REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCA NO. 14 OF 2018

AGRIPINA KHATI.....APPELLANT/APPLICANT

VERSUS

RICHARD LIVONDO WIRANGA

EMILY BABANGALA MWIKALI.....RESPONDENTS

RULING

The application is dated 20th February 2019 and is brought under Order 40 Rules 2(1) (2), 3 and 4 of the Civil Procedure Rules seeking the following orders:

1. That this application be heard exparte in the 1st instance.

2. That the respondents be restrained from evicting the appellant/applicant from the suit land pending the hearing and determination of this application inter parties.

3. That the respondents be restrained from evicting the appellant/applicant from the suit land pending the hearing and determination of this appeal.

4. That the respondents be restrained from interfering with the appellant/applicant farming activities on the suit land pending the hearing and determination of this appeal.

5. The costs of this application be provided for:

It is based on the grounds that, the respondents want to evict the appellant/applicant before her appeal is heard and determined. That the respondents are interfering with the applicant's farming activities on the suit land. That the appellant/applicant depends on the farming activities for her daily subsistence. That the respondents have started ploughing the suit land in order to stop the appellant/applicant from staying on the suit land. That the respondent's activities will result in violence and bloodshed unless stopped by the court. That it is in the interest of justice and public tranquility that the above order be granted.

The 1st respondent submitted that, he was the registered proprietor of the suit parcel herein but he has since sold and transferred it to a third party who is not a party to this suit (annexed and marked RLW-1 is a copy of the certificate of official search). That the orders of stay and maintenance of status quo can therefore not apply. That the appellant is not staying on the suit parcel herein but was prior to the delivery of the judgement in the lower court simply encroaching on the same by way of cultivation. That the applicant has not cultivated or encroached on the suit parcel since the delivery of the lower court judgment on 11th January, 2013 and by allowing the application, she will continue to encroach an act which will occasion the current registered proprietor irreparable loss. That the appellant owes him a sum of Kshs.201,970/= as costs of the lower court case which she has neither paid nor offered to deposit as a condition for grant of stay. (Annexed and marked RLW-2 is a copy).

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 submitted that, the respondents want to evict the appellant/applicant before her appeal is heard and determined. That the respondents are interfering with the applicant's farming activities on the suit land. That the appellant/applicant depends on the farming activities for her daily subsistence. That the respondents have started ploughing the suit land in order to stop the appellant/applicant from staying on the suit land. 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 18TH DECEMBER 2019.

N.A. MATHEKA

JUDGE