



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 23 OF 2012

RICHARD KUBONDO ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

NDUNGU WAWERU ::::::::::::::::::::::::::::::::::: DEFENDANT

RULING

The first application by the plaintiff is dated 7th May 2018 and is brought under Order 22 Rule 29 of the Civil Procedure Rules seeking the following orders;

1. That this application be certified as urgent and be heard and disposed off on priority basis.
2. That this honourable court be pleased to order the OCS of Matunda Police Station give security to the auctioneer/court broker while executing the warrants.
3. That the defendant be ordered to pay the costs of the eviction exercise that may be incurred by the plaintiff/decree holder.

It is based on the grounds that, judgment has already been entered in favour of the plaintiff for the eviction of the defendant. That the judgment and decree have been served upon the defendant/respondent but the defendant has failed to give vacant possession. That it is apparent that the defendant/respondent will not vacate the suit properties unless forcibly evicted. That the plaintiff/decree holder now seeks orders for warrants of eviction to be executed by the plaintiff's preferred auctioneer/court broker.

The second application by the defendant is dated 13th September 2018 and is brought under order 41 rule 6 of the Civil Procedure Rules seeking the following orders:-

1. That this matter be heard urgently as the applicant may be evicted any time from the date herein.
2. That the court be pleased to issue a stay order staying the execution of eviction orders issued against the defendant herein pending the filing and determination of the intended appeal.
3. That costs be provided for.

The grounds are that the applicant has a good appeal capable of succeeding. The appellant will suffer substantial loss if the eviction is not stopped. The applicant is willing to provide security as and when ordered by the court.

The plaintiff submitted that, judgment was entered against the defendant/applicant on the 23rd November, 2017 which the applicant sought to be issued with a stay of execution. That the application was dismissed on the 10th day of July, 2018 prompting the applicant to file the application for stay of execution. That this application is an abuse of court process and the intention is to deny the plaintiff of his fruits of judgment. That there is no appeal which this court can order a stay as what is there is only a notice of appeal. That this applicant is not likely to suffer irreparable damage/loss as the subject matter is land. That the applicant only wants to enjoy the stay as he has been occupying land that does not belong to him as the title passed to me through public auction thus a purchaser for value.

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, the applicant/defendant was aggrieved by the order/ruling of 10/7/2018 in the ELC No. 23 of 2012 at Kakamega High Court. That the defendant/applicant had filed his Notice of appeal. I find that the defendant has not fulfilled any of the grounds to enable me grant the stay. Indeed the appeal has not been filed. I find the application dated 13th September 2018 has no merit

and I dismiss it with costs. Consequently I grant prayer 2 of the application dated 7th May 2018 with costs.

Orders accordingly.

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

N.A. MATHEKA

JUDGE