



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 34 OF 2013

TURBO MUNYAKA CO-OPERATIVE SOCIETY LTD.....PLAINTIFF

VERSUS

JOHN MBUGUA NJOROGE.....1ST DEFENDANT

WAITI NJOROGE.....2ND DEFENDANT

JAMES KIAMBUTHI MUNGAI.....3RD DEFENDANT

STEPHEN MWAURA MUNGAI.....4TH DEFENDANT

FRANCIS KINGARA MBUGUA.....5TH DEFENDANT

DANIEL NJOROGE GICHARU.....6TH DEFENDANT

WAWERU WAHOME.....7TH DEFENDANT

JOHN WAWERU.....8TH DEFENDANT

RULING

1. The application dated **3/12/2018** and filed in court on the same and has been brought by the defendants. It seeks orders that the this court be pleased to grant a stay of execution of the judgment/decree herein pending the hearing and determination of the appeal and that the court be pleased to allow the applicants to act in person in place of Risper Arunga and Co. Advocates.
2. An affidavit sworn by the 1st applicant on **3/12/2018** is annexed to the notice of motion in support of the grounds.
3. The background of the application is that the judgment was delivered in this matter on **15/11/2018** in which adverse order was made against the defendants who now wish to appeal again the said judgment and decree to the Court of Appeal. It is averred that if a stay of execution is not granted a substantial loss may result to the applicants who have built their homes on the suit land yet the intended appeal has a reasonable chance of success and would be rendered nugatory if execution issued. It is further averred that the application is brought without undue delay.
4. The respondents filed grounds of opposition only. In those grounds filed on **19/2/2019** the respondents avers that the defendants' intended appeal has no chance of success; that the defendants do not have any documentary evidence of ownership; that the appeal intends to deny the plaintiff the fruits of its judgment; that the defendants would not suffer loss if execution issued and that no sufficient reason has been advanced to warrant the orders sought.
5. **Order 42 rule 6** of the **Civil Procedure Rules** states as follows:

(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 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 subrule (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.”

6. On a preliminary basis this court has to examine whether there is an appeal on the record. **Order 42 rule 4** of the **Civil Procedure Rules** provides as follows:

“(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”

7. For the purposes of an application for stay as is established under **Order 42 Rule 4** of the Civil Procedure Rules a filed Notice of Appeal is sufficient. I have noted that there is a filed notice of appeal in place in this matter and hence the application is competent at least on this ground.

8. The second issue that this court will address is whether the instant application has been brought timeously. The judgment having been delivered on **15/11/2018** the application was lodged on **3rd December 2018**. Without any further examination I find that the application was filed without any undue delay.

9. The third issue is whether the court is satisfied on the basis of the material on the record that substantial loss would result from the execution of the judgment if the orders sought do not issue.

10. In respect of this ground the applicants have averred on oath through the 1st applicant who has been given their authority to plead on their behalf, and it is not disputed by the respondent, that they are resident on the suit land, having built their homes there upon acquiring the land. The destruction of their homes on the suit land and seizure of possession by the respondent may subject the applicants to immense difficulties. In my view substantial loss would result to the applicants if the orders are not granted.

11. As to security, the applicants have not offered any. The decree in this matter is for eviction of the applicants from the suit land. In my view **Order 42 Rule 6** gives this court the mandate even where no security has been offered by an applicant, to order such security for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

12. The applicants do not have title to the land they occupy. At the end of the appeal if their appeal is not successful there would be no need or any retransfer of title. The costs shall also be subject to the orders in the court above. The only substantive order that this court may deal with in terms of security is costs and filing of the appeal.

13. I hereby grant a stay of execution of the decree in this suit pending the hearing and determination of the intended appeal on condition that the applicants shall file and serve their intended appeal within **45 days** hereof in default of which the order of stay will automatically lapse.

14. The costs of this application shall abide by the outcome of the intended appeal.

Dated, signed and delivered at Kitale on this 7th day of March, 2019.

MWANGI NJOROGI

JUDGE

7/03/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

All except the 7th defendant/applicant present

Mr. Bisonga for the plaintiff absent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

7/03/2019