



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC. NO. 84 OF 2012

MONICA ANYANGO ALUOCH.....PLAINTIFF

VERSUS

LUCIA OLALA.....1ST DEFENDANT

MICHAEL OMONDI OLALA.....2ND DEFENDANT

PAULINE AKINYI OLALA.....3RD DEFENDANT

HILDA OLALA.....4TH DEFENDANT

OLUOCH OLALA.....5TH DEFENDANT

RULING

1. The application before court is dated 8/7/2019 and is brought by the Judgement debtors who lost in the main suit. The Judgment debtors pray that **this Honourable Court be pleased to grant orders of stay of Execution in respect to the judgment entered against the Defendants on the 22nd November 2018 and any other orders that may be issued pursuant thereto, pending the filing and determination of an intended appeal. For avoidance of doubt pending the filing and determination of an intended appeal, there be an order restraining the Plaintiff whether by herself, her agents, servants or any person claiming through her from evicting or otherwise interfering with the Defendants' occupation, ownership and use of the property the subject matter of this suit. The costs of this application be borne by the plaintiff.**
2. The application is based on grounds that **the intended appeal raises serious and arguable issues of law which need to be determined by the Court of Appeal. That unless the stay and orders prayed for are granted, this application, the leave to appeal granted, and the intended appeal itself will all be rendered nugatory.**
3. **The injury caused thereby to the Defendants will be disproportionate and would be irreversible and irreparable. The grant of leave to appeal to this Honourable Court would then become illusory, and neither the Superior Court nor this honourable Court acts in vain.**
4. **The decree made on 21st November 2018 made by the Superior Court gravely and adversely affect the Defendants as the suit property has always been their family home and it would be prudent to enable the Court of Appeal to determine effectively the legality of the said judgement of 21st November 2018.**
5. **Notice of Appeal against the Judgement made on 21st November 2018 has been lodged in accordance with the rules of this court.**
6. **That the Defendants ready and willing to deposit such nominal sum as this Honourable Court may order into court as security for costs.**
7. **An order allowing this application will meet the requirements of Constitution of Kenya and the overriding objectives or the rules of procedure of this Court.**
8. In the supporting affidavit sworn by Michael Omondi Olala, he states that leave to appeal was granted and therefore if stay is not granted will become illusionary.

9. In a detailed replying affidavit, the decree holder states that the case was determined on merit. That the court order was fair as each party was ordered to go back to their original land parcels as none was held in trust for the other. According to the respondent, the applicant has not demonstrated that the appeal raises serious and arguable issues. Most importantly, he states that the application has been brought in bad faith to deny the respondent to enjoy the fruits of judgment.

10. I have considered the application and the evidence on record and do find that stay of execution pending appeal is not a right to the applicant. The court has to exercise its discretion judiciously and not capriciously.

11. **Order 42 Rule 6 (1)** provides that:

“6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 application being made, to consider such application and to make such order thereon as may to it seem just, and 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 such order set aside.”

Order 42 rule 6 Sub rule 2 provides:-

(2) No order for stay of execution shall be made under subrule (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.”

7. To begin with, in this matter judgment was entered on 21/11/2018 and yet the application herein was filed on 8/7/2019 slightly more than 7 months after judgment. I do find this to be inordinate delay. There is no satisfactory explanation for the delay. There is no explanation for the delay.

8. On substantial loss or damage, I do find that the applicant has not demonstrated the same and most importantly, the decree holder has a right to enjoy the fruits of the Judgment. Moreover, the parties were directed to go back to their original land parcels as none was held in trust for the other and therefore there cannot be substantial loss.

9. Application is dismissed with costs. Orders accordingly.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 15TH DAY OF NOVEMBER, 2019.

In the presence of:

Mr Kirenga for the applicant

M/S Otieno for respondent

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE