



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC. NO. 45 OF 2017

1. SALIM MWANA JAMILA

2. ALI ISSA CHEMNI

3. MBWANA MWINYIRI BRAMU

4. SHABAN OMAR

5. AMINI SALIM CHAMIRA.....PLAINTIFFS/APPLICANTS

VERSUS

BETTY WANJIKU KIURA.....DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 9th May, 2018 and brought under Order 42 rule 6 (1) & (2) of the Civil Procedure Rules and Section 1A, 1B, 3A and 63 of the Civil Procedure Act, the Plaintiffs/Applicants seek orders that this Honourable Court be pleased to grant an order of stay of execution of the order contained in the Ruling of the Court dated 2nd May, 2017 pending the lodging, hearing and determination of the appeal filed in the Court of Appeal against the said ruling and order.

2. The application is based on the grounds:

- i. That that plaintiffs have filed in the Court of Appeal an appeal against the decision contained in the ruling given on 2nd May 2018.**
- ii. That the Plaintiffs are in imminent danger of being evicted from the suit land over which they hold an indisputable valid title.**
- iii. That the plaintiffs shall suffer substantial loss irremediable by an award of damages or compensable in other satisfactory manner.**
- iv. That the appeal filed in the court of Appeal shall be rendered nugatory if stay is not granted and which appeal has high chances of success.**
- v. That the plaintiffs have been in use and possession of the said Suitland until their and peaceful possession was invaded.**

3. The application is supported by the affidavit of **SALIM MWANA JAMILA** sworn on 9th May, 2018 in which he depones inter alia, that the plaintiffs were aggrieved by the ruling and order given by the Honourable Court herein on 2nd May, 2018 and have since filed a Notice of Appeal against the said decision in the Court of Appeal. That they have applied to the court to be granted copies of the proceedings and ruling but the same have not been supplied and shall take a while before they are supplied to enable the plaintiffs prepare and compile a record of appeal to lodge to the court of appeal. He further depones that pending the lodging, hearing and determination of the appeal to the Court of Appeal the plaintiffs seek conservatory order in the nature of stay execution of the said decision. He avers that unless an order of stay of execution is made, the plaintiffs are apprehensive and in imminent danger of being evicted from the suit land herein and stand to suffer irremediable and substantial loss which is sufficient cause to entitle the Honourable Court to grant an order of stay of execution as a conservatory measure of preventing the plaintiffs appeal from being rendered nugatory and otiose upon the Appeal being successful. He adds that the plaintiffs shall further suffer substantial loss unless stay of execution is granted because the defendant intends and is likely to alienate, dispossess and dispose off the suit land over which the plaintiffs hold and are registered as valid and lawful proprietors; that alienation and disposition of the suit land to third parties shall put the suit land beyond the reach of the plaintiffs and the recovery thereof upon successful determination of the appeal shall be impossible; that the plaintiffs shall be deprived of and loose the legal protection they are

entitled to under the Land Registration Act and the constitution as being lawful and valid proprietors of title **Number CR.67802 LR NO.29878** and that the loss of legal protection is substantial loss as contemplated in law to entitle the grant of stay of execution pending appeal. That the policy of the law is to exercise the best discretion so as to prevent the appeal filed, if successful from being rendered nugatory as was held in **H. M. Butt –v- The Rent Restriction Tribunal (nbi) County Appeal Civil Appeal No.6 of 1979**. The plaintiffs aver that in light of the observation by the court in the said ruling, stay ought to be granted as a conservatory and preservative measure to maintain status quo pending the hearing and determination of the appeal. That both the plaintiffs and the defendant have maintained and observed status quo order that the court granted upon the plaintiffs application for interim injunction and it is in the interest of justice that the status quo be sustained to prevent the plaintiffs from being evicted which would result in substantial loss to the plaintiffs.

4. The defendant opposed the application and filed grounds of opposition dated 2nd July 2018. It is the defendant's contention that the application is misconceived and bad in law since there is no positive and enforceable order save for costs, arising from the ruling delivered by the court on 2nd May, 2018 dismissing the Notice of Motion dated 20th February, 2017. That this court never ordered the parties to do anything or refrain from doing anything capable of being stopped as the same is a negative order and it is incapable of execution by the respondent against the applicant hence cannot be stayed. The defendant avers that the application is frivolous, vexatious and an abuse of the court process and that it is in the interest of justice that the court dismisses it with costs.

5. Directions were given by the court and the parties agreed that the application be canvassed by way of written submissions. Only the respondent filed written submissions. The applicants did not file submissions within the time agreed or at all.

6. I have considered the application, the affidavit in support and the grounds of opposition filed. I have also considered the submissions filed and the authorities cited. The only issue for determination is whether this court should stay execution of the order contained in the ruling of the court dated 2nd May 2018 pending the lodging, hearing and determination of the intended appeal.

7. Order 42 Rule 6 sets out the conditions that must be met before an order for stay of execution is allowed. It states as follows:

“6 (1) No appeal or 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 application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court appealed from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

(2) 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 undue 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.

8. The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law, not capriciously or whimsically. Therefore stay of execution should only be granted where sufficient cause has been shown by the applicant. In determining whether sufficient cause has been shown, the court would be guided by the three principles provided under Order 42 Rule 6 above. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the applicant unless stay of execution is granted; and thirdly, 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.

9. In the instant case, the order appealed against was made on 2nd May 2018 and the application herein was filed on 10th May 2018. The period between filing of this application and the issuance of the order is about 8 days. I therefore find that there was no delay on the part of the applicant in bringing this application.

10. I have perused the application and the documents annexed thereto. There is on record and filed a Notice of Appeal dated 5th May 2018 and lodged on 8th May 2018. The law does not allow this court at this stage to determine whether the appeal is merited or not.

11. Have the applicants demonstrated that they will suffer substantial loss if the order or stay is not granted? The applicants aver that they are in imminent danger of being evicted from the suit land over which they hold an indisputable valid title and that they shall suffer substantial loss irremediable by an award of damages or compensable in other satisfactory manner and that if stay is not granted, the appeal filed shall be rendered nugatory.

12. The ruling of this court delivered on 2nd May 2018 declined to allow the applicants application seeking a temporary injunction against the defendant from entering, occupying, trespassing, erecting and/or constructing any wall perimeter fence or in any other way from interfering with the plaintiffs' use, possession, occupation and quiet possession of the plaintiffs land known as **Title Number CR.67802 Land Reference Number 29878** pending hearing and determination of the suit. The court found that the defendant is in occupation and has been in occupation for several years of the suit properly registered in her name being **LR No.13003 CR 31857** and therefore declined to grant the injunction order sought. The ruling, in my view, has nothing positive to be executed or acted upon, save to the extent of costs. Having found that the defendant was in occupation and to grant injunctive orders, the ruling did not order any party to do or refrain from doing anything capable of being stopped. The order of 2nd May 2018 merely dismissed the plaintiff's application for injunction with costs based on the findings of the court.

13. The applicants have stated that the suit land may be alienated, thus rendering the appeal nugatory. No proof was shown of this allegation. This court takes cognizance of the fact that a stay of execution helps preserve the subject matter of the appeal and so that the appeal is not rendered nugatory if it succeeds. In this case, I am not convinced that the intended appeal will be rendered nugatory if the stay herein is not granted. The subject matter of this suit which is the suit land will still be present post the appeal. I do not find it necessary to order for any security from the applicants as the stay orders have been refused.

14. For the foregoing reasons, I find the application dated 9th May 2018 as lacking in merit and hereby dismiss it with costs to the respondent.

DATED, SIGNED and DELIVERED at MOMBASA this 30th day of January, 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Asige for Applicant

Ms. Kamau for Defendant

Yumna Court Assistant

C.K. YANO

JUDGE

30/1/19