



**REPUBLIC OF KENYA**

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

**E & L NO. 826 OF 2012**

**BEATRICE NANYAMA MURUNGA.....PLAINTIFF**

**VERSUS**

**BENJAMIN AMCHAT.....1<sup>ST</sup> DEFENDANT**

**JACKSON KIPSANG KOGO.....2<sup>ND</sup> DEFENDANT**

**RULING**

In the application dated 26<sup>th</sup> February 2019, the Defendants/Judgment Debtors apply for an order of Stay of Execution of the judgment or decree pending hearing and final determination of the intended appeal and that the applicant to file Notice of Appeal out of time. The application is based on the grounds that the appeal is merited and that the delay of filing the Notice of Appeal is excusable and reasonable. That the Respondent will not be prejudiced if the orders sought are granted. The Plaintiffs are willing to abide by any security by the court. The Plaintiffs claim that they will suffer irreparable loss unless stay of execution is granted. They claim that school going children will be affected if stay is not granted. The defendants have nowhere to go.

The Plaintiff/Decree Holder on the other hand filed an application for the eviction of the defendants from parcel Number NANDI/KAPTEL/1058 in compliance with the judgment of the court. The application was filed on 11/3/2019.

In reply to the defendant's application for stay of execution pending appeal and leave to file Notice of Appeal out of time she states that the defendants are occupying land Number NANDI/KAPTEL/1057 measuring 9.1 acres and that the 2<sup>nd</sup> Defendant has a small home on 1058 in which he doesn't reside. She states that the Judgment debtors have not appealed and the court can't issue orders on the basis of speculation.

I have considered both application supporting affidavit and replying affidavit and do find that judgment was delivered on 21/12/2018 while the application was made on 26/2/2019.

Time stated running on 14/1/2019 as per the provisions of **Order 50 rule 4 of the Civil Procedure Rules 2010 Cap 21, Laws of Kenya** and therefore the delay is of approximately 47 days. In the circumstances of this case the delay is inordinate as the Plaintiff is out of possession while the defendants are in possession and any form of laxity is to their benefit and the two Plaintiff's detriment.

I do find that there is no demonstration of substantial loss. Moreover, the plaintiff decree holder is the registered proprietor of the suit parcel of land.

**In Kenya Shell Limited vs. Kibiru [1986] KLR 410, Platt, Ag. JA** (as he then was) at page 416 expressed himself as follows:

***“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.***

On the part of **Gachuhi, Ag.JA** (as he then was) at 417:

***“It is not sufficient by merely stating that the sum of Shs.20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”*** (See also the holding by Odunga J. in *Socfinac Company Limited V Nelphat Kimotho Muturi*, supra.)

In *Anne Njeri Mwangi v Muzaffer Musafee Essajee & another [2014] eKLR, H.C at Nairobi (Milimani), Civil Case No 49 of 2011*, the learned judge Havelock J. delivered himself as follows;

“As regards determination of what amounts to substantial loss, Musinga, J (as he then was) in *Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001* held that:

**“...substantial loss’ is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.”**

Platt Ag JA again in the *Kenya Shell* case (supra) gave his observations as to the meaning of ‘substantial loss’ when he detailed:

**“The application for the stay made before the High Court failed because the first of the conditions set out in order XLI rule 4 of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents be unable to repay the decretal sum plus costs in two courts. The learned judge later went on to say: “It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”**

On the Notice of Appeal, I do find that the Defendant were to file the Notice of appeal within 14 days from the 14<sup>th</sup> of January 2019 as per the provisions of *Order 50 rule 4 of the Civil Procedure Rules 2010 Cap 21, Laws of Kenya* which they did not do and the said 14 days lapsed on 28/1/2019. The application was made more than 20 days after the lapse of the period for filing of Notice of Appeal. No explanation is given for the inordinate delay. I do find that the application not merited and the same is dismissed with costs.

The application by the decree holder is merited as she is entitled to the fruits of the judgment. I do order and authorize Nasioki Auctioneers to enforce the orders made on 24<sup>th</sup> January, 2019 by evicting the Judgment Debtor, Benjamin Amchat and Jackson Kipsang Koho and any person occupying the suit land after lapse of 45 days. Costs to the Applicant to be borne by the Judgment Debtors.

**Dated and delivered this 10<sup>th</sup> day of September, 2019**

**A. OMBWAYO**

**JUDGE**