



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 98 OF 2017**

**ALOIS MUIA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**EDWARD MUTINDA NDETEI.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**COUNTY GOVERNMENT OF MAKUENI...2<sup>ND</sup> DEFENDANT/APPLICANT**

**R U L I N G**

1. What is before this court for ruling is the 1<sup>st</sup> Defendant's/Applicant's Notice of Motion application expressed to be brought under Order 22 Rule 22, Order 42 Rule 6, Order 51 Rules 1 and 3 of the Civil Procedure Rules 2010, Section 3 and 3A of the Civil Procedure Act and all enabling provisions of the law for orders: -

**1) Spent**

**2) Spent**

**3) THAT this Honourable Court be pleased to issue an order staying execution of the judgement and orders of Honourable Justice Mbogo on 28<sup>th</sup> December, 2018 in Makueni Environment and Land Court Number 98 of 2017 pending the hearing and determination of the appeal.**

**4) THAT the cost of this application be in the appeal.**

2. The application is dated 31<sup>st</sup> December, 2018 and was filed in court one even date. It is predicated on the grounds on its face and is supported by the affidavit of Edward Mutinda, the 1<sup>st</sup> Defendant/Applicant, sworn at Nairobi on the 31<sup>st</sup> December, 2018.

3. The Plaintiff/Respondent has opposed the application vide his replying affidavit sworn at Nairobi on the 06<sup>th</sup> February, 2019 and filed in court on 07<sup>th</sup> February, 2019.

4. The 1<sup>st</sup> Defendant/Applicant and the Plaintiff/Respondent filed their submissions pursuant to the directions issued to dispose off the application by way of written submissions.

5. The 1<sup>st</sup> Defendant/Applicant has deposed in paragraphs 4, 6 and 9 of his supporting affidavit that he is advised by his Counsel which advice he verily believes to be true that:-

**(a) The appeal has good chances of success.**

**(b) The application for stay has been lodged without undue delay.**

**(c) The balance of convenience clearly weighs in favour of the applicant in this matter owing to substantial loss. That the applicant is bound to suffer irreparable loss and damage if the application is not allowed and that the applicant is willing to abide by such terms and conditions as the court may direct or order, in order to ensure that the Respondent is not in any way prejudiced.**

6. On the other hand, the Plaintiff/Respondent has deposed in paragraphs 7, 13 and 14 of his replying affidavit that he is advised by his advocate on record which advice he verily believes to be true that this court cannot consider merits and/or chances of success of an intended appeal as it cannot sit in appeal against its own decision and further that this is not one of the grounds which ought to be considered by this

court, that for the court to consider granting an order for stay which ought not to apply to the current case, the 1<sup>st</sup> Defendant/Applicant ought to furnish security for due performance of the decree which security has not even been offered by the 1<sup>st</sup> Defendant/Applicant and which security (if any) should be based on profits, general damages awarded and cost of enforcing the order i.e. demolition of the illegal structure and that it is not in the interest of justice for the orders sought to be granted and further the mere fact that the application has been filed without undue delay cannot on its own be a ground for the court to exercise its discretion.

7. The counsel for the 1<sup>st</sup> Defendant/Applicant cited **Order 42 Rule 6 of the Civil Procedure Rules, 2010** which stipulates the principles for granting stay of execution of a judgment pending determination of appeal 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.”*

8. Arising from the above, the Counsel went on to submit that the 1<sup>st</sup> Defendant/Applicant has developed permanent structures on the suit property and that there is real and imminent danger of the structures being demolished to give effect to the judgement herein thus the 1<sup>st</sup> Defendant/Applicant stands to suffer substantial loss. The Counsel pointed out that the 1<sup>st</sup> Defendant/Applicant runs a hotel on the suit property which he has been in occupation of since 2012. The counsel cited the case of **Kiplagat Kotut vs. Rose Jebor Kipngok [2015] eKLR** where Ombwayo, J stated thus:-

*“It follows therefore as much as the Plaintiff/Applicant has failed to prove to the trial court that the suit land belongs to him and being ordered to vacate the same, it is not in dispute that for the last 14 years he has invested on the said land to the tune of Kshs.6,000,000/= and given the fact that he has preferred an appeal against the judgment herein, it is very clear beyond peradventure that unless stay is granted he will suffer substantial loss of worthy Kshs.6,000,000/=”*

The Counsel further cited the case of **Feisal Amin Janmohammed T. A. Dunya Forwarders vs. Shami Trading Co. Ltd [2014] eKLR** where Kasango, J while relying on the holding by the Court of Appeal in **Civil Application No. Nai 15 of 2002 ABN Amro Bank, N.V vs. Le Mond Foods Ltd** reiterated as follows:-

*“We agree with Mr. Regeru for the Respondent that the burden was upon the bank to show that its appeal would be rendered nugatory if a stay is not granted. But in requiring an applicant to discharge that burden, the Court must also be alive to certain limitations which an Applicant such as the bank, must of necessity suffer from. The bank in this case is required to pay over to the Respondent over Kshs.30 million. An officer of the bank has sworn that they are not aware of any assets owned by the Respondent. They swear that they have checked the returns filed by the Respondent with the Registrar of Companies and they are unable to find in those returns what property, if any, the Respondent owns. They, of course, cannot be expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. So all an Applicant in the position of the bank can reasonably be expected to do is, to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”*

9. On the other hand, the Counsel for the Plaintiff/Respondent submitted that the Applicant has not demonstrated to the court the substantial loss he is likely to suffer because the mere fact that he entered unlawfully into the suit property in the year 2012 does not make his entry lawful. The Counsel added that nowhere in his affidavit has the 1<sup>st</sup> Defendant/Applicant shown that the Plaintiff/Respondent is not a person of means or demonstrated that the Plaintiff/Respondent will be unable to compensate him should the appeal succeed.

10. The Counsel further submitted that the circumstances in this case are different from those in the case of **Kiplagat Kotut vs. Rose Jebor Kipngok [2015] eKLR** in that whereas the Applicant in the aforementioned case had shown that he had been in occupation of and invested in the suit property for over 14 years, the Applicant herein did not plead any right over the suit property.

11. It was also submitted by the Counsel for the 1<sup>st</sup> Defendant/Applicant that the application herein was filed in due time. That the judgement in the matter was delivered on the 28<sup>th</sup> December, 2018 and the application for stay of execution of judgement and Notice of Appeal was filed in court on 31<sup>st</sup> December, 2018. In support of his submission, the Counsel cited the case of **Focin Motorcycle Co. Ltd vs. Anne Wambui Wangui & Another [2018] eKLR** where it was held;

*“There is no doubt that the appeal was filed without undue delay. The application for stay was filed after two months. This was after the Applicant realized the execution of the decree was imminent. The Court has to consider whether the delay was*

unreasonable. The Applicant has tried to explain that the delay was due to the fact that proceedings were supplied towards the end of June, after which they filed the application. It is submitted by the Respondent that the Memorandum of Appeal was filed without proceedings. My view is that having filed the appeal within the stipulated time and in view of the explanation offered, a delay of two months cannot be said to be unreasonable. The Applicant cannot be shut out, he is seeking the discretion of the Court. My view is that he should be given an opportunity to ventilate the appeal.”

The Counsel further relies on the case of **Amal Hauliers Ltd vs. Abdulnasir Abukar Hassan [2017] eKLR** where it was held:-

“The application has been filed four months after the delivery of the judgement. It is noted that the appeal was filed on 22<sup>nd</sup> March, 2017 soon after the delivery of judgement thus signaling the Applicant’s interest in pursuing the appeal. It is only after the Respondent’s Counsel wrote to the Applicant’s counsel on 19<sup>th</sup> June, 2017 about the intention to execute that the Applicant found it necessary to file the instant application. There is thus no inordinate delay on the part of the Applicant.”

In addition, the 1<sup>st</sup> Defendant/Applicant’s Counsel cited the case of **G. N. Muema P/A(Sic) Mt View Maternity & Nursing Home vs. Miriam Maalim Bishar & Another [2018] eKLR** where it was held thus:-

“Notably, delay must not only be inordinate, it must also cause prejudice to the opposing party. The delay herein appeared to have been inordinate but did not cause the Respondents to suffer prejudice or injustice. This court came to the aforesaid conclusion because there was no evidence that was adduced before this court to demonstrate that the Respondents had obtained the Certificate of Costs and Decree or made an application for execution of the decree that would have been thwarted midstream by the filing of the present application. In addition, a perusal of the lower court file showed that the proceedings were only certified as a true copy of the original on 14<sup>th</sup> June, 2017. The implication of this was that the Applicant would not have been able to have filed his Record of Appeal before this time. In the circumstances foregoing, this court was persuaded to find and hold that the Applicant had satisfied the second ground for being granted a stay of execution pending appeal.”

12. The Counsel for the Plaintiff/Respondent conceded that indeed the application was filed without inordinate delay. He however submitted that inordinate delay is not the only condition that the 1<sup>st</sup> Defendant/Applicant has to meet.

13. On the issue of 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 1<sup>st</sup> Defendant/Applicant, it was submitted that the 1<sup>st</sup> Defendant/Applicant has offered to provide security and therefore satisfied the ground for stay. The Counsel for the 1<sup>st</sup> Defendant/Applicant relied on the case of **Focin Motorcycle Co. Ltd v Ann Wambui Wangui & Another [2018] eKLR** where L. W. Gitari, J stated thus:-

“Where the Applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgement. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but is the discretion of the court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

On the other hand, the Counsel for the Plaintiff/Respondent submitted that although the 1<sup>st</sup> Defendant/Applicant has offered to provide security, the same should only be considered when the 1<sup>st</sup> Defendant/Applicant has established the right worth of being protected.

14. Having read the application together with the supporting affidavit as well as the replying affidavit and having read the submissions that were filed by the Counsel on record for the parties herein, my finding is as follows;

15. Firstly, it should be noted that it is not within the province of this Court to determine whether or not the Applicant herein has an arguable appeal. That argument should be directed to the appropriate forum which is the Court of Appeal.

16. Secondly, the 1<sup>st</sup> Defendant/Applicant herein has demonstrated that he has built permanent structures and runs a hotel on the suit property. Given those circumstances, I am satisfied that substantial loss may result if the order of stay of execution is not granted. The Plaintiff/Respondent has conceded that the application is made without unreasonable delay. I do also note that the 1<sup>st</sup> Defendant/Applicant is ready to furnish sufficient security as the court may order. In its judgement delivered on 28<sup>th</sup> December, 2018, the court did award the Plaintiff Kshs.200,000/= as general damages. In my view, therefore, Kshs.200,000/= would be sufficient security under the circumstances.

17. Arising from the above, my finding is that the application has merits and I hereby proceed to grant prayer 3 on condition that the Applicant shall deposit Kshs.200,000/= in an interest earning account in the joint names of the advocates on record for the parties within the next 30 days from today failure of which execution shall issue. Costs of the application shall be in the cause.

**Signed, dated and delivered at Makueni this 26<sup>th</sup> day of July, 2019.**

**MBOGO C. G.,**

**JUDGE.**

**In the presence of: -**

Ms. Kemunto holding brief for Mr. Mwangambo for the 1<sup>st</sup> Defendant/Applicant Mr. Mutinda holding brief for A. M. Mbindyo for the

Plaintiff/Respondent

Mr. Munyao – Court Assistant

**MBOGO C. G. (JUDGE),**

**26/07/2019.**