



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE 741 OF 2014**

**SIMON KIMANI.....PLAINTIFF**

**=VERSUS=**

**GEOFFREY KIMANI GATHIGI.....1<sup>ST</sup> DEFENDANT**

**COUNTY LAND REGISTRAR, KIAMBU COUNTY.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is the noticed of motion dated 28<sup>th</sup> May 2020 brought under section 3A of the Civil Procedure Act Cap. 21 Laws of Kenya and Order 42 Rule 6(1), (2) and 4, order 50 rule 1 and 3 of the Civil Procedure Rules 2010.

2. It seeks orders:-

*(1) Spent.*

*(2) Spent.*

*(3) That an order of stay of execution of the judgement issued on 5<sup>th</sup> May 2020 or any decree issued subsequent to the judgment be and is hereby granted pending the hearing and determination of the appeal preferred herein.*

*(4) That this honourable court does make any other or further orders to safeguard the interest of the applicant/appellant.*

*(5) That the costs of this application be provided for.*

3. The grounds are on the face of the application and are set out in paragraphs 1 to 6.

4. The application is supported by the affidavit of Simon Kimani the plaintiff/applicant sworn on the 28<sup>th</sup> May 2020.

5. The application is opposed. There is a replying affidavit sworn by Geoffrey Kimani Gathigi, the 1<sup>st</sup> defendant/respondent sworn on the 13<sup>th</sup> July 2020.

6. On the 6<sup>th</sup> July 2020, the court with the consent of parties directed that the application be canvassed by way of written submissions.

7. It is the plaintiff's/applicant's submissions that the substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory. That any removal and/or demolition of the balcony, means the metal brackets laid in the building will be rendered weak therefore compromising the overall structural integrity of the plaintiff's/applicant's building. He has put forward the case of **JMM vs PM [2018] eKLR**.

8. That in the issue of security for due performance of the decree, he has relied on the case of **HGE vs SM [2020] eKLR**. That the plaintiff/applicant has demonstrated sufficient grounds upon which this court should grant stay of execution of the judgment issued on 5/5/2020 or any decree issued subsequent pending the hearing and determination of the appeal.

9. It is the defendants'/respondents submissions that the High Court in entertaining an application for stay pending appeal must be guided by the four requirements set out in order 42 rule 6(1) of the Civil Procedure Rules. That the plaintiff/applicant has not satisfied the four

conditions set out. He has put forward the case of **Carter & Sons Ltd vs Deposit Protection Fund Board & Others Civil Appeal No 291 of 1997** where the pre-conditions were laid thus:-

***“...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”.***

10. Further that the plaintiff/applicant has not demonstrated the loss if any, it would suffer if stay of execution is not granted. The plaintiff/applicant should have availed an expert report to demonstrate why the structural soundness of the building would be affected by the partial demolition of the balconies. He has put forward the cases of **Machira t/a Machira & Co. Advocates vs East African Standard [2002] KLR 63; James Wangalwa & Another vs Agnes Naliaka Cheseto Bungoma HC Misc. App. No. 42 of 2011; Equity Bank Ltd vs Taiga Adams Company Ltd [2006] eKLR.**

11. The defendant has been severely affected and has not utilized his land effectively due to the plaintiff's encroachment. A stay order would extend this prejudice.

12. A balance of both parties' interests must be made when considering substantial loss. He has put forward the case of **Absolom Dova vs Tarbo Transporters [2013] eKLR.**

13. The plaintiff/applicant merely proposed to 'provide reasonable security if the court deems it necessary'. Such proposal is vague and lacks specificity as to the existence acceptability and is thus not good enough.

14. Judgement giving rise to the appeal was delivered on 5<sup>th</sup> May 2020. The appeal has not been filed. This application was filed after inordinate delay. No explanation has been tendered. He prays that the application be dismissed with costs.

15. I have considered the notice of motion, the affidavit in support and the replying affidavit. I have also considered the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

***(i) Whether the plaintiff's/applicant's application meets the threshold for grant of orders of stay of execution pending appeal.***

***(ii) Who should bear costs?***

16. The principle guiding the grant of stay of execution pending appeal are well settled. **Order 42 rule 6(2)** of the Civil Procedure Rules provides that:-

***“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.”***

17. It is clear from the above provisions that for an order of stay of execution to be granted, specific conditions must be met by the applicant.

18. I have considered the notice of motion herein. I find that it has been brought without unreasonable delay.

19. It is the plaintiff's/applicant's case that any demolition or removal of the balcony will render weak the overall structural integrity of the building. Further that there is need to preserve the status quo pending appeal. He also stated that he is ready to abide by any condition imposed by the court. The defendant/respondent on the other hand states that the plaintiff/applicant has not demonstrated the loss he is likely to suffer if these orders are not granted.

20. In the case of **Feisal Amin Jan Mohammed t/a Dunvia Forwarders vs Shami Trading Co. Ltd [2014] eKLR, Kasango J** stated as follows:-

***“It is trite law therefore that a stay of execution order is generally granted if the applicant has successfully demonstrated a substantial loss that may result to him unless the order is made, that the application is made without unreasonable delay and that the applicant has offered proper security.”***

I am guided by the above authority.

21. I have considered the circumstances of this case. I find that the plaintiff's/applicant's meets the requirements as set out under order 42 rule 6 of the Civil Procedure Rules.

22. In conclusion, I find merit in this application and I grant the orders sought namely:-

*(a) That an order of stay of execution of the decree emanating from the judgment delivered on 5<sup>th</sup> May 2020 is hereby granted pending the hearing and determination of the intended appeal on condition that the plaintiff/applicant do deposit Kshs.500,000 being security for costs in a joint interest earning account in the names of counsel for the plaintiff and counsel for the defendant within forty five (45) days from the date of this ruling. In default the orders of stay shall automatically lapse.*

*(b) That costs of this application be borne by the plaintiff/applicant.*

It is so ordered.

Dated, signed and delivered in Nairobi on this 16<sup>th</sup> day of December 2020.

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

No appearance for the Plaintiff

No appearance for the Defendants

Kajuju - Court Assistant