



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 4 OF 2019

MARY AWINO KWEYU.....PLAINTIFF/RESPONDENT

VERSUS

LAWRENCE MMATA CHORE

MELISA MUHONJA MMATA.....DEFENDANTS/APPLICANT

RULING

The application is dated 26th August 2019 and is brought under order 42 rule 6 (1) (2) of the Civil Procedure Rules and sections 3 & 3A of the Civil Procedure Act seeking the following orders:-

1. That the present application be and is hereby certified urgent and be heard ex-parte on priority basis during this vacation period.
2. That pending the hearing of this application inter-partes an order of stay of execution of this courts orders made on 4th July 2019 be and is hereby issued.
3. That pending the hearing of the appeal at the court of appeal there be stay of execution of the orders of the court made on 4th July 2019.
4. That the costs hereof be in the cause.

It is grounded on the annexed affidavit of Lawrence Mmata Chore and grounds that the applicant has preferred an appeal to the Court of Appeal. That the respondent has already extracted the orders in readiness of execution. That the applicant has an arguable appeal to the Court of appeal. That the applicant shall suffer substantial loss. That it is in the interest of justice that the orders sought be granted. That the appeal shall be rendered nugatory if the orders sought are not granted.

The respondent submitted that, the said application has been brought in blatant violation of Order 9 rule 8 and is amenable to being struck out from the court's records, having been drawn and filed by the 1st defendant in person despite being represented in the suit herein by M/s. Onganda & Associates Advocates who, in the absence a duly filed and served Notice to Act in Person or Notice of change of Advocates, remain to be the advocates validly on record for the 1st defendant and therefore the only ones legally permitted to draw and file the 1st defendant's pleadings. That the said application has been brought in a wrong suit and therefore untenably bad in law, having been brought in the suit herein (i.e. ELC 4/19) in quest for a stay of execution of the orders that were made in a different suit, namely ELC Case No. 81 of 2018. That, even if the said application were to be brought in the right suit, it would still not satisfy the twin requirements for grant of stay for reasons that under sections 75 & 76 of the Civil Procedure Act, the appeal in question is incapable of prosecution or hearing and therefore not arguable because it has been preferred against the orders that could only be appealed against with leave of court, which leave has never been obtained to date and the applicant has not demonstrated in what way the appeal would be rendered nugatory if the orders granted in ELC Case No. 81 of 2018 are implemented because those orders are capable of reversion without occasioning any loss to parties and, if they ever become irreversible, damages will reasonably compensate the aggrieved party. The plaintiff/respondent prays that the 1st defendant's Notice of Motion application dated 26th August 2019 be struck out or be dismissed with costs.

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 4th July 2019. This court has perused the notice of intended appeal and it talks of the ruling in ELC Case No. 81 of 2018, however the two suits were consolidated. 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 28TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE