminent following that the applicants have been served with eviction orders. The applicants intended appeal to the Court of Appeal will be rendered nugatory following the execution of decree and judgment. The applicants will suffer irreparable harm if the orders staying execution of decree are not granted given it pertains to eviction of the applicants who have purchasers interest having bought from beneficiaries and have also made extensive developments. The execution of decree and judgment will likely engender breach of peace as the dispute is still generally contested by the applicants. It is only in the interest of justice that the orders sought herein are granted.

The respondent/plaintiff submitted that no appeal has been filed and that the applicants are in contempt of court as they have failed to vacate the land. That the said application should be dismissed.

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, in the application the applicant being aggrieved with the judgment delivered by this court on 23rd June, 2020 have filed a notice of appeal. 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.

The second application is dated 23rd September 2020 and is brought under Section 1A of the Civil Procedure Act Order 51 Rule 1 of the Civil Procedure Rules, 2020 seeking the following orders;

1. That the honourable court be pleased to order the O.C.S. Matete Police Station to provide security in enforcement of the decree dated 25th June, 2020.
2. Costs of this application be provided for.

This application is grounded on the affidavit of Esther Nelima Manyasi. I find that there being no stay of execution of the judgement delivered on the 23rd June 2020, this application is merited with costs to the plaintiff/applicant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 24TH NOVEMBER 2020.

N.A. MATHEKA

JUDGE