



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCA NO. 73 OF 2017

JOHN ODONGO.....APPLICANT

VERSUS

JOYCE IRUNGU MUHATIA.....RESPONDENT

RULING

The application is dated 9th July 2019 and is brought under order 42 rule 6 (1) (2) (4) (6) of the Civil procedure Rules seeking the following orders;

1. That the application herein be certified as urgent and be heard on a priority basis.
2. That the honourable court be pleased to order for a stay of execution of the orders made in this appeal and the orders issued in Kakamega CMC No. 263 of 2007 pending the hearing and determination of the appellant's intended appeal to the Court of Appeal.
3. That the money deposited by the appellant/applicant as security for costs be retained in the interest earning account opened by both counsels pending the hearing and determination of the intended appeal to the Court of Appeal.
4. That the costs of this application be provided for.

It is based on the annexed affidavit of John Odongo and the grounds that the appellant/applicant was dissatisfied with the judgment of the honourable court and he intends to prefer an appeal to the Court of Appeal. That the appellant/applicant has filed a notice of appeal as required by law. That the appellant/applicant will suffer irreparable loss unless the above application is allowed since he had done substantive development on the suit plots. That the appellant/applicant's tenants have been threatened with eviction by the respondent who wants to take possession of the buildings on the disputed plots forcefully. That the appellant/applicant has already deposited Ksh. 250,000/= as security for costs in a joint interest earning account in the names of both counsel on record. That the respondent will not suffer any loss if the above orders are granted. That it is in the interest of justice and public tranquility that the above orders be granted.

The respondent that the appellant's/applicant's application is not only bad in law, incompetent, an abuse of the due process of the court but the same is wanting in merit besides failing or disclose a reasonable cause of action and the same should be stuck out and or dismissed with costs. That he commenced the suit herein against the appellant seeking inter alia a permanent injunction to restrain him from trespassing and from laying any claim over the suit property and general damages for trespass. That subsequent to the filing of the suit he filed an application dated 2nd July 2007 seeking a temporary injunction to stop the appellant/applicant from further developing, constructing, working and or in any manner whatsoever carrying out activities and or developments/improvements on the suit property pending hearing and final determination of the suit therein. That on or about 3rd July 2007 he obtained interim orders and which orders were confirmed after inter parties hearing in a ruling delivered on 3rd October 2008. Annexed and marked JIM 1 is a copy of the ruling. That despite the said orders the appellant with impunity proceeded with the construction and development of the said plots. That the applicant cannot seek to benefit from the alleged continued development and construction of the said 2 plots in total defiance of court orders. That the appellant/applicant has continued to draw rent from the premises to his total exclusion. That the security for costs of Ksh. 250,000/= deposited in court was strictly limited to the outcome of the appeal and the same is therefore not applicable to the present application.

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.”

This application is based on the annexed affidavit of John Odongo and the grounds that the appellant/applicant was dissatisfied with the judgment of the honourable court and he intends to prefer an appeal to the Court of Appeal. That the appellant/applicant has filed a notice of appeal as required by law. 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 12TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE