



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 286 OF 2013

MELISA AKUMU SONGORO.....PLAINTIFF/RESPONDENT

VERSUS

ERNEST TWABWALABA

EUNICE KHALITAVA KHISA

ENOS MATANGWE SIKOYO.....DEFENDANTS/APPLICANTS

RULING

The application is dated 24th May 2019 and brought under Order 21 Rule 22 of the Civil Procedure Rules seeking the following orders;

- (a) There be stay of execution of the judgment and all subsequent orders herein pending the hearing of an appeal.
- (b) Costs be in the cause.

It is based on the supporting affidavit of Enos Matangwe Sikoyo the 3rd defendant/applicant. It is based on the following grounds that, the appellants/ applicants are aggrieved by the judgement in Kakamega ELC No. 286 of 2013 and have filed a notice of appeal against the said judgement. That it is in the interest of justice and the balance of convenience tilts in favour of the appellants/applicants that the orders sought be granted. That the appeal lodged herein by the appellant has high chances of success as the 3rd applicant is an innocent purchaser.

The respondent submitted that, on the 8th day of May, 2019 this honourable court delivered judgment herein nullifying all the transactions emanating from L.R. NO. East Wanga/Mung'ang'a/222 which was formerly registered in the name of the deceased. That further, the honourable court directed that upon nullification of all the transactions as stated above, plot 222 was to be subjected to succession proceedings. That the honourable court came to the above decision after evidence adduced during the trial clearly demonstrated that plot 222 was sub-divided without due process being undertaken, that is, without the estate of the deceased undergoing succession process. That a party aggrieved by the judgment of a superior court has to file and serve a Notice of Appeal within 14 days of such decision and that further, the said Notice of Appeal must be served on all the parties within 7 days from the date of filing of such notice. That to date, no such Notice of Appeal has been served and clearly any appeal contemplated by the 3rd defendant will be still born due to the stringent rules governing appeals before the Court of Appeal. That the above notwithstanding, for a stay order to issue, an applicant has to inter alia, demonstrate substantial loss (in the event stay is not granted). That a perusal of the supporting affidavit by the 3rd defendant has not demonstrated as required by the law in which manner he is likely to suffer substantial loss; or how failure to obtain stay orders will render the intended appeal nugatory.

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 appellants/ applicants are aggrieved by the judgement in Kakamega ELC No. 286 of 2013 and have filed a notice of appeal against the said judgement. 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 24TH SEPTEMBER 2019.

N.A. MATHEKA

JUDGE