



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC NO. 441 OF 2014**

**THOMAS VAITAS IKOBWA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**GEOFFREY ONGOYA OMURENDE.....DEFENDANT/APPLICANT**

**RULING**

The application is dated 3<sup>rd</sup> October 2018 and is brought under sections 1A, 1B and 3A of the Civil Procedure Act and order 22 rule 52, order 42 rule 6 (1) of the Civil procedure rules seeking the following orders:-

1. That this application be certified urgent and heard exparte in the first instance.
2. That upon (1) above the honourable court be pleased to issue an exparte temporary order of stay of execution of this decree herein issued on 15/11/2017 pending interpartes hearing of the application herein.
3. That upon interparties hearing thereof the honourable court be pleased to issue an order of stay of the decree herein issued on 15/11/2017 pending final determination of Kisumu Court of appeal Civil Appeal No. 101 of 2018. (Geoffrey Ongoya Omurende vs. Thomas Vaitas Ikobwa).
4. That costs of this application be provided for.

It is based on the following principal grounds and on the affidavit of Geoffrey Ongoya Omurende. That, this honourable court issued a decree on 15/11/2017 in favour of the plaintiff/respondent. That pursuant thereto the defendant/applicant is facing imminent eviction from his parcel of land known as S. KABRAS/CHESERO/2625. That the defendant/applicant filed an application to set aside the said decree issued on 15/11/2017 which application was dismissed on 29/6/2018. That being aggrieved by the said ruling the defendant has filed an appeal in Kisumu Court of appeal Civil Appeal No. 101 of 2018. That the defendant/applicant has a good appeal with high chances of succeeding. That if the orders sought are not granted the appeal will be rendered nugatory. That the plaintiff/respondent will not suffer undue prejudice as he will be given an opportunity to present his case.

The plaintiff/respondent opposed the application dated 3<sup>rd</sup> day of October, 2018 on grounds that, the application is frivolous, vexatious and an abuse of the due process of court. That there can be no stay of costs, the plaintiff/respondent's suit having been merited with costs. That thus in the circumstances of this case, no stay of execution should be granted. That the application does not comply with provisions of Order 42 rule 6 (2) of the Civil Procedure Rule 2010.

This court has carefully considered the application and the submissions therein. 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.”*

The circumstances of this matter are that this court issued a decree on 15/11/2017 in favour of the plaintiff/respondent. That pursuant thereto the defendant/applicant is facing imminent eviction from his parcel of land known as S. KABRAS/CHESERO/2625. That the defendant/applicant filed an application to set aside the said decree issued on 15/11/2017 which application was dismissed on 29/6/2018. That being aggrieved by the said ruling the defendant has filed an appeal in Kisumu Court of appeal Civil Appeal No. 101 of 2018. **The applicant has failed to persuade the court 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. The applicant has failed to satisfy the conditions of Order 42, rule 6** of the Civil Procedure Rules. I find this application has no merit and I dismiss it with costs.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 27<sup>TH</sup> DAY OF FEBRUARY 2019.**

**N.A. MATHEKA**

**JUDGE**