



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 260 OF 2016

FATUMA MOHAMUD MOHAMMED MIRE....PLAINTIFF

VERSUS

JAPHET NTEERE MWENDWA.....DEFENDANT

RULING

The application before me is the Notice of Motion dated 27th November 2018 brought under **Order 42 Rule 6 & 51 C.P.R and Articles 48 and 159 of the Constitution of Kenya, 2010** as well as **Sections 1A, 1B 3A & 63 (e) C.P.A.** The Applicant is seeking the following orders:

(1) Spent.

(2) That an order of status quo as earlier ordered by this Court on 14th February 2017 do continue to be in force pending the hearing of the application or until further orders of the Court.

(3) That there be a stay of execution of the judgment delivered on 31st October 2018 pending the hearing and determination of the intended appeal to the Court of Appeal.

(4) That costs be provided for.

The application is premised on grounds shown on the face of the said application supported by an affidavit sworn by the Appellant on 27th November 2018. The application is further supported by four (4) annexures to the supporting affidavit marked **JMN 1, JMN 2, JMN 3 and JMN 4.** The applicant also filed a supplementary affidavit pursuant to leave granted on 5th December 2018 sworn on 6th December 2018. In reply to that application, the Respondent filed a replying affidavit sworn on 4th December 2018.

APPLICANT'S CASE

The applicant contends that he has exercised his undoubted right of appeal against the judgment and decree of this Honourable Court issued on 31st October 2018. The Applicant further argued that he has brought this application timeously and that the intended appeal is arguable. In conclusion, the Applicant stated that he stands to suffer substantial loss unless the order sought is granted.

RESPONDENT'S SUBMISSIONS

The Respondent on her part submitted that after the delivery of judgment, the Court granted the Applicant 30 days stay of execution. The Respondent further submitted that whether or not the defendant has an arguable appeal or not is not an issue for consideration in an application for stay pending appeal. The Respondent therefore sought to have the application dismissed so that she may enjoy the fruits of her judgment.

DECISION

The applicant's application is for stay pending appeal. **Order 42 Rule 6 (2)** 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; 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 appellant”

It is trite that where an applicant wishes to be granted stay pending appeal, she has to satisfy the Court on three conditions. First she has to demonstrate that such application has been filed timeously and without unreasonable delay. The judgment and decree being appealed from was delivered on 31st October 2018. The applicant was given 30 days stay of execution which is also the same period within which he is entitled to file an appeal, if any. The second requirement is that the applicant must demonstrate that he shall suffer substantial loss unless the order is granted. In the supporting affidavit, the applicant has deponed that he has occupied and developed the suit property where he has been running a business since 1988 and that he stands to suffer substantial loss if he is evicted.

In the case of *Wellington Lusweti Barasa & 47 others Vs Lands Limited & Another (2015) e K.L.R.*, Justice Ombwayo held as follows:

“.....on substantial loss, the applicants’ state that they have occupied the land for the last 50 years and therefore have nowhere to go. They have cultivated the land which has been their only source of livelihood other than cultivating on the land, the judgment debtors have not shown any substantial loss they are likely to suffer. I do find that living on the land and cultivating food crops is not sufficient reason for the grant of stay pending appeal. In Charles Wahome Sethi Vs Angela Wairimu Gethi, Court of Appeal Civil Appeal No. 302 of 2007, the Court of Appeal held that it is not enough for the appellant to say that they reside or live on the suit land and that they will suffer substantial loss. The applicants must go further and show the substantial loss that the applicants should suffer if the respondent executes the decree in this suit against them’.

Again in *Butt Vs Rent Restriction Tribunal (1982) K.L.R 417*, the Court of Appeal gave guidance on how a Court should exercise discretion and held as follows:

“1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the Judge’s decision.

3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the appellant at the end of the proceedings.

4. The Court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The Court in exercising its power under Order XLI Rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse”.

The judgment and decree which is the subject of the intended appeal was issued on 31st October 2018. On 27th November 2018, the applicant filed the present application for stay pending appeal. The application was filed within the stipulated period for appeal. I am satisfied that the application has been brought without unreasonable delay. On the second principle for stay pending appeal, the applicant has deponed in his supporting affidavit that he operates a business in the suit premises. In a consent signed between the Advocates for both the Appellant and the Respondent dated 5th December 2018 and filed in Court the same date, the parties acknowledged that they both occupy the suit premises and agreed not to undertake any form of construction or development over the suit property and to maintain status quo pending the delivery of this Court’s ruling.

In the case of *Siegfried Busch Vs M.C.S.K (2013) e K.L.R.*, the Court held thus:

“A Superior Court to which an application has been made must recognize and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the Court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment”.

In acknowledging that the Appellant/Applicant is currently obtaining his livelihood by doing business in part of the suit premises where the Respondent is also in occupation and weighing the Applicant’s right of appeal with the Respondent’s enjoyment of the fruit of her judgment, I find the Applicant’s Notice of Motion partially successful and the same is allowed in the following terms:

(1) The Appellant/Applicant is granted a stay of execution for only 12 months from today.

(2) An order of status quo be and is hereby issued requiring both the Appellant and the Respondent to maintain their respective positions and/or occupation of the suit property and that NO construction of any kind whether by way of improvement or demolition should be undertaken over the suit property.

(3) The Applicant shall bear the costs of this application.

READ and DELIVERED in open Court at Meru this 3rd day of June, 2019.

E.C. CHERONO

ELC JUDGE

3RD JUNE, 2019

In the presence of:

- 1. Mr. Kirimi holding brief for Mwirigi for Plaintiff***
- 2. M/S Nyaga for Respondent***