



**REPUBLIC OF KENYA**

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

**ELC NO. 62 OF 2003**

**CHARITY VENESSA GATHONI KAMAU.....PLAINTIFF**

**VERSUS**

**MARK PYMAN.....1<sup>ST</sup> DEFENDANT**

**KEZIA PYMAN.....2<sup>ND</sup> DEFENDANT**

**GEORGE TIMOTHY PYMAN.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. By an application dated **19/2/2019**, the Defendants /Applicants seeks stay of execution of ruling and all consequential orders issued on 5/2/2019 pending the hearing and determination of this application inter partes. They also sought stay of execution of ruling and all consequential orders issued on **5/2/2019** pending the hearing and determination of the appeal.

2. The application is premised on the grounds set out therein and is supported by an affidavit sworn by the 2<sup>nd</sup> applicant, Kezia Pyman on **19/2/2019**. She depones that the defendants are aggrieved and dissatisfied by the ruling delivered on **5/2/2019** and have filed notice of appeal against the whole decision; that the court delivered a ruling to the effect that the order made on **8/7/2014** dismissing the plaintiff's suit for want of prosecution is vacated and the *status quo* maintaining before the **11/4/2018** be restored pending the hearing and final determination of this suit and that the plaintiff's suit be reinstated for further hearing; the further effect was that the order made on **8/7/2018** authorizing the eviction of the plaintiff from parcel land **L.R No. 12949** situated at Milimani Kitale was vacated and if already effected, the plaintiff should be restored into the suit property and that the defendants shall not interfere with the suit property in any manner whatsoever pending the hearing of the suit.

3. It is the applicants' case that they stand to suffer irreparable loss and damage and the appeal will be rendered nugatory if the instant orders sought are not granted.

4. The application was opposed based on grounds of opposition filed by the Plaintiff/Respondent on **11/3/2019**. The Respondent argues that the applicants have not satisfied the conditions or criteria for granting of an order of stay; that the appeal has no or slim chances of success and that the applicants do not merit or deserve the exercise of the honourable court's discretion in their favour.

5. This court ordered the parties on 6/3/2019 to canvass the application by way of written submissions. I have noted that none of the parties has filed submissions.

**ISSUES, ANALYSIS AND DETERMINATION**

6. Having observed the different perspectives of the parties in this case as above, the issue for determination is whether an order for stay of execution of the ruling and all consequential orders issued on 5/2/2019 pending appeal should be granted.

7. **Order 46 Rule 6 (2)** of the **Civil Procedure Rules, 2010** provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following:-

1. **Substantial loss may result to the applicant unless the order was made;**
2. **The application was made without unreasonable delay; and**
3. **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.**

8. In the cases of **Kiplagat Kotut vs Rose Jebor Kipngok [2015] eKLR, Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR** the common thread was that a stay of execution will not be granted unless the conditions in **Order 42 Rule 6** of the **Civil Procedure Rules** are satisfied.

9. In **Kiplagat Kotut vs Rose Jebor Kipngok [2015] eKLR**, the court quoted with approval the decision of the Hon. Justice Gikonyo, J, **Antoine Ndiaye vs. African Virtual University [2015]eKLR, High Court at Nairobi, Civil Suit No. 422 of 2006** as follows:

**“In the case of Antoine Ndiaye vs. African Virtual University [2015] eKLR, High Court at Nairobi, Civil Suit No. 422 of 2006 the learned judge Gikonyo J. opined as follows:**

**“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:**

- a) **The application is brought without undue delay;**
- b) **The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and**
- c) **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”.**

10. To grant or refuse an application for stay of execution pending appeal is discretionary in that the Court, when considering an application for stay has to balance the interests of the Appellant with those of the Respondent having regard to the provisions of **Order 46**.

11. In the same case of **Kiplagat Kotut (supra)** the court observed as follows:-

**“The foregoing notwithstanding, it is important to note that a litigant that has lost his case is entitled to appeal against the same. It follows therefore that a matter is deemed concluded after going through its due course all the way to the apex court if need be. But also it must be also understood that until and unless the Judgment/Decree has been set aside by the superior court, remains in force capable of being executed. The courts, therefore must balance the two competing interest of the decree holder and that of the appellant.”**

12. Before this court are applicants who irregularly obtained possession by evicting the respondent in

circumstances that clearly show that the suit could not have been deemed as fully concluded. Further, irregularity has been found in the manner of service effected upon the respondent before the eviction orders were obtained. They therefore seek to maintain the *status quo* obtained by virtue of an unfortunate episode in this litigation. Nevertheless I must consider their application on the merits under **Order 46**.

13. The application was filed on 19/2/2019 and I find that to be sufficiently expeditious action on the part of the applicant.

14. On the issue of security, the Applicants have indicated that they are able and willing to abide by any orders that the Court may grant as regard security.

15. However no evidence of probable loss is exhibited by the applicants. All they are saying is that they will suffer irreparable loss. I would have expected the supporting affidavit to be more detailed in this regard. It is not. The application must fail on this ground.

16. The application dated **19/2/2019** has no merit and it is hereby dismissed with costs to the respondent.

**Dated, signed and delivered at Kitale on this 8<sup>th</sup> day of April, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**8/4/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Ingosi for the plaintiff/respondent

N/A for the defendants/applicants

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**8/04/2019**