



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 117 OF 2012**

**GEORGE NDIRANGU.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**GEORGE KING'ORI GATHOGO.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**ANNE NYAMBURA NDERITU.....3<sup>RD</sup> PLAINTIFF/RESPONDENT**

**ATHI-LAMU SELP HELP GROUP.....4<sup>TH</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**HAWRITTA BUCHETE ISOSHO.....DEFENDANT**

**RULING**

1. By a Notice of Motion application dated 10<sup>th</sup> August 2018, the Defendant Hawritta Buchete Isosho prays for an order of stay of execution of this Court's Judgment dated 19<sup>th</sup> July 2018 pending the hearing of an Intended Appeal. The said application is premised inter alia on the grounds:-

***i) That the Applicant is aggrieved by the said Judgment that found in favour of the Plaintiffs and intends to appeal against the same;***

***ii) That the Applicant has filed a Notice of Appeal before this Court and has requested for typed and certified proceedings and is now fearful that the Judgment may be executed before he is able to lodge the Appeal.***

2. The four Plaintiffs/Respondents are opposed to the grant of the orders sought by the Defendant. In Grounds of Opposition filed herein on 10<sup>th</sup> September 2018 they state:-

***1. That there is inordinate delay in bringing the application as the Judgment was delivered on 19<sup>th</sup> July 2018 and the application was filed on 15<sup>th</sup> August 2018.***

***2. That the Defendant has failed to explain the circumstances that occasioned the delay.***

***3. That there is no proof that the Defendant will suffer substantial, great and irreparable loss if she is not granted an order of stay of execution as (provided) under Order 42 Rule 6(2) (a).***

***4. That the application is an afterthought aimed at preventing the Plaintiffs from enjoying the fruits of the Judgment.***

3. I have considered the application and the Grounds of Opposition filed in response thereto. I have equally perused and considered the written submissions filed herein by the Learned Advocates for the parties as well as the authorities they referred me to.

4. As was stated by Gikonyo J. in ***Antoine Ndiaye –vs- African Virtual University(2015)eKLR:-***

***“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.

5. In the matter before me, it is the Applicant's case that she is apprehensive that the Judgment delivered herein on 19<sup>th</sup> July 2018 may be executed if the orders of stay sought are not granted. It is further her case that she stands to suffer substantial loss if the execution proceeds.

6. As was stated in *Lucy Nyamu Kimani –vs- Lawrence Mburu Muthiga(2006)eKLR:-*

***“An Applicant demonstrates substantial loss by showing that the Respondent is not a person of means and payment of the decretal sum prior to appeal would put the same beyond reach of the Applicant.”***

7. In the matter before me, the Applicant does not allege anywhere that the four Respondents will not be in a position to compensate her for the suit property. As it were she did not deny that she received from the Plaintiffs the proceeds of the Sale Agreement which proceeds she keeps to-date from 10<sup>th</sup> June 2010 when the parties entered into the Sale Agreement. She has not in fact even offered those proceeds as security for the due performance of the decree.

8. As Odunga J stated in *Joseph Gachie T/A Joska Metal Works –vs- Simon Ndeti Mwema(2012)eKLR:-*

***“It is not sufficient merely to state that the decretal amount is a lot of money and the applicant would suffer if the money is paid. In an application of this nature, the applicant should show the damages it will suffer if the order for stay is not granted since by granting stay would mean that the status quo should remain as it were before Judgment and that would be denying a successful litigant of the fruits of Judgment which should not be done if the applicant has not given to the Court sufficient cause to enable it exercise its discretion in granting the order of stay.”***

9. In the circumstances of this case, while I was prepared to accept that the application was made within a reasonable time, I did not think that it met the threshold for the grant of an order of stay of execution.

10. The application dated 10<sup>th</sup> August 2018 is accordingly dismissed with costs to the Plaintiffs/Respondents.

**Dated, signed and delivered at Malindi this 30<sup>th</sup> day of July, 2019.**

**J.O. OLOLA**

**JUDGE**