



**REPUBLIC OF KENYA**

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

**ELC MISC. CASE NO. 33 OF 2019**

**ROSE MULONDA OPANDA**

**JAPHETH OPANDA**

**JOSEPH OPANDA**

**JIMMY OPANDA AMBUNYA.....APPLICANTS**

**VERSUS**

**LEONIDA OUMUKHOYIA NYANGWESO.....RESPONDENT**

**RULING**

This application is dated 10<sup>th</sup> June 2019 and is brought under Section 1A, 1B, 1C and 3A of the Civil Procedure Act and Orders 42 Rule 6 (1) and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders:-

1. That the application herein be certified as extremely urgent and the same be heard exparte on priority basis in the first instance.
2. That execution of the orders of the lower court in Kakamega MCL & E case No. 86 of 2018 purportedly served on the 1<sup>st</sup> applicant herein on or about 21<sup>st</sup> may, 2019 be stayed pending the hearing and determination of this application interparties.
3. That execution of the orders of the lower court in Kakamega MCL & E case No. 86 of 2018 made pursuant to the ruling delivered on 19<sup>th</sup> March, 2019 and served on the 1<sup>st</sup> applicant on or about 21<sup>st</sup> may, 2019 be stayed pending the hearing and determination of the Notice of Motion dated 30<sup>th</sup> May, 2019 and the intended appeal.
4. That further proceedings in Kakamega MCL & E Case No. 86 of 2018 be stayed pending the hearing and determination of the intended appeal.
5. That costs of this application be provided for.

It is based on the affidavit of Rose Mulonda Opanda and further grounds that this honourable court delivered its ruling in or about 19<sup>th</sup> March, 2019. That the applicants were not aware that the ruling had since been delivered. That the 1<sup>st</sup> applicant came to know of the ruling when she was served with the order made pursuant to the said ruling on 21<sup>st</sup> May, 2019. That as at the time the court made the order the applicants were in occupation of the said land which had crops i.e. maize, beans and cane and if the orders of stay are not granted the applicant will be unable to work on the said land with the result that the crops will go to waste thereby occasioning the applicants extreme loss. That the applicants not being satisfied with the ruling have filed an application in this court seeking leave to file an appeal out of time challenging the said ruling. That if the stay orders are not granted then the intended appeal will be rendered nugatory. That the applicant's intended appeal has a good chance of succeeding in that the orders granted relate to a non-existent title namely Butsotso/Esumeyia/1102 and that at the same time compliance with the orders sought to be stayed will amount to interfering with the status quo prevailing at the time the suit in the lower court was filed. That the respondent will not suffer undue prejudice since she is in occupation of the land. That it is in the interest of justice that the orders sought herein be granted.

The respondent submitted that, the applicants were illegally registered as owners of land parcels No. Butsotso/Esumeyia/3298, 3299, 3300, 3301 and 3302 purported to be a sub-division of land parcel No. Butsotso/Esumeyia/1102. That she will be objecting to the alterations of the orders issue by the court since the applicants have been forcefully using her late father's piece of land. That staying the orders issued by the court will prejudice her as the Kakamega HC Succession Cause No. 13 of 2013 which whose proceedings stayed because of this case as the applicants are adamant to use their land (attached and marked L.O.S.-1 is a copy of the Succession Cause). That this is the second time the applicants want to stay the proceedings in her cases being Kakamega HC Succession No. 13 of 2013 and Kakamega CM L & E No. 86 of

2018 and it will prejudice the respondents who will be further delayed in getting justice and it is trite law that justice delayed is justice denied. That it is not true that she will not suffer undue prejudice because the applicants have been illegally occupying the suit land since she initiated the Succession Cause and allowing them to further occupy the same will cause more prejudice to her as for the last 10 years the applicants have continued to forcefully occupy the estate of the deceased Conzolo Nyangweso and being the only heir to that estate she has never benefited. That the present application is pre mature as the main suit in Kakamega CM L & E Case No. 86 of 2018 has not been heard and determined.

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 of this application, the court delivered its ruling in or about 19<sup>th</sup> March, 2019. That the applicants were not aware that the ruling had since been delivered. That the 1<sup>st</sup> applicant came to know of the ruling when she was served with the order made pursuant to the said ruling on 21<sup>st</sup> May, 2019. That as at the time the court made the order the applicants were in occupation of the said land which had crops i.e. maize, beans and cane and if the orders of stay are not granted the applicant will be unable to work on the said land with the result that the crops will go to waste thereby occasioning the applicants extreme loss. That the applicants not being satisfied with the ruling have filed an application in this court seeking leave to file an appeal out of time challenging the said ruling. This court is not persuaded, that the appeal or intended appeal is arguable, that is to say it is not frivolous. There is no appeal or notice of appeal filed. 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 24<sup>TH</sup> SEPTEMBER 2019.**

**N.A. MATHEKA**

**JUDGE**