



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
CHUKA ELC CASE NO 89 OF 2017
FORMERLY MERU ELC CASE NO.410 OF 1991

GILBERT KATHENYA MUKUNGI.....PLAINTIFF

VERSUS

**EVANGELINE KANYUA MWIANDI (as legal representative of the estate of
MWIANDI KAIBIRU).....DEFENDANT**

RULING

1. This application is dated 20th December, 2018. It is brought to court under order 42 Rule 6 (1), (2) Civil Procedure Rules. It seeks the following orders:

1. That the application herein be certified urgent and be heard ex-parte in the first instance.
2. That pending the inter-parties hearing of the application herein, there be an order of stay of execution/implementation of the judgment of the court dated 23.10.2018.
3. That pending the hearing and determination of the intended appeal to the Court of Appeal, there be a stay of the execution of the court's judgment delivered on the 23.10.2018.

2. The application has the following grounds:

- i) That the plaintiff is in the process of executing the judgment of the court as he took surveyors to the suit land on the 14.12.2018, who caused out some survey works.
- ii) That if the judgment is executed, the applicant stands to suffer substantial loss.
- iii) That if the judgment is executed, the intended appeal will be rendered nugatory.
- iv) That the application has been made without unreasonable delay.

3. The application is supported by the affidavit of Evangeline Kanyua Mwiandi, the applicant, which states:

I, EVANGELINE KANYUA MWIANDI adult female of Irindi village, Kirumi sub location, Ganga Ward, Tharaka Nithi County in the Republic of Kenya do hereby make oath and solemnly swear as follows:

1. That I am the applicant/defendant herein and I am competent to swear this affidavit in support of this application.
2. That the judgment of the court was delivered on 23.10.2018 against the estate of Mwiandi Kaimbiru and in favor of the plaintiff.
3. That in the judgment, the court ordered that the plaintiff gets some 7.00 acres out of L.R.No. Mwimbi/N. Mugumango/516, 942 and 943 and the same should be excised and transferred to him.
4. That I was dissatisfied with the judgment of the court and I instructed the firm of Murango Mwenda & Company, Advocates to take over the matter from the firm of D.J. Mbaya & Company, Advocates to file Notice of Appeal.

5. That the Notice of Appeal was duly lodged in the high court registry on the 6.11.2018 as can clearly be seen from the copy on record annexed as CMI.
6. That my advocate did also apply for proceedings to enable the filing of the appeal. Copy of the letter annexed as CMII.
7. That the record of the court has not been made available to my advocate to lodge the appeal.
8. That on the 14.12.2018, the respondent, in the company of administration police officers took private surveyors to the lands and caused out survey work therein.
9. That I verily believe that the respondent went to the land with surveyors so that they could excise and transfer to him 7.00 Acres in execution of the decree.
10. That if the execution is completed, the respondent will get registered as the owner of the 7.00Acres, which will have separate title deeds.
11. That once the respondent gets title to the 7.00 Acres, he could easily alienate the land to other parties which will make it impossible to recover in the event of a successful appeal.
12. That in this eventuality, I will suffer substantial loss.
13. That the intended appeal will also be rendered nugatory if execution takes place.
14. That I have made this application without any delay and in the interest of justice, I pray that it be allowed.
15. That the execution of the judgment will also deprive me of the use of the land from where I eke a living.
16. That what I depone herein is true and within my personal knowledge.

4. The application was canvassed by way of written submissions.

5. The applicant's submissions are reproduced in full herebelow. Any spelling or other mistakes, if any exist, are solely ascribable to the applicant's advocates. The submissions state as follows:

APPLICANT'S SUBMISSIONS

BACKGROUND

In a plaint filed on 24th September 1991, the Respondent herein claimed beneficial interest over the Applicant's land. The Respondent's case was heard and judgment was delivered on 23rd October 2018 in his favour.

The Applicant therefore lodged a Notice of Appeal on 6th November 2018 followed by this application on 20th December 2018 seeking stay of execution of the judgement of the court pending the hearing and determination of an intended appeal to the Court of Appeal against the said decision. The Respondent filed their response to the Application and also raised a notice of Preliminary Objection challenging the jurisdiction of this Honourable Court to hear and determine this Application on grounds that Order 42 rule 6 of the Civil Procedure Rules does not donate jurisdiction to this court upon issuance of a Notice of Appeal.

On 27th March 2019 the court directed the Application and Preliminary Objection be dealt with together by way of written submissions. Having read the Replying Affidavit, the notice of Preliminary Objection and the written submissions filed by the Respondent, we wish to submit on the following critical points raised by the respondent/plaintiff:

- a) Whether the application is merited
- b) Jurisdiction of the court
- c) Merits of the application

a) WHETHER THE APPLICATION IS MERITED

The Respondent submitted that the application is not merited because during the main suit, the Applicant was represented by the firm of M/S D. J. Mbaya & Company Advocates and after judgement was delivered, the firm of M/S Murango Mwenda & Company Advocates lodged a Notice of Appeal and filed this Application.

We wish to submit that we did not come from the blues as alleged by the Respondent. The provisions of Order 9 rule 9 of the Civil Procedure Rules 2010 (CPR) were clearly followed. A consent between the firm of M/S D.J. Mbaya & Co. Advocates, the outgoing advocates, and M/S Murango Mwenda and Co. Advocates, the incoming advocates, was recorded and filed on 20th December 2019. The firm of M/S Murango

Mwenda and Co. Advocates also filed a Notice of Change of Advocates on 20th December 2019. Therefore, it is not true that the firm of M/S D.J. Mbayana and Company Advocates is still on record for the Applicant.

Your Lordship, the law does not bar the substitution of an advocate by a party to represent them after he had appointed an earlier advocate. This is underpinned by the constitutional requirement for unrestricted access to justice and a fair hearing under Articles 48 and 50. Parties have the right to be represented by advocates of their choice. The Application is competent because the appointment of M/S Murangomwenda & Company Advocates does not offend the provisions of Order 9 rule 9 (CPR).

Therefore, we submit, Your Lordship, that the firm of M/S Murangomwenda & Company Advocates is properly on record for the Applicant and the Application filed by the law firm on behalf of the Applicant is therefore competent.

b) JURISDICTION OF THE COURT

The Respondent challenged the jurisdiction of this Honourable Court to hear and determine the application of grounds that under Rule 5 (2) (b) of the Court of Appeal Rules 2010 (COAR), once Notice of Appeal has been lodged under Rule 75 (COAR), the superior court or the High Court has no jurisdiction to order stay of execution pending the hearing and determination of the appeal by the Court of Appeal. Rule 5 (2) (b) (COAR) provides that;

The institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.

It is our submission that Rule 5 (2) confers jurisdiction on the Court of Appeal to order stay of execution, where a Notice of Appeal has been lodged in accordance with rule 75. However, the Rule does not in any way limit such jurisdiction to the Court of Appeal. The Rule does not curtail the jurisdiction of the High Court to order stay of execution.

The Applicant herein filed this Application under order 42 rule 6 (CPR) and not under Rule 5 (2) (COAR). Order 42 Rule 6 provides that:

(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.

My Lord, it is clear from the wording of Order 42 Rule 6 that the court appealed from, in this case the Environment and Land Court at Chuka, may order stay of execution of its orders.

In *Maree Ahmed & Another v Leli Chaka Ngoro (2017) eKLR*, the court agreed that Order 42 Rule 6 (1) of the Civil Procedure Rules 2010 empowers the High Court (which now in light of the Constitution of Kenya 2010 needs to be construed as also including the Environment and Land Court and the Employment and Labour Relations Court) as the court being appealed from, to stay execution of its decree or order for sufficient cause.

We humbly submit that in the present Application, the jurisdiction of this Honourable Court was correctly invoked under Order 42 Rule 6 (CPR) which confers jurisdiction on the High Court to grant orders for stay of execution as opposed to Rule 5 (2) (COAR).

c) MERITS OF THE APPLICATION

In the Replying Affidavit filed on 30th January 2019, the respondent claims that the intended appeal is an abuse of the court process as the same has no chances of success. We wish to confirm that we have filed the substantive appeal in this matter being Nyeri Civil Appeal Number 79 of 2019. We submit that the Memorandum of Appeal lodged in the Court of Appeal at Nyeri on 23rd April 2019 and served on the Respondent on 24th April 2017 raises arguable grounds of appeal which have chances of success. The four grounds of appeal are:

- a) That the Learned judge erred in law and in fact in failing to find that the suit had been dismissed by Hon. Justice Lenaola on the 2/6/2006 and that the order of dismissal had not been set aside, and therefore, there was no suit upon which judgement could be delivered. Clearly, this is an arguable point which if proved increases the chances of the appeal being allowed.
- b) That the Learned Judge erred in law by unprocedurally closing the appellant's case and proceeding to write judgement without giving the appellant an opportunity to testify in support of her defence.
- c) That the learned judge erred in law and in fact by failing to consider or take into account the appellants statement of defence, her statements and documents already filed and on record, because, had he done so, he would have come to a different conclusion.
- d) That the learned judge erred in finding that the appellant held 7.00 acres out of L.R. NO Mwimbi/N.Mugumango/516 and L.R. NO Mwimbi/N.Mugumango/942 and 943 in trust for the respondent when there was no evidence to support the existence of trust.

It is our submission that the appeal raises serious questions of law and fact and the same has high chances of success and is therefore not an abuse of the court process as alleged by the Respondent.

It is the Respondent's submission that the conditions set out under Order 42 Rule 6 (2) for the grant of stay of execution have not been met. We also submit that the Application is merited because the same was filed without unreasonable delay. This requirement is undisputed.

The Respondent contends that the Applicant has not proved that she stands to suffer substantial loss if the orders prayed for are not granted because the subject matter of the suit is land and that a transfer will not affect the status of the land as he lives on the land. Further, that if the appeal succeeds, the land will revert back to the Applicant. In an attempt to execute the judgement, the respondent on 14th December 2018 took surveyors to the suit land to carry out survey works as part of the process of transferring 7.00 acres of the said land to the respondent. The Applicant stands to be inconvenienced by the various processes and departments involved in the subdivision and transfer process.

In *Felix Kipchoge Limo Langat v Robinson Kiplagat Tuwei (2018) eKLR*, the court found that inconveniences occasioned by having to subdivide and transfer then retransfer the suit land would cause substantial loss. The court held:

“The requirement of proof of substantial loss does not only mean monetary terms but also the inconvenience of having to subdivide and transfer part of the suit land to a third party and later to retransfer in case the applicant is successful. We should always look at the bigger picture and what the implementation of the decree entails and the agencies involved. I would reluctantly find that substantial loss has been demonstrated.”

We submit that this process will occasion the Applicant substantial loss because in the event that the appeal is successful, the transfer process will begin again to have the land retransferred to the Applicant.

Moreover, the Applicant stands to suffer substantial loss because if execution is completed the Respondent will be registered as the owner of the 7.00 acres on separate title deeds thus enabling him to deal with the land. This creates a danger of the land being alienated to other parties and the same may not be in existence by the time the appeal is determined. This would render the appeal nugatory.

In *Christopher Njeru v Eugenio Njagi M'Chege (2019) eKLR*, the Court opined that alienation of the suit land would occasion substantial loss and render the pending appeal nugatory. The court held:

“The court is of the opinion that there is a possibility of substantial loss if the suit property is alienated before the conclusion of the pending appeal. The court is further of the view that such substantial loss may render the pending appeal nugatory...”

In addition to that, execution will lead to denial of access to the land on the Applicant by the Respondent. Denial of access is not capable of compensation.

Although this court ordered the Applicant to deposit with the Court the sum of One Million and Fifty Thousand Kenya Shilling (Kshs, 1, 050,000/=), the Applicant has not been able to raise the security sum as the same is too high. The Applicant, having been unable to raise the security sum is ready to give an undertaking not to deal with the land in any way that may defeat the interests of the Respondent. We ask that the Court substitutes the security sum by ordering that the land remains inhibited until the Appeal is fully determined.

CONCLUSION

My Lord, it is clear that this application is merited as the firm of Murango Mwenda & Co. Advocates is properly on record for the Applicant having complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules.

It is also clear that this Honourable Court, being the court being appealed from, has jurisdiction to hear and determine this application. The jurisdiction of this Honourable Court was properly invoked under Order 42 Rule 6 of the Civil Procedure Rules.

We ask the Court to find that this Application is merited since the same was file without unreasonable delay and the Applicant has proved that she stands to suffer substantial loss if execution of the judgement is completed. The Applicant is also ready to give an undertaking not to deal with the suit land in any way that may defeat the interests of the Respondent.

The Applicant has filed the appeal being Nyeri Civil Appeal Number 79 of 2019. The Applicant has demonstrated that the appeal is arguable and will be rendered nugatory if the orders prayed for are not granted.

In the upshot, Your Lordship, we urge this Honourable Court to consider these submissions and find that the application is merited and the same be allowed.

We have attached the following for the court's consideration.

- a) Maree Ahmed & Another v Leli Chaka Ndoro (2017) eKLR
- b) Copy of the Memorandum of Appeal filed in Nyeri
- c) Felix Kipchoge Limo Langat v Robinson Kiplagat Tuwei (2018) eKLR
- d) Christopher Njeru v Eugenio Njagi M'Chege (2019) eKLR

DATED AT MERU THIS.....29THDAY OF.....APRIL,.....2019

FOR: MURANGO MWENDA & CO

ADVOCATES FOR THE APPLICANT/DEFENDANT

6. The respondent's submissions are reproduced herebelow. Any spelling or other mistakes, if any exist, are solely ascribable to the respondent's advocate. The submissions state as follows:

RESPONDENT'S SUB-MISSION ON THE APPLICATION

DATED 20TH DECEMBER, 2018

This Honourable Court delivered its judgment in this matter on 23rd October, 2018.

The plaintiff who is the Respondent in this application was represented by M/S MAITAI RIMITA & CO. ADVOCATES while the Defendant was represented by M/S JOHN MBAYA & CO. ADVOCATES.

After the Judgment had been delivered M/S MURANGO MWENDA & CO. ADVOCATES filed a NOTICE OF APPEAL on 6th November, 2018.

This was followed by the Application dated 20th December, 2018 which is the subject of these submissions.

The application was by way of MOTION ON NOTICE and was brought under Certificate of Urgency. The application has made the following prayers:-

1. THAT the application herein be certified urgent and be heard ex-parte in the first instance.
2. THAT pending the inter-partes hearing of the application herein, there be an order of stay of execution/implementation of the Judgment of the court dated 23rd October, 2018.
3. THAT pending the hearing and determination of the intended Appeal to the court of appeal, there be a stay of the execution of the court's judgment delivered on the 23rd October, 2018.

The application was brought under order 42 r 6(1) (2) of the Civil Procedure Rules.

The Application has been brought by the firm of M/S MURANGO MWENDA & CO. ADVOCATES.

The application is supported by an affidavit of grounds on the body of the Application.

The application is opposed by the Plaintiff/Respondent. A replying affidavit has been filed and Notice of Preliminary Objection.

When parties and their Advocates took directions on how to deal with the application it was agreed and directed by the court that the application and the Notice of Preliminary of objection be dealt with or taken together.

Our sub-missions will therefore cover both cover both the application and the Preliminary Objection.

To be clear we will address the court on the following:-

- a. WHETHER THE APPLICATION IS COMPETENT
- b. JURISDICTION OF THE COURT
- c. MERITS OF THE APPLICATION
- d. CONCLUSION

A. IS THE APPLICATION BEFORE THE COURT COMPETENT

The Defendant was represented by the firm of M/S DAVID JOHN MBAYA & CO. ADVOCATES and they are still on record.

Out of the blues the firm of M/S MWENDA MURANGO & CO. ADVOCATES lodged a NOTICE OF APPEAL.

They also filed the application before the court. Since judgment had been delivered in the matter, the provisions of Order 9. r. 9 of the Civil Procedure Rules had to be followed.

The provisions of this order was ignored and the firm that made the application had no locus to file the application (see the case of MBOGO VS ASIKOYO & 3 OTHERS (2004) 1 KLR 697.

Our submission is that the application is not competent. This court made a decision on the matter in LAWRENCE GITONGA NJERU VS DIOCESE OF MERU TRUSTEES CHUKA ELC NO. 242 OF 2017

On that ground alone the application ought to be struck out and dismissed.

B. JURISDICTION OF THE COURT

Your Lordship, our submission is that once NOTICE OF APPEAL has been lodged/given in accordance with Rule 75 of the court of Appeal Rules the superior court or the High Court has no jurisdiction to order stay of execution, an order of injunction or stay of any further proceedings pending hearing of the Appeal by the court of Appeal.

Rule 5(2) of the court of Appeal rules is clear on this issue and states.

“ 5(2) subject to rule (1)

(a)

(b) In any Civil proceedings, where a notice of appeal has been lodged in accordance with rule 75,

Order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.

It is a matter of interpretation and understanding, the court is defined as the COURT OF APPEAL and includes a division thereof and a single judge exercising any power vested in him sitting alone.

The Appellate jurisdiction Act Cap 9 of the Laws of Kenya allows the High Court to extend time to give NOTICE OF APPEAL (see section 7 of the said Act).

The Court of Appeal when dealing with an application for stay of execution or injunction applies two principles which are different from what is applied in the High Court or the Magistrate’s courts. The first is whether the appeal is arguable. This cannot be decided by the High Court which has already rendered its judgment.

The second hurdle that an applicant is required to surmount is whether the intended Appeal will be rendered nugatory if the court does not grant stay. The two limbs must be satisfied but not one of them.

We have attached some rulings of the court of appeal to demonstrate what we are saying.

C. MERITS OF THE APPLICATION

On this we are relying on the Replying Affidavit.

The issue here is land. The Plaintiff/Respondent is in possession of the land he claims and ordered to be transferred to him.

The only stay that the court can issue is for legal transfer of the portion granted to the Respondent.

If the Appeal succeeds, it is only the Respondent who would suffer loss of transfer and sub-division fees.

The applicant will suffer no substantial loss. In any case there is no evidence produced to show that the Applicant will suffer such substantial loss.

The loss must be substantial not any loss.

The applicant must also provide security. This court ordered the applicant to deposit a sum of kshs. 1,050,000/= as security. This the applicant has refused or failed to pay.

The applicant has refused or failed to pay.

The applicant has failed to prove that she will suffer substantial loss and has failed to pay security. These are requirements under Order 42 r(2) of Civil Procedure Rules.

Which states :-

6(1)-----

(2) NO order for execution shall be made under subrule

(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.

D. CONCLUSION

We submit, your Lordship, that from what we have said, and a look at the applicable Law show clearly that this application must fail. We also pray for costs.

We have attached the following for court's perusal and consideration.

- a. Rule 5 (2) of the court of Appeal Rules.
- b. Rule 75 of the court of Appeal Rules.
- c. Section 7 of the Appellant jurisdiction Act Cap 9 Laws of Kenya
- d. Civil Application No. 62 of 2016 – CFC STANBIC LTD VS KUNGU KIARIE & ANOTHER
- e. Civil Application NO. 138 of 2017 (Nyeri)
- f. Order 9 r. 9 of Civil Procedure Rules
- g. Mbogo vs Asikoyo and 3 others (2004)1 697
- h. LAWRENCE GITONGA NJERU VS DIOCESE OF MERU TRUSTEES CHUKA ELC NO. 242 OF 2017

DATED AT MERU THIS3RDDAY OFMARCH,.....2019

MAITAI RIMITA & CO.

ADVOCATES FOR THE RESPONDENT/PLAINTIFF

7. I have considered the pleadings, the authorities and the provisions of law proffered by the parties to buttress their veritably and diametrically divergent assertions. Those authorities and provisions of the law have been elaborated upon in the written submissions (op.cit) which have been fully reproduced in this ruling. It would, therefore, amount to a superfluous exercise if I regurgitate them.

8. I unequivocally state that my duty is to determine the merit or demerit of this application which has been filed under order 42 Rule 6(1) and (2) of the Civil Procedure Rules. Order 42 Rules 1 and 2 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.

9. On 21st December, 2018, at the exparte stage, I delivered the following ruling.

GILBERT KATHENYA MUKUNGI.....PLAINTIFF

VERSUS

EVANGELINE KANYUA MWIANDI (as legal representative of the estate of MWIANDI KAIBIRU).....
.....DEFENDANT

RULING

1. This application is brought to court under Order 6(1) and 6(2) of the Civil Procedure Rules. It seeks the following orders:

4. That the application herein be certified urgent and be heard ex-parte in the first instance.

5. That pending the inter-parties hearing of the application herein, there be an order of stay of execution/implementation of the judgment of the court dated 23.10.2018.

6. That pending the hearing and determination of the intended appeal to the Court of Appeal, there be a stay of the execution of the court's judgment delivered on the 23.10.2018.

2. The application has the following grounds:

i) That the plaintiff is in the process of executing the judgment of the court as he took surveyors to the suit land on the 14.12.2018, who caused out some survey works.

ii) That if the judgment is executed, the applicant stands to suffer substantial loss.

iii) That if the judgment is executed, the intended appeal will be rendered nugatory.

iv) That the application has been made without unreasonable delay.

3. During the exparte hearing, Miss Matiri, the applicant's advocate, told the court that on 14th December, 2018, the defendant, who has a judgment in his favour in this matter, had taken surveyors to the suit land with a view to excising 7 acres from the suit land as per the apposite judgment. She told the court that if execution of the judgment was completed, the defendant/applicant would suffer irreparable damages not compensable in monetary terms. She also said that the intended appeal would be rendered nugatory. More or less, her submissions were in consonance with the grounds stated on the face of the application.

4. This application has been heard exparte during this court's recess. I opine that the suit property should be preserved pending interpartes hearing of this application.

5. Order 42 Rule 6(2): of the Civil Procedure Rules has been stated by the applicant as one of the provisions of the law which buttresses her application.

It states:

Order 42 Rule 6(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. I issue the following orders:-

a) This application is not certified urgent BUT will be heard on priority basis.

b) Prayer 2 is granted pending hearing of this application AND the defendant/applicant is ordered to deposit with court as security the sum of Kshs. One Million and Fifty Thousand (Kshs.1,050,000/=) within 21 days of the date of delivery of this ruling which is the 21st day of December, 2018 FAILING WHICH the order of stay granted herein will stand LAPSED.

7. As the court is in recess and the ELC Judge will be on leave until 20th March, 2019, the application will be heard interpartes on 27th March, 2019 AND the defendant/applicant is ordered to serve the application upon the respondent/defendant within the next 10 days.

8. It is so ordered.

Delivered in open Court at Chuka this **21st day of December, 2018** in the presence of:

CA: Ndegwa

Miss Matiri present for Applicant/Respondent

P. M. NJOROGE,

JUDGE.

10. Order 42 Rule 6 (1) of the Civil Procedure Rules mandatorily requires the court to satisfy itself that substantial loss may result to the applicant unless stay of execution has been granted. It is not disputed that the respondent has stayed on the suit land for decades. I am, therefore, not satisfied that denial of stay of execution will occasion the applicant substantial loss.

11. Order 42 Rule 6(2) mandatorily requires the applicant to provide security for due performance of such decree or order as may ultimately be binding on him. On **21st December, 2018** as has been pellucidly been made clear in this court's ruling delivered on **21st December, 2018**, the applicant was ordered to provide the stipulated security. She did not do so. No explanation has been given to explain why she did not give the stipulated deposit for security. She has also not evinced any intention to give security as mandatorily required by the law.

12. In the circumstances I find that this application has no merit. It is hereby dismissed.

13. I do not find it necessary to address the other issues raised by the parties. For example, it is not the purview of this court to decide if the apposite appeal is arguable or not.

14. Costs are awarded to the respondent.

15. It is so ordered.

Delivered in open Court at Chuka this **29th day of May, 2019** in the presence of:

CA: Ndegwa

Rimita present for the Plaintiff/Respondent

Kithaka h/b Murango Mwenda for the Applicant/Defendant

P. M. NJOROGE,

JUDGE.