



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MAKUENI**

**APPEAL NO. 8 OF 2018**

**JULIUS KERIKA.....APPLICANT**

**VERSUS**

**WILSON KAATA.....RESPONDENT**

**RULING**

1. What is before this court for ruling is the Notice of Motion application dated 13<sup>th</sup> June, 2018 and filed in court on 14<sup>th</sup> June, 2018 for orders: -

**1) Spent.**

**2) Spent.**

**3) THAT this Honourable Court be pleased to discharge, stay or set aside judgment and orders made against the Applicant in Makindu Civil Case No.51 of 2011 on 25<sup>th</sup> May, 2018 pending hearing and determination of the intended Appeal.**

**4) THAT the Court be at liberty to make such further and other orders that as it deems fit to meet the ends of Justice.**

**5) Cost of this Application be provided for.**

2. The application is predicated on the following grounds: -

**1) THAT the Applicant is dissatisfied with the decision of the lower court thus intending to appeal.**

**2) THAT if the orders are not granted, the Respondent will proceed with execution to the detriment of the Applicant on 15<sup>th</sup> June, 2018 who will suffer irreparably and the appeal will be rendered nugatory.**

**3) THAT the Applicant's Advocate requested the court to be supplied with a copy of the judgment but they took a lot of time to do so.**

**4) THAT there has been no delay in filing this application save for the judgment being supplied to the Applicant on 12<sup>th</sup> June 2018 and that the appeal has merits.**

**5) THAT if there is any delay pegged on the 21 days given by the Court, then it is occasioned by the court by taking a lot of time to type the five paged judgement and not the Applicant.**

**6) THAT the Respondent will not suffer any prejudice if this application is allowed.**

**7) THAT it is in the wider interest of Justice that this application be allowed.**

It is also supported by the affidavit of Nduta B. Jecinta, the advocate for the Applicant herein.

3. The application is expressed to be brought under sections 1A, 1B and 3A of the Civil Procedure Act, Order 51 Rule 1 and Order 42 Rule 6 of the Civil Procedure Rules, 2010 and any other enabling provisions of the law.

4. Wilson Moipei Kaata, the Respondent herein, has opposed the application vide his replying affidavit dated 17<sup>th</sup> September, 2018 and filed in court on even date.

5. Parties herein were directed to dispose off the application by way of written submissions.

6. In his submissions, the Applicant's Counsel framed three issues for determination. These were: -

**1. Whether the orders sought can be granted.**

**2. Whether the orders sought will prejudice the Respondent.**

**3. Who is to bear the cost of this application.**

7. On the issue of whether or not the orders ought should be granted the Counsel referred the court to the case of **Patricia Njeri & 3 Others vs. National Museum of Kenya (2004) eKLR** where Visram J (as he then was) stated thus: -

*“In the venture capital case the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and not in whimsical or arbitrary fashion.” This discretion is guided by certain principles some of which are as follows: -*

*(a) The discretion must be exercised against an Applicant whose appeal is frivolous (See **Madhupaper International Limited vs. Kerr (1985) KLR 840** (cited in **Venture Capital**). The Applicant must state that a reasonable argument can be put forward in support of his appeal (**J. K. Industries vs KCB (1982 – 88) KLR 1088** (also cited in **Venture Capital**))*

*(b) The discretion should be refused where it would inflict greater hardship than it would avoid (See **Madhupaper supra**).*

*(c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See **Butt vs. Rent Restriction Tribunal (1982) KLR 417** (cited also in **Venture Capital**)).*

*(d) The Court should also be guided by the principles of **Giella vs. Cassman Brown & Company Ltd (1973) EA 358** as set out in the case of **Shitukha Mwamodo & Others (1986) KLR 445** (also cited in **Venture Capital**)).*

8. The Applicant's Counsel went on to submit that an Applicant has to satisfy the conditions provided under **Order 40 Rule 6 of the Civil Procedure Rules** which provide that: - an Applicant who is seeking stay of execution pending appeal must demonstrate;

*(1) Substantial loss may result unless the order is made*

*(2) the application is made without unreasonable delay, and*

*(3) 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.*

9. The Counsel was of the opinion that substantial loss does not have to be a lot of money since the Applicant herein has used money to file this application, the intended appeal and sought legal representation suffice it to show that he went through hardship.

10. On whether the orders sought will prejudice the Respondent, the Counsel submitted that the Applicant has been in occupation of the suit property and that if the Respondent is allowed to proceed with execution, he will suffer irreparably and that his appeal will be rendered nugatory.

11. On the issue of costs, the Counsel submitted that costs follow the event unless where the Court or Judge for good reason otherwise directs. In support of his submissions the Counsel cited the cases of **Republic –vs Rosemary Wairimu, Ex-parte Applicant vs. Ihururu Dairy Farmers Co-operative Society Ltd. [2014] eKLR, Jasbir Singh Rai & Talochan Rai & Others [2013] eKLR** and **Party of Independent Candidates of Kenya vs. Mutula Kilonzo & 2 Others (2013) eKLR**.

12. In his brief submissions, the Counsel for the Respondent urged the court not to exercise its discretion in favour of the Applicant since he has not come to court with clean hands.

13. Having read the application together with the supporting affidavit as well as the replying affidavit, the Applicant appears to have dwelt on the issue of delay in providing him with a copy of typed judgement to enable him file this appeal. He has deposed that he is in occupation of the suit premises and that if the Respondent is allowed to proceed with execution, he (Applicant) will suffer irreparably and that his appeal will be rendered nugatory. He has also deposed that the Respondent will not be prejudiced if the application is allowed.

14. On his part, the Respondent has deposed in paragraphs 5 and 7 of his replying affidavit that the application is made to prevent him and other Respondents from enjoying the fruits of their judgement and that he has been advised by his advocate on record which advise he verily believes to be true that the intended appeal does not stand a high chance of success.

15. Arising from the above, the Applicant herein is in occupation of the suit property. Even though he has not indicated the value of the investment he has put in the suit premises, it seems to me that he will suffer substantial loss if the order of stay is not granted. The judgement in Makindu Civil Case No.51 of 2011 was delivered on 25<sup>th</sup> May, 2018 while the present application was made on 14<sup>th</sup> June, 2018 which in my view is not an undue delay.

16. The interest of justice herein demands that the court does exercise its discretion in favour of the Appellant/Applicant and consequently, I hereby proceed to order for stay of execution of the judgement and decree in Makindu Civil Case No.51 of 2011 pending the hearing and determination of the appeal herein. Costs of the application are provided for to the Applicant.

**Signed, dated and delivered at Makueni this 29<sup>th</sup> day of November, 2019.**

**MBOGO C. G.,**

**JUDGE.**

**In the presence of: -**

Mr. Hassan holding brief for Mr. Onyancha for the Respondent

No appearance for the Appellant.

Mr. Kwemboi – Court Assistant

**MBOGO C. G. (JUDGE),**

**29/11/2019.**