



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ELC APPEAL NO. 34 OF 2019**

**SAMWEL GISIORA OGOTI.....APPELLANT /APPLICANT**

**VERSUS**

**SEVENTH DAY ADVENTIST CHURCH (E.A)LTD.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY REGISTRAR NYAMIRA.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY LAND ADJUDICATION OFFICER BORABU....3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction**

1. On 15<sup>th</sup> January 2020, the Applicant filed an application for stay of execution pending appeal. In the said application he stated that he had lodged an appeal in this Honourable court against the judgment in **Keroka PMELC Case No. 26 of 2018** delivered on 11<sup>th</sup> December 2019. He also stated that he had filed an application for stay of execution before the lower court but at the time of filing the instant application, the lower court had declined to extend the interim order of stay pending the inter partes hearing of the application. In its ruling dated 28.2.20 this court stayed the application filed in this court pending the hearing and determination of the application filed in the lower court.

2. The applicant subsequently withdrew the application in the lower court on 18.2.2020 and opted to pursue the application filed in this court. I shall therefore consider the said application on its merits. The application is based on the applicant's supporting affidavit sworn on the 15<sup>th</sup> January 2020 in which he depones that he has filed an appeal against the decision of the lower court. He depones that he is apprehensive that if a stay is not granted, he shall be evicted from a portion of the suit property and the appeal shall be rendered nugatory. He depones that he has a large family which depends on his land parcel No. Gesima Settlement Scheme/299 and if he is evicted therefrom, it will result in untold suffering for him and his family.

3. The application is opposed by the 1<sup>st</sup> Defendant through the Grounds of Opposition dated 20<sup>th</sup> January 2020 and the affidavit of Duke Moseti Sibwoga sworn on the 20<sup>th</sup> January 2020. In essence the 1<sup>st</sup> respondent contends that Kekinga SDA church has been in possession of a portion of Land parcel no. Gesima Settlement Scheme/482 which is registered in the name of the 1<sup>st</sup> respondent and the Appellant had merely fenced it with view to propagating his claim over the same. The 1<sup>st</sup> respondent contends that the Appellant has not met the conditions for stay of execution pending Appeal as he has failed to demonstrate that he will suffer substantial loss if the orders for stay are not granted and he has not provided any security for costs.

**Applicant's Submissions**

4. The application was argued orally. In his submissions Counsel for the Applicant relied on the supporting affidavit. He emphasized the fact that if the order for stay is not granted, the applicant would be denied the use of a portion of land he has occupied for the last 50 years. He submitted that the appeal has high chances of success and that the applicant was willing to abide by any conditions the court may impose.

**Respondent's Submissions**

5. In his response counsel for the respondent submitted that the applicant did not deserve the orders sought as he had not met the conditions for stay pending appeal as set out in Order 42 Rule 6 of the Civil Procedure Rules. He submitted that granting the stay would prevent the respondent from enjoying the fruits of his judgment. He argued that even though the court had a discretion to grant an order of stay, such discretion should not be exercised where the Respondent is likely to suffer hardship.

**Issues for determination**

6. The singular issue for determination is whether the applicant has met the conditions for grant of a stay of execution pending appeal.

#### **Analysis and determination.**

7. 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. Substantial loss may result to the applicant unless the order was made;**

**2. The application was made without unreasonable delay; and**

**3. 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.**

8. 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 GuyoWakalo 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”.*

#### **Whether the Applicant has demonstrated that he will suffer substantial loss if the order for stay is not granted.**

9. The applicant has expressed the fear that if the application is not granted he will be evicted from land parcel number Gesima Settlement Scheme/299 together with his family and he will therefore suffer substantial loss. I note that the applicant’s contention is that land parcel no. Gesima Settlement Scheme/482 which the 1<sup>st</sup> Respondent claims was illegally curved out of land parcel No. 299. There is nothing to show that the applicant’s homestead is on this portion of land parcel number 482 nor is there any proof that his eviction thereof will result in substantial loss. In **Machira T/A Machira & Co Advocates V East African Standard (2002) 2 KLR 63** Kuloba J (as he then was) stated that:

*“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must provide specific details and particulars. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay”*

10. Beyond his desire to continue occupying the disputed portion of land, the Applicant has not demonstrated what tangible loss he stands to suffer if the order of stay is not granted. It is therefore my finding that the Applicant has failed to satisfy this condition.

#### **Whether the application has been made without undue delay.**

11. The applicant first applied for stay in the lower court soon after the judgment was delivered. He then made a formal application for stay on 15.1.2020, which is about a month after judgment was delivered. It was therefore made without undue delay.

#### **Whether the Applicant has furnished security for costs.**

12. In the case of **Exclusive Mines Limited & another v Ministry of Mining & 2 others [2015] eKLR**, the court stated as follows:

*“...On the issue of furnishing security, my understanding is that an applicant seeking an order of stay pending appeal should, as a sign of good faith, offer or propose any such security for the performance of the decree which the appeal has been preferred.*

13. With regard to security for costs, the applicant has not demonstrated by way of affidavit that he is willing to furnish security for costs which is one of the prerequisites for the grant of an order of stay pending appeal.

In view of the foregoing, the application lacks merit and it is hereby dismissed with costs to the Respondents.

**Dated, signed and delivered at Kisii this 10<sup>th</sup> day of November 2020.**

**J.M ONYANGO**

**JUDGE**