



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC MISC. CASE NO. 24 OF 2017

GEORGE AURA LIBUKU.....APPLICANT

AND

JAPHETH OKWIRI LIBUKU.....RESPONDENT

RULING

The application is dated 19th April 2013 and brought under Order 22 Rule 22, Order 10 Rule 11 Section 3A & 1A of the Civil Procedure Act 21 Law of Kenya seeking the following orders;

1. That there be stay of execution of the orders of the Honourable Court made on 12/7/2012 pending appeal against the said orders.
2. That status quo be maintained as at the time of filing of this application.
3. That there be orders on costs.

It is founded on grounds that whereas the Honourable Court did make orders vide ruling delivered on 12th July, 2012, being dissatisfied with the said ruling and orders, the applicant herein has elected to lodge appeal to the Court of Appeal. That the said appeal has high chances of success the applicant having been an indivisible title holder and having had earlier court rulings in his favour. That unless orders are made as herein, the respondent intends to proceed extensively and adversely against the applicant. That it is in the interest of justice that this application per the prayers.

The applicant submitted that he is the applicant who was dissatisfied with the ruling 12th July, 2012 and have appealed against the said ruling annexure "GL 1". That the said appeal is still pending and has high chances of success. That the respondent has intends to upset the status quo pending this appeal as per the application dated 18th June, 2013 annexure "GL 2". That this being a land matter, it is imperative that the issues are determined conclusively. That the land in question is his and registered in his name "GL 3". That it is only just and fair that his case be fully adjudicated without shortcuts and adversity. That he has a formidable appeal with high chances of success as per the draft annexure "GL 4".

The respondent submitted that the application is opposed in its entirety. That the High Court Misc. Application No. 50 of 2011 was later transformed to Kakamega Misc. Application No. 24 of 2017 and is yet to be determined. That there is an application for stay of execution pending appeal whose notice has been filed and is still pending. That this application is thus premature and ill conceived. That orders sought cannot be effected as the Land Registrar has not been enjoined and the said orders are hanging. That the application made is in bad faith as there are substantive issues to be decided. That the procedure adopted for the orders sought as hereby are unknown to law. That application is opposed.

This court has carefully considered the application and the submissions herein. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the Civil Procedure Rules as follows:

"No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside."

Order 42, rule 6 states:

“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 appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and
3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

The principles governing the exercise of the court’s jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR), thus:

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

- 1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,*
- 2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”*

The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in Chris Munga N. Bichange Vs Richard Nyagaka Tongi & 2 Others eKLR where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus:-

“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

In the case of Mohamed Salim T/A Choice Butchery Vs Nasserpuria Memon Jamat (2013) eKLR, the court stated that:-

“That right of appeal must be balanced against an equally weighty right that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right”

We are further guided by this court’s decision in Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997, at Page 4 as follows:

“ . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

From the grounds, the applicant who was dissatisfied with the ruling 12th July, 2012 and has appealed against the said ruling annexure “GL 1”. That the said appeal is still pending and has high chances of success. The court must take judicial notice that this application was filed way back in 2013. This court is not persuaded, that the appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, I am not persuaded that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the applicant has not fulfilled any of the grounds to enable me grant the stay. I find this application has no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25TH SEPTEMBER 2019.

N.A. MATHEKA

JUDGE