



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL NO. 41 OF 2018

PAUL KAMURA KIRUNGE.....APPELLANT/APPLICANT

VERSUS

JOHN PETER NGANGA.....RESPONDENT

(Being an appeal against the Judgment of Hon. Olwande SPM

delivered in the Chief Magistrates Court at Limuru, Civil Case No. 108 of 2011)

JOHN PETER NGANGA.....PLAINTIFF/RESPONDENT

VERSUS

PAUL KAMURA KIRUNGE.....DEFENDANT/APPLICANT

RULING

The matter for determination is the **Notice of Motion** Application dated **28th February 2019**, by the Appellant seeking for orders that;

- 1. The Plaintiff/Respondent be restrained from selling, disposing of charging or in any other way dealing with the property to the detriment of the Appellant/Applicant pending the hearing and determination of this Appeal.***
- 2. There be a stay of execution of the Judgment delivered by the subordinate Court in Limuru CMCC 108/11 on 17th December 2018, pending the hearing and determination of this Appeal.***
- 3. Costs of this application be provided for.***

The Application is premised on the grounds that on the **21st February 2018**, the trial Magistrate at Limuru Senior Principal Magistrates Court issued a stay of execution but gave onerous conditions for the same including orders that the Appellant should not use the suit land, he should remove his livestock from the suit land and on top of that deposit a sum of **Kshs.500,000/=** which conditions are excessive and unfair in the circumstances of the matter. That the compliance was required within fourteen days and the Plaintiff/Respondent may proceed to execute at any time, which action is bound to cause the Applicant irreparable harm. That further the suit property ought to be preserved as the Applicant's appeal has high chances of success and will be rendered nugatory unless stay is granted, the appeal will be rendered nugatory and further that should execution proceed, it will cause him substantial loss as the Plaintiff/Respondent may sell the property, commit the same or evict him and it is in the interest of Justice that he is afforded ample opportunity to exercise his rights of appeal.

In his supporting Affidavit, the Appellant averred that the subordinate Court delivered Judgment on the **17th December 2018**, and being aggrieved with the Judgment, he appealed against the whole Judgment. Further that he has requested for the proceedings for purposes of appeal and that he believes that the appeal has very high chances of success. He stated that one of his main ground of appeal is that the Court ignored a Judgment from the Supreme Court on the issue of customary trust and he is apprehensive that if stay is not granted, the Plaintiff/Respondent will proceed to execute the Judgment by way of evicting him from the land thereby subjecting him to substantial loss. Further that he is willing to deposit security if the Court grants a conditional stay of execution as the property should be secured pending the hearing and determination of the appeal.

The Application is opposed and the Respondent filed a Replying Affidavit sworn on the **10th of April 2019**, and averred that the Appellant/Applicant has been in occupation and has been utilizing the suit property for his own gain throughout the pendency of the suit in the lower Court and should the Application be successful, it will further serve to deprive him of the fruits of his Judgment. He averred that the Applicant cut down trees of estimated market price of **Kshs.500,000/=** and that the Respondent will suffer irreparable harm if the

Application is allowed.

It was his contention that since the Applicant has averred that he is ready and willing to deposit security, then he should be ordered to provide security in the sum of **Kshs.3 million** to cater for the trees he sold. Further that the Applicant has not demonstrated that he will suffer substantial loss if the orders are not granted. Again that he has been advised by his Advocates that the right of stay must be balanced equally with right of the successful party to enjoy the fruits of his Judgment.

The Court has carefully considered the whole proceedings and the said Judgment issued by the Subordinate Court on **17th December 2018**.

The Court has also considered the written submissions, the cited authorities and provisions of **Order 42 Rule 6(2)**.

The above provisions of law set out the principles that the court should consider while deciding whether to grant **Stay of Execution Pending Appeal**. These are:-

“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.”

There are also plethora of decided cases on the issue of grant of Stay of Execution pending Appeal. See **Civil Appeal No.107 of 2015, Masisi Mwita..Vs...Damaris Wanjiku Njeri (2016) eKLR**, where the Court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another..Vs... Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-

“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely;- Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.

In addition, the Applicant must demonstrate that the intended

Appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo...Vs...Straman EA Ltd (2013) as follows:-

“In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory.”

These twin principles go hand in hand and failure to prove one dislodges the other”

This Court will then proceed to determine whether the Appellant/Applicant herein satisfied the required standard for grant of stay orders pending Appeal.

Firstly, the Applicant must show that he will suffer substantial loss.

It is evident from the above provisions of law that the Court has discretion to issue an Order of stay of execution. However, the said discretion must be exercised judicially. See the case of **Canvass Manufacturers Ltd...Vs...Stephen Reuben Karunditu, Civil Application No.158 of 1994, (1994) LLR 4853**, where the Court held that:-

“Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised”.

Further in the case of **Stephen Wanjohi...Vs...Central Glass Industries Ltd, Nairobi HCC No.6726 of 1991**, the Court held that:-

“For the court to order a stay of execution there must be:-

i. Sufficient cause

ii. Substantial loss

iii. No unreasonable delay

iv. Security and the grant of stay is discretionary”.

As the Court also embarks in determination of this application, it will take into account that it is not the practice of the Courts to deprive a successful litigant of the fruits of his/her litigation. Further the Court will take into account that the purpose of stay of execution pending Appeal is to preserve the subject matter. See the case of Consolidated Marine...Vs...Nampijja & Another, Civil App.No.93 of 1989 (Nairobi), where the Court held that:-

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.

The conditions that the Applicant herein should satisfy is as stated in **Order 42 Rule 6(2)** of the **Civil Procedure Rules**. The Court will now consider each of the condition and juxtapose them with the available evidence herein to determine whether the Applicant is deserving of the orders sought.

Firstly, the Applicant must satisfy that he will **suffer substantial loss**, unless the orders sought are issued. From the Judgment of the subordinate Court, it is clear that the Respondent had sought for orders of eviction as against the Appellant/Applicant and damages which orders were granted by the Court. To this effect, the Court found in favour of the Respondent and ordered the Appellant to return the title deed to the Respondent.

Though the Respondent has alleged that the Applicant would not suffer loss as the Court has already found in his favour and that he is entitled to benefit from the fruits of his Judgment, he has also acknowledged that all along the Appellant/Applicant has been in possession and has been cultivating the suit land and rearing his cattle. Since the Appellant was in possession of the suit and the fact that the orders that have been granted will serve the purpose of evicting him from the said land, this Court finds that the Appellant will suffer loss and his Appeal might be rendered nugatory in the event his Appeal is successful. This is so because the Appellant is fighting not to be evicted and if he is to lose possession of the suit land at this stage, it would probably mean that he has already been evicted and the Appeal would serve no purpose.

The Court makes this finding taking into account that it is not the duty of the Court to deny a successful litigants the fruits of his/her Judgment. Further, the Appellant should also have an assurance that his Appeal will not be rendered nugatory. However, taking into account that the Appellant herein was in possession, then he has satisfied this Court that he will suffer substantial loss if the orders sought are not granted.

The Applicant must satisfy the Court that the application was made without **unreasonable delay**. The Court noted that the **Memorandum of Appeal** was filed on **19th December 2018**, and an application for stay was filed on **28th February 2019**. *This Court also notes that there is an Application of stay that was filed in the lower Court and was determined on the 21st of February 2019*. Therefore the Court finds that that there was no inordinate delay in filing this Application.

On the issue of security of costs, the Applicant has averred that he is ready to provide security for costs. Though the Respondent has alleged that the Appellant has embarked on a mission of destroying the suit land, no evidence has been provided to that effect and therefore the Court finds that the same is not tenable.

Therefore the Court orders that the Appellant do provide security of **Kshs.500,000/=** within 30 days from the date hereof. Equally, the Court herein finds that the **Order** sought of stay of execution would protect and preserve the suit property

Having now carefully considered the instant application, the written submissions, the cited authorities and the relevant provisions of law, the Court finds that the said application is merited and it is allowed entirely with a condition that the Appellant to deposit **Kshs.500,000/=** as security of costs within 30 days from the date hereof.

Further, the Court directs the parties to prepare the Appeal for hearing expeditiously. For that reason, the Court directs the Appellant/Applicant to file Records of Appeal within the next 30 days from the date hereof and then cause the matter to be listed before the Judge for directions under Section 79B of the Civil Procedure Act within the next **30 days** from the date hereof.

It is so ordered.

Dated, Signed and Delivered at Thika this 8th day of November, 2019.

L. GACHERU

JUDGE

8/11/2019

In the presence of

Mr. Kalee holding brief for Mr. Makori for the Appellant/Applicant

Mr. Angaya for the Respondent

Lucy - Court Assistant.

L. GACHERU

JUDGE

8/11/2019