



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**ELC CASE NO. 91 OF 2010.**

**PIUS KISIANG'ANI WAKOLI.....PLAINTIFF**

**VERSUS**

**WILLIAM MBANGA NYUKURI.....1<sup>ST</sup> DEFENDANT**

**JOTHAM MANDILA MUFUBI.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

This is in respect to the 2<sup>nd</sup> defendant/Applicant's Notice of Motion dated 14<sup>th</sup> May 2018 filed pursuant to the provisions of **Order 51 Rule 1, Order 22 Rule 22** of the **Civil Procedure Rules** as well as **Sections 1A, 3, 3A and 63(e)** of the **Civil Procedure Rules**. It seeks the following prayers:-

**1. Spent**

**2. That there be a stay of execution of the Judgment and all consequential orders in this matter pending the hearing and determination of the application.**

**3. That this Honourable Court be pleased to grant leave to the Applicants to file an appeal out of time.**

When the application was placed before me on 25<sup>th</sup> March 2019, the Applicant informed the Court that although he was previously represented by counsel, he now wishes to prosecute the application himself. This was after the Court drew his attention to the fact that he has a new counsel **MUKHOOLI ADVOCATE** who filed a Notice of Appointment to act for him. Since the firm of **J. S KHAKULA** had been duly served, I allowed the Applicant to proceed as there was no appearance by either the Respondents or their Counsel or even an explanation as to their absence. There is however a replying affidavit filed by **STEPHEN YAOLA WANJALA** the 1<sup>st</sup> plaintiff/Respondent. The application is therefore being determined on the basis of the parties' respective affidavits.

The Applicant's case is that although a Judgment was delivered by this Court on 22<sup>nd</sup> February 2018, he was not aware about its delivery and neither was his advocate informed. That he only came to learn about the Judgment when he heard rumours that he was being evicted.

On his part, the Respondent in his replying affidavit dated 17<sup>th</sup> July 2018 deponed, inter alia, that the 1<sup>st</sup> defendant **WILLIAM MBANGA NYUKURI** and who was a party to this suit is no longer a party as he is deceased and has not been substituted. Further, that the 2<sup>nd</sup> defendant and who is the Applicant herein was in fact evicted on 15<sup>th</sup> May 2018 and therefore there is nothing to stay and the appeal has no prospects of success. Annexed to the replying affidavit is a letter dated 15<sup>th</sup> May 2018 from **ONGUMWE AUCTIONEERS** and addressed to the Deputy Registrar of this Court confirming that both defendants and their families were evicted from land parcel **NO KIMILILI/KAMUKUYWA/2267** on 15<sup>th</sup> May 2018 in execution of this Court, Judgment dated 22<sup>nd</sup> February 2018.

I have considered the application, the rival affidavits and the applicable law.

The law applicable is in fact **Order 42 Rule 6(2)** of the Civil Procedure Rules which provides as follows:-

***"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 un-reasonable delay.***

***(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.”* Emphasis added.

It is clear therefore that before an order for stay of execution pending appeal is granted, the Applicant must demonstrate:-

- (a) That he may suffer substantial loss if the order of stay is not issued.**
- (b) That he has moved the Court without un-reasonable delay.**
- (c) It is also clear from the provisions of Order 42 Rule 6(1) that “sufficient cause” be shown.**

In **KENGA SHELL LTD V BENJAMIN KARUGA & ANOTHER 1982 – 1988 1 KAR 1018**, the Court of Appeal said:-

***“If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdiction for granting stay.”*** Emphasis added.

See also **MUKUMA V ABUOGA 1988 KLR 645**.

It is clear that a party seeking stay of execution orders must satisfy the Court that unless the Court issues the orders sought, substantial loss may be caused to him. For example, by showing that the substratum of the dispute may be lost pending the appeal. In this case, the late **MUKUNYA J** in his Judgment dated 22<sup>nd</sup> February 2018 ordered that the defendants be evicted from the land parcel **NO KIMILILI KAMUKUYWA/2267** if they do not vacate within 30 days. A decree followed and it is clear from the letter by **ONGUMWE AUCTIONEERS** dated 15<sup>th</sup> May 2018 [Respondents annexure **SYWK – 1**] and whose contents were not rebutted, that the 2<sup>nd</sup> defendant/Applicant was in fact evicted together with the deceased 1<sup>st</sup> defendant and their families on 15<sup>th</sup> May 2018 which is the same day the said letter was written. Therefore, the Applicant is no longer on the land in dispute and it is clear that he has not established what other substantial loss he will suffer if the orders sought are not granted.

It is true that the Applicant was not aware about the date of delivery of the Judgment by **MUKUNYA J** on 22<sup>nd</sup> February 2018. The record shows that after the trial ended on 21<sup>st</sup> November 2017, the Judge gave 29<sup>th</sup> January 2018 as the date for Judgment. This was done in the presence of both their parties and counsel. It is clear from the record also that the Judgment was in fact delivered on 22<sup>nd</sup> February 2018 but there is no evidence of whether any notices were issued to the parties or counsel. That may have been sufficient case to enable the Court grant an order of stay but the Applicant does not state when he eventually became aware about the Judgment and the orders made against him.

In paragraph 10 of his Supporting Affidavit dated 14<sup>th</sup> May 2018, the Applicant only depones as follows:-

***“That we came to know of the Judgment when we visited KIMILILI POLICE STATION after hearing rumours that we were going to be evicted.”***

Surely as a matter of good faith, it would help to state when he heard the rumours that he would be evicted. That would enable the Court make an informed decision as to whether or not he moved to Court in good time without unreasonable delay. Parties coming to Court and seeking the exercise of the Court’s wide discretion in their favour must make a full disclosure as a mark of good faith. It does not help to refer to rumours especially when it is not stated when the said rumours were heard. In the circumstance of this case however, taking into account the fact that the Decree was drawn on 3<sup>rd</sup> May 2018 and this application was filed on 14<sup>th</sup> May 2018, I am prepared to make a finding that it was filed without unreasonable delay.

However, the Applicant having been evicted from the land in dispute on 15<sup>th</sup> May 2018, there is really nothing to stay. The 1<sup>st</sup> limb of the application must collapse.

The Applicant also seeks leave to appeal out of time against the Judgment of **MUKUNYA J** delivered on 22<sup>nd</sup> February 2018. As I have already found above, that Judgment was delivered in the absence of the Applicant and his then counsel **MR KUNDU**. The record of 22<sup>nd</sup> February 2018 is clear. The Applicant was therefore not in a position to exercise his right of appeal when he did not know about the contents of the said Judgment as no notice was issued to him or his counsel. It would not be in the interest of justice to deny him such leave. That prayer is granted.

Ultimately therefore and upon considering all the issues raised, I make the following orders with regard to the application dated 14<sup>th</sup> May 2018:-

- 1. The prayer for stay of execution is dismissed.**
- 2. The prayer for leave to appeal out of time is allowed. The Applicant has 30 days from today to file his appeal.**
- 3. Each party to meet their own costs.**

**Boaz N. Olao.**

**JUDGE**

**9<sup>th</sup> April 2019.**

**Ruling dated, delivered and signed in Open Court this 9<sup>th</sup> day of April 2019.**

Applicant present

No appearance for the Respondent

**Boaz N. Olao.**

**JUDGE**

**9<sup>th</sup> April 2019.**