



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**CIVIL SUIT NO. 176 OF 2017**

**RODAH CHEPTONUI LANG'AT.....PLAINTIFF**

**-VERSUS-**

**REV. AGGREY WATINDI.....1<sup>ST</sup> DEFENDANT**

**LOGOS REVIVAL MINISTRIES.....2<sup>ND</sup> DEFENDANT**

**PRINCEDOM EDUCATION CENTRE.....3<sup>RD</sup> DEFENDANT**

**RULING**

This ruling is in respect of an application dated 18<sup>th</sup> June 2019 by the defendant/applicants seeking for the following orders:-

1. Spent.
2. That, there be a temporary stay of execution of the judgement delivered on 29<sup>th</sup> May 2019, till when this application is heard and determined inter parties
3. That, there be stay of execution of the Judgement delivered on 29<sup>th</sup> May 2019, till when the appeal lodged by the applicant in the court of appeal is heard and determined.
4. That, the applicant do deposit Kshs 150,000 (read one hundred and fifty thousand) in a joint account of both advocates on record, pending hearing and determination of the appeal filed at the court of appeal.
5. That this court be pleased to **make** any further order as to any other security as the court deems fit.
6. That costs if this application be provided for.

Counsel agreed to canvass the application by way of written submissions. Counsel argued the application and submitted on the requirements of Order 42 Rule 6 of the Civil Procedure Rules of stay of execution. I have considered the submissions by both Counsel and come to the following analysis and conclusion below.

**Analysis and Determination**

The issues for determination in an application for stay of execution are as provided for under order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

**(2) 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 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.**

The issues are as to whether the applicant filed the application without unreasonable delay, whether the applicants have satisfied the court

that they will suffer substantial loss if the order of stay is not granted and finally an order of security for the due performance of such decree which may be ultimately binding on the applicant.

It should be noted that the grant of stay of execution is discretionary but the same must be exercised judiciously so as not to cause injustice to the parties to the suit. The discretion must also be exercised within the parameters of the law taking into consideration the rights of both parties to the suit. In this case, the party who has the judgment in his favour and the one who is aggrieved by the decision.

I am guided by the principles enunciated in the Court of Appeal case in **Butt v Rent Restriction Tribunal [1982] KLR 417** which gave guidance on how a court should exercise discretion and held that:

*“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 discretion.*

*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 applicant 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 powers 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 following principles capture the issues to be considered in an application for stay of execution.

Going to the issues at stake, the applicants have established that they filed the application for stay of execution timeously as the Judgment was delivered on 29<sup>th</sup> May 2019 and by 18<sup>th</sup> June 2019 they had filed the application. The court had granted 30 days stay to the applicant.

On the second limb on establishment of substantial loss, the applicants state that they will suffer substantial loss if the order is not granted and have attached a valuation report which has contradictory evidence with the replying affidavit. Which document does the court rely on?

The applicants did not address satisfactorily the issue of offering security for the performance of the decree which is an important limb of an application for stay of execution. The court is alive to the fact that it would be in the interest of justice to preserve the substratum of the suit land pending the hearing and determination of the intended appeal.

In the case of **Siegfried Busch vs MCSK [2013]eKLR**, the court held that

*“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...”*

The respondent is the registered owner of the suit I order that the amount of Kshs 150,000/ be released to the respondent within 30 days failure of which the stay order lapses. The court also orders that the applicant is precluded from carrying out any developments on the suit land and not to interfere with the character of the suit land pending the hearing and determination of the intended appeal. Applicant to pay costs of the application.

**DATED and DELIVERED at ELDORET this 26<sup>th</sup> DAY OF SEPTEMBER, 2019.**

**M. A. ODENY**

**JUDGE**

**RULING READ** in open court in the presence of

Mr. Yego for the Plaintiff/Respondent and

Miss. Karuga holding brief for Mr. Andambi for Defendant/Applicant.

Mr. Mwelem – Court Assistant