



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC NO. 219 OF 2016

PARESH NARANDASH SEDANI.....APPLICANT

VERSUS

THE LAND REGISTRAR, VIHIGA)

THE RESIDENT MAGISTRATE, VIHIGA).....RESPONDENTS

SAMSON ANGOLO TIMOTHY OSIRU.....1ST INT. PARTY/APPLICANT

AND

CHARLES SIGU OTIENO.....2ND INTERESTED PARTY

RULING

The application is dated 6th August 2018 and is brought under order 42 rule 6 of the Civil Procedure Rules and section 1A and 3A of the Civil Procedure Act seeking the following orders:-

1. That this application be certified urgent and service be dispensed with in the first instance.
2. That this application be certified urgent and service be dispensed with in the first instance.
3. That this application be heard during the vacation of this honourable court.
4. That this honourable court be pleased to grant a stay of execution of the judgment delivered herein on the 11th day of July, 2018 pending hearing and determination of appeal preferred by the 1st interested party/applicant.
5. That costs be provided for.

It is based on the grounds that, judgment was entered for the application to the detriment of the 1st interested party/applicant on the 11th day of July, 2018. The 1st interested party/applicant being dissatisfied with the said judgment has filed a Notice of Appeal herein as required by law and is in the process of filing the substantive appeal at the appellate court. The said 1st interested party/applicant is however apprehensive that the applicant in the main suit is in the process of executing the judgment herein and in view of him pursuing an appeal, he will suffer immense loss and irreparable damage. No party will be prejudiced if and when the said orders are granted as they will have their day in court. It is in the interest of justice that the orders sought be granted as prayed.

The respondent submitted that, judgment was entered for the application to the detriment of the 1st interested party/applicant on the 11th day of July, 2018. The 1st interested party/applicant being dissatisfied with the said judgment has filed a Notice of Appeal. No appeal has since been filed and the notice has since expired. No memorandum of appeal has been availed to the court to show that the applicant has chances of success if they were to go on appeal.

This court has carefully considered the applications 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 of the application are that, judgment was entered for the application to the detriment of the 1st interested party/applicant on the 11th day of July, 2018. The 1st interested party/applicant being dissatisfied with the said judgment has filed a Notice of Appeal herein as required by law and is in the process of filing the substantive appeal at the appellate court. The said 1st interested party/applicant is however apprehensive that the applicant in the main suit is in the process of executing the judgment herein and in view of him pursuing an appeal, he will suffer immense loss and irreparable damage. I find that the applicant has not fulfilled any of the grounds to enable me grant the stay. The applicant has not shown that the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal. I find the application dated 6th August 2018 has no merit and I dismiss it with costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH DAY OF FEBRUARY 2019.

N.A. MATHEKA

JUDGE